Practical Personal Injury Phases of Maritime Law

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I. INTRODUCTION

In discussing the personal injury phases of maritime law, we must consider various categories of persons who can and do receive injuries in and about vessels. These include seamen, passengers, visitors to the vessel for one reason or another, and longshoremen and harbor workers.

II. SEAMEN

Seamen actually have three basic remedies in case of injury in their capacity as seamen. These are recovery of maintenance and cure, recovery of damages for injuries caused by unseaworthiness of the vessel, and recovery of damages under the Jones Act for injuries caused by negligence.

A. SEAMEN—MAINTENANCE AND CURE

Maintenance and cure is the ancient maritime remedy of seamen and was finalized in 1903 by Justice Brown in the famous case of The Osceola. In that case Justice Brown stated that "the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." Maintenance and cure is analogous to workmen's compensation. Workmen's compensation is an exclusive substitute for a tort action against one's employer and is limited to injuries received "in the course of employment." The employer gives up the possibility of escape from all liability and the employee gives up the possibility of a large sympathetic jury verdict. Maintenance and cure, however, is not an exclusive remedy for seamen and is not a substitute because the shipowner is liable for maintenance and cure for all injuries received while the seaman is employed. The exceptions to this rule are cases of injuries caused by the seaman's wilful misconduct and injuries received prior to employment and knowingly concealed.

1 The author is a partner in the firm of Stover and Stover of Milwaukee, Wisconsin.
2 189 U.S. 158 (1903).
3 See generally, Larson's Workmen's Compensation Law, ch., 1 (1952); Schneider, Workmen's Compensation Law, 2d Ed., §1.
5 Rosenquist v. Isthmian S. S. Co., 205 F. 2d 486 (2d Cir. 1953); Milton v. Pure Oil Co., 264 F. 2d 892 (4th Cir. 1959).
"Seamen" employed on a "vessel" qualify for maintenance and cure. Whether or not one is a seaman is a question of fact and generally the three basic requirements for a worker to qualify as a "seaman" in order to recover for maintenance and cure in case of an injury are that the vessel be in navigation, that the worker have some permanent connection with the vessel, and that the worker be employed aboard the vessel primarily to aid in navigation. These are construed liberally. The master, officers and members of the crew of a vessel are seamen and this includes temporary seamen such as a railroad brakeman temporarily afloat on a car ferry. The term includes specialists, such as stewards, cooks, maids, waiters, and probably musicians and bartenders, as well as the deckhands and the engine room crew. It does not generally include the employees of independent contractors such as repairmen, longshoremen and harbor workers. It does not include some seamen employed by the United States Government who have an exclusive remedy under the Federal Employees Compensation Act. Foreign seamen on foreign owned and registered vessels are ineligible for maintenance and cure because their remedies are determined by the law of the ship's flag. The term "vessel" includes seagoing, coastwise, river, harbor and Great Lakes shipping. It includes

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6 The Osceola, supra note 1.
9 Warner v. Goltra, 293 U.S. 155 (1934); Murphy v. Light, 224 F. 2d 944 (5th Cir. 1955); cert. denied, 350 U.S. 960 (1955); The E. H. Russell, 42 F. 2d 569 (E.D.N.Y. 1930).
12 Pacific Mail S. S. Co. v. Schmidt, 214 Fed. 513 (9th Cir. 1914); Troupe v. Chicago, Duluth & Georgian Bay Transit Co., 234 F. 2d 253 (2d Cir. 1956).
15 Lawler v. Matson Navigation Co., 217 F. 2d 645 (9th Cir. 1954), cert. denied, 349 U.S. 912 (1955); Williams v. United States, 228 F. 2d 129 (4th Cir. 1955); but in Schiemann v. Grace Line, Inc., 269 F. 2d 596 (2d Cir. 1959) a barber who operated a barber shop aboard the S.S. Santa Maria and signed ship's articles for a nominal rate was held not to be a seaman entitled to bring suit under the Jones Act.
commercial and pleasure craft. It does not include a dead vessel laid up for the winter or out of commission or a partially completed structure. Dredges, canal boats and barges are borderline cases, although liberal interpretation of the word will generally include almost all of them. It is interesting to note that in 1921 Justice Cardozo and the New York Court of Appeals, for certain purposes, held that a seaplane was a "vessel" while in the water. This was later nullified by the Air Commerce Act.

