Probing the Mysteries of the Jones Act

by Michael J. Rauworth

In the summer of 2010, as the nation was scrambling to contain the Deepwater Horizon oil spill, the American public began to hear about the Jones Act. Senator Kay Bailey Hutchison (R-Texas) filed legislation in June to waive the Jones Act—temporarily—to allow foreign-flagged vessels and their non-American crews to operate in US waters. She and other opponents of the Jones Act argued that the United States needed more responders at a lower cost to help with the marine environmental disaster off the Gulf Coast, and that provisions of the Jones Act bar this as a possible remedy.

Over the last few years, the Jones Act—officially, the Merchant Marine Act of 1920— has been in the news more and more. Senator John McCain (R-Arizona) has gone on record in favor of its repeal, as he considers it "an antiquated law that has for too long hindered free trade, made the US industry less competitive, and raised prices for American consumers." In June 2012, a Federal Reserve Bank of New York report on Puerto Rico's economy concluded that the Jones Act had a negative impact on the island's economy. And just this March, a Jones Act case was decided in the state Supreme Court in Washington that stemmed from a shipboard injury to a member of a commercial fishing trawler's crew.

Ask people you know if they support the Jones Act. Their answers will likely depend more on their relationship to the maritime industry than on having heard about it in the news or in the classroom. Those with no maritime connections are not likely to have heard of it. Ask a professional mariner, and she will talk about how it protects seaman, along the lines of workers' compensation. Ask someone in the shipping or cruise industry, and he'll likely start talking about cabotage, the maintenance of the merchant marine, shipbuilding, and national security.

The Jones Act, named for Senator Wesley Jones (1863–1932) of Washington State, has been revised multiple times since 1920. It covers a lot of topics and is misunderstood and confusing to most people outside of the industry. It is confusing to many within the maritime field as well. We asked our colleague and friend Mike Rauworth, a maritime attorney in Boston and former professional mariner of both sail and steam, to take on the Jones Act in *Sea History* and break it down so it could be better understood. We will look at the Jones Act in this issue and in the autumn issue (*Sea History* 160), as it is too complicated to cover in a single article. In Part 1, here, Captain Rauworth reviews the part of the law that addresses seamen and their work aboard American-flagged commercial vessels.

What most mariners mean when they talk about the "Jones Act" is the right of a seaman to sue his or her employer for workplace injuries. The Jones Act does confer that right, of course, but it is only the most recently created of three separate legal doctrines that govern seamen's personal injury rights, even though that phrase is used—in effect—as a shorthand for the package of all three, making it one of the most misunderstood phrases in the maritime world. In this issue and the next, we will take a look at what we refer to as the Jones Act in all its forms. All three need to be considered together, but we have broken the issue down into two parts, as the chronology and all its machinations go way back. In this article, we'll discuss the first two legal doctrines that are critical to understand before we get into the legislation we formally call the Jones Act.

Before we do, however, we need to bear in mind that this discussion regards only the rights of seafarers to obtain compensation from their employers because of some injury or shortcoming related to their employment. It has nothing to do with any legal rights of, for example, passengers, longshoremen, pilots, equipment technicians on board to service equipment, or the like. It also has nothing to do with rights of seamen to compensation from persons other than their employers.

A Pause to Consider Workers' Compensation

First, some context. We're talking about an employee suing his employer for on-the-job injuries. This is a very rare occurrence in the world of work in general. The reason it's rare is because of the phenomenon of workers' compensation (formerly known as workmens' compensation). Each state in the US has a workers' compensation system, and together they govern almost all workplace injuries. *Almost.*

Workers' comp involves a trade-off. First, it prohibits any employee (with very few exceptions) from suing his or her employer for an injury incurred on the job. Instead, the injured employee is entitled to compensation (most often from an insurer selected and paid by the employer). Second, the amount of compensation is commonly set by a pre-determined formula and is usually less than what the employee probably would have received if he or she had been permitted to sue and had won the suit. These two features would seem to be a bad deal for the injured employee, but they are balanced by the third feature of workers' compensation, namely that the employee only needs to show that he or she was hurt on the job—it does not matter whether the employer was at fault or not. This is a big upside for the employee because, in a lawsuit, fault would have to be demonstrated. Under the workers' compensation system, even if it is determined that there is no fault on the part of the employer, the employee still receives benefits.

This may seem fair to some, and not to others. What we think of it doesn't matter, however, because there is no choice left to a shoreside employee: if you are injured at work in a typical shoreside employment situation, you can apply for compensation benefits and take what you get, or you can get nothing (from your employer). There's no option to sue your employer, with very limited exceptions.