The right to recover maintenance and cure gives rise to a maritime lien so that the right runs against both the ship and the shipowner, permitting an action in rem in admiralty against the ship and an action in personam in admiralty against the shipowner. An action at law under the "saving to suitors" clause of the Judiciary Act of 1789 as amended to date can be brought in either state or federal court, provided that service of process can be obtained on the shipowner and that the requisite diversity of citizenship and $10,000.00 amount in controversy exists for the action at law in federal court. "Fact of employment" is the test and no causal relationship is necessary between the seaman's employment and the injury. A seaman injured ashore while employed by and in the service of the ship, even on shore leave, qualifies to recover maintenance and cure. Wilful misconduct is the only bar to recovery. Negligence is not wilful misconduct. Fighting or drinking is not a bar and courts often excuse such conduct by saying that it is the classic disposition or normal proclivity of seamen ashore to engage in fisticuffs and imbibe heavily. Neither overstaying one's leave nor horseplay bar recovery.

Maintenance is really another term for a living allowance for the

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23 The Osceola, supra note 1; Calmar S.S. Corp. v. Taylor, supra note 3; The Bouker No. 2, 241 Fed. 831 (2d Cir. 1917).
26 Calmar S. S. Corp. v. Taylor, supra note 3.
27 Aguilar v. Standard Oil Co., supra note 3; Farrell v. United States, supra note 3; Warren v. United States, supra note 3; but shore leave does not include a "leave of absence," Blanco v. S. S. Michael Tracy, 272 F. 2d 93 (4th Cir. 1959).
28 See cases, supra note 3.
29 Warren v. United States, supra note 3.
30 Murphy v. Light, supra note 9.
individual seaman.\textsuperscript{32} It does not cover any allowance for his family. The liability of the shipowner for maintenance continues from the date of injury until such time as a maximum cure is effected.\textsuperscript{33} Recovery has been allowed for one or two years and even longer.\textsuperscript{34} Cases in recent years have allowed from six dollars to eight dollars per day as reasonable maintenance.\textsuperscript{35} Union contracts often fix the amount of maintenance and courts are prone to follow them.

Cure means medical expenses.\textsuperscript{36} As in the case of maintenance, liability for cure continues to the point of maximum cure.\textsuperscript{37} A seaman is not permitted to recover a lump sum for partial or total disability based on his life expectancy.\textsuperscript{38} Liability for cure continues so long as there is a chance of improvement and can be revived in a hopeless case by a new discovery causing a resumption of treatment.\textsuperscript{39} Recovery includes past medical expenses plus those which can be definitely ascertained for the immediate future. In the absence of a release for future maintenance and cure, successive suits against the shipowner are permissible.\textsuperscript{40} In this regard, it might be well to mention that the hospital facilities and personnel of the United States Public Health Service are available for use by seamen without charge.\textsuperscript{41} Refusal to use the United States Public Health Service or use of a private hospital or doctor by an injured seaman is done at his own risk.\textsuperscript{42} However, if the Court concludes that the government facilities and treatment are inadequate, outside expenses are recoverable.\textsuperscript{43} Either an oral or written contract between an injured seaman and the shipowner, that the shipowner will indemnify the seaman for all improper treatment received at the Public Health Service Hospital is a valid enforceable maritime contract.\textsuperscript{43a} The duty of the shipowner to provide proper care is absolute. Failure to do so, resulting in aggravation and causing increased medical expenses or maintenance, makes the shipowner liable for such increased

\textsuperscript{32} Calmar S.S. Corp. v. Taylor, \textit{supra} note 3.
\textsuperscript{33} Farrell v. United States, \textit{supra}-note 3.
\textsuperscript{34} Koslusky v. United States, 208 F. 2d 957 (2d Cir. 1953); Diniero v. United States Lines, 185 F. Supp. 818 (S.D.N.Y. 1960).
\textsuperscript{36} See \textit{supra} note 27.
\textsuperscript{37} See \textit{supra} note 33.
\textsuperscript{38} See \textit{supra} note 27.
\textsuperscript{39} See \textit{supra} note 33.
\textsuperscript{40} See \textit{supra} note 27.
\textsuperscript{42} Benton v. United Towing Co., 120 F. Supp. 638 (N.D. Cal. 1954), \textit{aff'd}, 224 F. 2d 558 (9th Cir. 1955).
\textsuperscript{43a} Kossick v. United Fruit Co., 363 U.S. 838 (1961).
expenses as well as for damages in a maintenance and cure action.\textsuperscript{44} This is the only situation where an injured seaman can recover damages in a maintenance and cure action.