In spite of workers' compensation laws, shoreside workers do retain the right to bring a traditional personal injury lawsuit against firms or persons other than their employer, if a third party can be claimed to have some fault in causing the injury. Suits of this kind share much in common with other personal injury lawsuits, such as trip-and-fall suits or auto accident lawsuits, where the injured party has to both prove fault and prove the damages that resulted from the fault. In this scenario, shoreside workers stand in much the same position as seamen, so we are going to leave the topic of these third-party suits alone and focus exclusively on rights of an employee as against his/her employer.

Workers' compensation law applies to virtually all employees in the United States. There are only three major exceptions: (1) members of the military and some other government workers, (2) railway workers, and (3) seamen. The reasons for these exceptions are too complicated to take up here, but suffice it to say that the fact that workers' comp does not cover seamen has permitted the three legal doctrines to continue to govern seamen's remedies against their employers for personal injuries, namely: (1) Maintenance and Cure, (2) Unseaworthiness, and (3) the Jones Act itself.

The remainder of this article will discuss unseaworthiness and maintenance and cure; we will take up the Jones Act itself in the next issue of *Sea History.*

Background

Maintenance and cure is truly an ancient legal doctrine, traceable back to the Middle Ages, and extending, perhaps, before that. In the 12th century, Oléron, an island off the coast of what is now France, was ruled by Eleanor of Aquitaine, who established one of the earliest sea codes in history, the Laws of Oléron, which provided:

> Art. VII. If it happens that sickness seizes on any one of the mariners, while in the service of the ship, the master ought … likewise to afford him such diet as is usual in the ship; that is to say, so much as he had on shipboard in his health, and nothing more, unless it please the master to allow it him; and if he will have better diet, the master shall not be found to provide it for him, unless it be at the mariner's own cost and charges…[1]

While the Jones Act, as we know it today, is a statute that was passed by the US Congress and signed by the president, maintenance and cure is purely a creature borne out of the decisions of judges spanning hundreds of years—each building upon the last, and each under the influence of authorities reaching back to the Laws of Oléron and other similarly ancient legal writings.

The leading US case on the subject dates from 1823. It encapsulates not only the indulgent attitude of the courts of admiralty towards seamen—an attitude that persists today—but also the rationale of the American judiciary for the adoption of the doctrine of maintenance and cure, held in this case to be in wide use in the law of other maritime nations:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment.
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> On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity.
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> Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages.[2]

Entitlement to Maintenance and Cure

In a certain sense, you could consider maintenance and cure like a modern-day health maintenance organization (HMO), except that the patient—the seaman—does not pay a premium, and the shipowner (or the shipowner's insurer) serves as the HMO. In short, a seaman is entitled to have the shipowner pay the seaman's medical expenses incurred by reason of the seaman's injury—or illness—that manifests itself on board, including, for example, cancer or appendicitis or some other affliction unrelated to the seaman's work environment. In other words, the shipowner has to pay the seaman's medical bills even if the shipowner had no role in causing the condition needing medical treatment.

This entitlement is based on the relationship between the seaman and the vessel. Therefore, any provision of a contract with the seaman that attempts to deprive the seaman of the benefits of maintenance and cure will not be enforced. Certain union contracts, however, are allowed to shape some of the benefits.

At this point, it is worth noting a comparison between maintenance and cure and workers' comp. You'll recall that a shoreside employee is entitled to workers' comp for any injury incurred on the job, *even if* the employer had *no fault* in the injury. (This is known as "strict liability.") But maintenance and cure is even more expansive. The shipowner, like the shoreside employer, is liable for on-the-job injuries without regard to the employer's fault, but the shipowner is, in addition, liable for medical care for illnesses of the seaman, even those arising independently of the workplace. For example, take a form of cancer or a heart condition that manifests itself during the course of employment. The shipowner would be liable under maintenance and cure, but a shoreside employee could not collect benefits under workers' compensation.

Maintenance and cure is also more expansive in terms of geography. A shoreside employer is liable for injuries incurred "on the job" (as opposed to "at home," or "on the town," for example), but the shipowner is liable for maintenance and cure for illnesses and injuries that occur at any point that the seaman is subject to

recall to duty on board the ship. As long as the seaman has not severed the employment relationship with the vessel, he or she would be entitled to maintenance and cure benefits even for incidents that occur while on shore leave, or even at home, as long as he or she is still subject to recall to work. Indeed, in one famous (or infamous) case, a seaman was ruled entitled to maintenance and cure benefits for an injury he incurred while making his escape from a bordello.

Even the negligence or fault of the seaman in creating the injury or illness will not, for the most part, defeat the right to collect maintenance and cure. This is at odds with the rule in most other forms of legal recovery for injury or illness, but it does mean that an intoxicated seaman (on shore leave, for example) may not necessarily thereby lose the rights to benefits.

There are a few sorts of conduct on the part of the seaman that can result in the rightful denial of maintenance and cure benefits. One is when the injury is wholly attributable to his/her own misconduct—typically venereal disease or intoxication. Another is when the seaman misrepresents his/her medical condition to the shipowner, and the need for medical treatment relates to the falsehood. But these are rare exceptions, and, in general, the law favors the position of the seaman.

Benefits Under Maintenance and Cure

While entitlement to maintenance and cure is expansive, its benefits are somewhat limited in comparison to other remedies. There are three headings of benefits under maintenance and cure.

The first is "cure," in other words, medical care. This means that the shipowner (or its insurer) will have to pick up the tab for the seaman's hospital or other medical bills. While these may amount to a considerable sum, there is a limit. That is the point at which the seaman attains "maximum medical improvement"—in other words, the point where his/her medical condition cannot be further improved by additional treatment. At that point, the shipowner is entitled to cease payment for medical services, even if the seaman requires further care for some reason other than improvement of his/her condition—for example, what is called *palliative* care (treatment for pain).

It is important to note that the entitlement to "cure" does not include any compensation for effects of the injuries, apart from the foregoing medical care. That means if the seaman loses a leg or an arm or an eye, or is rendered a paraplegic, there is nothing to collect for this ongoing and future loss of function—at least, not under maintenance and cure. Likewise, maintenance and cure offers the injured seaman no recovery for pain and suffering—as is available in most traditional personal injury lawsuits.

The second heading is "maintenance." This is a per-diem payment intended to compensate the seaman for the loss of the food and lodging that he/she enjoyed aboard the vessel before his or her injury. This category of recovery is largely influenced by the circumstances seamen faced long ago, when they typically went from ship to ship, with only brief intervening periods ashore—a time when a seaman's ship was typically the only home he had.

In years past, collective bargaining agreements had set $8 per day as the rate to be paid to their members for maintenance, and this figure enjoyed large influence, even in non-union contexts. Nowadays, payments are more commonly based on the actual expenditures of the injured or ill seaman for lodging and sustenance ashore.

Like cure, maintenance has an end point. Once further medical treatment will no longer improve the patient's recovery, the shipowner's obligation to pay maintenance comes to an end, as does the obligation to pay cure.

The third heading of recovery is "unearned wages." Any seaman entitled to cure or maintenance is likewise entitled to unearned wages. The question is for how long. This is governed by the terms of the engagement. When the seaman is engaged on articles with a specific end date (or end point, such as return to a US port), the seaman gets wages (including any overtime that would have been earned) through that point. If such a date has not been specified, then the right to unearned wages probably ends at the earliest point that the seaman would have been practically and legally free to leave his employment, in the sense of leaving the ship. This end date is completely independent of the point of maximum medical improvement that governs the end of payments of cure and maintenance—except if the seaman becomes fit for duty before the end of the period for which wages would otherwise be due.

Special Considerations Under Maintenance & Cure

Maintenance and cure is essentially intended to be a hassle-free phenomenon, from the standpoint of the injured seafarer. For this reason, the courts give the seaman the benefit of the doubt in cases that come before them. More than this, the obligation to pay maintenance and cure is intended to be largely "self-executing," meaning, in essence, that the seafarer should be paid quickly and without having to bring suit. There are significant downsides to a shipowner (or its insurer) who delays in paying maintenance and cure—or who terminates it at a date that a court later rules to have been too early.

When a seafarer is injured under circumstances that do not raise questions of any possible defense, the wisest course for the shipowner to follow is to pay medical bills as soon as they are presented as cure, and to pay at least a reasonable minimum per day as maintenance, as well as unearned wages. While there may be some issues that demand investigation, this should be accomplished with great dispatch, and the payments adjusted according to the findings.

A negligent failure to pay maintenance and cure (or a negligent delay in doing so) can expose the shipowner (or its insurer) to payment of compensatory damages to the seaman—essentially payment for the consequences to the seaman of not receiving the maintenance and cure payments that were due.

More sobering, however, is the thought of what happens to a shipowner who "arbitrarily and willfully" fails to pay maintenance and cure. In a 2009 case that went to the Supreme Court, a seaman working aboard a commercial tug filed suit against his employer under the Jones Act and general maritime law for refusing to pay maintenance and cure after he injured his shoulder and arm in a fall on the tug's steel deck. In a 5 to 4 decision in favor of the seaman, the shipowner was held liable to pay punitive damages, and the legal fees of the injured seafarer.[3] This can amount

to a very significant sum. Punitive damages are damages awarded in addition to the compensatory damages awarded to a seafarer to make good his/her losses. Punitive damages in admiralty can probably as much as double the award of compensatory damages, and are designed to send a message to the defendant, to discourage any repeat of the act that led to the suit.

Conversely, the shipowner cannot count on being able to recover any amounts overpaid by reason of maintenance and cure—presumably a result of the favored position that seafarers occupy in the law. Accordingly, the shipowner (and more particularly, the shipowner's insurer) needs to proceed with particular care and good faith in responding to a claim for maintenance and cure.

In summary, maintenance and cure is available to seamen in a wide variety of circumstances. Its benefits may be considerable, but in general they provide compensation for fewer categories of loss than most other forms of recovery for personal injury.

Unseaworthiness

Virtually all injured seafarers will have at least some entitlement to maintenance and cure. If the case presents suitable facts, however, an injured seafarer may also claim, simultaneously, for recovery under the doctrine of "unseaworthiness."

Unseaworthiness, as a doctrine in US law favoring seafarers, stems from 1903. "The vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."[4] This was a time in which personal injury law was, in general, much less favorable to injured workers than it is today.

Essentially, the unseaworthiness doctrine makes a shipowner liable without fault for injuries that happen to a seafarer by reason of any way in which the vessel is not reasonably fit for its intended service.

Failures of the rig, faults in the hull, shortcomings in fittings such as ladders or mechanical equipment, inadequate or improper tools, or food, failure to staff the vessel with a proper crew, and failure to dispatch an adequate number of personnel to perform a particular task can all be held to make a vessel not reasonably fit for her intended service. This list is just illustrative, not exhaustive.

Whether a particular condition aboard ship makes a particular vessel not reasonably fit is a question for the jury at trial. If the jury finds the vessel not to be reasonably fit, and if the condition is held to be the cause of the injuries to the seafarer, then the seafarer is entitled to recover his damages from the shipowner. To be reasonably fit, however, a vessel need not be perfect—an imperfect vessel may still be found by the jury to be nevertheless seaworthy.

To find a vessel unseaworthy does not require that the jury find any fault or negligence on the part of its operator. A vessel may be not reasonably fit by reason of a condition that the operator may not know about, or even have any ability to have discovered. The classic example is an injury resulting from the failure of a shackle supporting a load above the injured person. The shackle failed by reason of a flaw in its casting, which would not have been revealed by visual examination. Despite the inability to have discovered the flaw, the shipowner would be ruled liable under the unseaworthiness doctrine. This is known as *strict liability*, and this doctrine now also applies to manufacturers and sellers of defective goods (think snowblowers, lawnmowers, and cars, as examples), even in the shoreside law context.

While a seaman can recover for medical expenses until the point of "maximum medical improvement" (MMI) under maintenance and cure, a seaman who is successful in a claim for unseaworthiness can recover both past and future medical expenses (including past the point of MMI), loss of past and future physical capabilities, and past and future pain and suffering. In contrast to recovering wages simply until the end of the voyage under maintenance and cure, under unseaworthiness, an injured seafarer can recover lost past wages, plus the loss of future earning capacity.

Punitive damages for unseaworthiness is currently a hot topic in maritime law. In March of 2017, the Supreme Court of the state of Washington held punitive damages available to a seaman who had been awarded compensation for unseaworthiness.[5] But other courts have ruled to the contrary, which increases the likelihood that this question will have to be resolved by the US Supreme Court.

Relationship of Unseaworthiness to Maintenance & Cure

An injured seafarer can bring a suit claiming both for maintenance and cure and unseaworthiness (as well as under the Jones Act). If the suit wins recovery under both, some of the medical damages may be awarded under both, and the same may apply to back wages, but double recovery is not permitted.

In the next issue of *Sea History,* we'll take a look at the Jones Act legislation proper and try to make it more understandable to those in the maritime industry to whom it is a vital protection, and to those who hear the term slung around by politicians and others in a way that often leads to confusion. ⚓

NOTES

[1] *Hudspeth v. Atlantic & Gulf Stevedores, Inc.*, 266 F. Supp. 937 (E.D. La. 1967).

[2] *Harden v. Gordon*, 11 F.Cas. 480, 483, 2 Mason 541 (1823).

[3] *Atlantic Sounding Co. v. Townsend*, 557 US 404 (2009)

[4] The *Osceola*, 189 US 158 (1903).

[5] *Tabingo v. American Triumph, LLC, et al.*, 2017 WL 959551 (Wash. Mar. 9, 2017).

Michael Rauworth's "day job" is as a maritime lawyer, based in Boston. He serves as president and board chair of Tall Ships America, and maintains his Coast Guard license as master of sail, steam, and motor vessels of any tonnage, with pilotage on the waters of three states, and with over 200,000 sea miles to his credit. He retired from the US Coast Guard with the rank of Captain, having served as Harbor Defense Commander in Operation Uphold Democracy in Haiti, and in command of five reserve units.