In addition to maintenance and cure, an injured seaman has the right to recover wages and transportation from his shipowner-employer.\textsuperscript{45} Wages are generally allowed to the end of the voyage which has been construed by the courts to mean to the end of the term of employment. This could mean the voyage or the term of the articles signed by the seaman in signing aboard the ship.\textsuperscript{46} In 1953 the Second Circuit allowed an injured seaman, employed aboard a bulk freighter on the Great Lakes, to recover his wages for the balance of the season of navigation.\textsuperscript{47} The injured seaman can also recover transportation expenses to the hospital\textsuperscript{48} and to his port of hire or home.\textsuperscript{49}

The question of the right of the shipowner, who pays maintenance and cure and wages to the end of the voyage to an injured seaman, to indemnification from a third party tortfeasor is an interesting one. Where both the shipowner-employer and third party are negligent, the shipowner has no right to indemnification from the third party because of the ancient doctrine prohibiting contribution between joint tortfeasors.\textsuperscript{50} Where the third party is the sole tortfeasor, the question becomes involved. Where the injured seaman sues the third party and recovers and then brings suit against the shipowner on an unseaworthiness theory, the shipowner is generally credited with the maintenance and cure expenses recovered by the seaman from the third party. Where the injured seaman brings suit against the shipowner-employer and third party in one action, the third party is primarily liable for maintenance and cure and the shipowner-employer is secondarily liable.\textsuperscript{51} Where the injured seaman brings suit against the shipowner for maintenance and cure and the shipowner seeks to implead the third party tortfeasor or, after recovery, seeks to bring suit against the third party tortfeasor for indemnification, there is a split of authority. The Second Circuit has ruled against impleader or indemnity because recovery of maintenance and cure is based upon the contract of employment and not tort.\textsuperscript{52}

\begin{thebibliography}{99}
\bibitem{Farrell} See, \textit{supra} note 6.
\bibitem{Harriman} Harriman v. Midland S. S. Line, Inc., 208 F. 2d 564 (2d Cir. 1953).
\bibitem{Luth} Luth v. Palmer-Shipping Corp., 210 F. 2d 224 (3d Cir. 1954).
\bibitem{Jefferson} The Jefferson Myers, 45 F. 2d 162 (2d Cir. 1930); Seely v. City of New York, 24 F. 2d 412 (2d Cir. 1928).
\bibitem{Federal} The Federal No. 2, 21 F. 2d 313 (2d Cir. 1927).
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The Third Circuit has ruled in favor of impleader or indemnity because such is permitted at common law.\textsuperscript{53} Professors Gilmore and Black in their outstanding and authoritative textbook on The Law of Admiralty argue that impleader or indemnity should be allowed because the injured seaman could recover the equivalent of maintenance and cure directly from the third party.\textsuperscript{54} The United States Supreme Court has yet to rule on the question.

**B. SEAMEN—UNSEAWORTHINESS**

The second remedy of the injured seaman against his shipowner-employer is recovery of damages for injuries caused by unseaworthiness of the vessel. It is the duty of the shipowner to furnish seamen with a seaworthy ship. This was first recognized in this country in an obscure Pennsylvania District Court decision in 1789 which did not allow recovery of damages for personal injuries but only gave seamen the right to leave the ship without any penalties such as forfeiture of wages or prosecution for desertion.\textsuperscript{55} The first authoritative statement giving seamen the right to recover damages for injuries caused by unseaworthiness was again in 1903 by Justice Brown in *The Osceola*.\textsuperscript{56} During the next seventeen to twenty years until passage of the Jones Act, it was quite common for seamen to bring actions against their shipowner-employers for recovery of damages for injuries caused by unseaworthiness of the vessel. After the Jones Act was passed, this remedy fell into disuse until 1944 because of the doctrine of election of remedies in the Jones Act which shall be discussed subsequently. The present doctrine of unseaworthiness has been developed since 1944 when it was decided in effect that unseaworthiness includes operating negligence.\textsuperscript{57}

The term "unseaworthiness" has become almost all inclusive. It includes structural defects and defective machinery, appliances, furnishings, equipment and tackle.\textsuperscript{58} In the most recent authoritative decision on this subject by the United States Supreme Court, it was held to be a jury question whether a defective wrench (play in the jaw of the wrench permitting it to slip) was such a defective appliance as to render a ship unseaworthy.\textsuperscript{59} Unseaworthiness includes incompetent or danger-

\textsuperscript{53} Jones v. Waterman S. S. Corp., *supra* note 46.
\textsuperscript{54} GILMORE & BLACK, THE LAW OF ADMIRALTY (1957), pp. 276-77.
\textsuperscript{55} The Cyrus, 7 Fed. Cas. 755, Case No. 3930 (D. Pa. 1789).
\textsuperscript{56} See, *supra* note 1.
\textsuperscript{57} Mahnich v. Southern S. S. Co., 321 U.S. 96 (1944).
\textsuperscript{58} See Mesle v. Kea S. S. Corp., 260 F. 2d 747 (3d Cir. 1958), *cert. denied*, 359 U.S. 966 (1959) wherein the Court said that unseaworthiness claims are of two categories: one where the shipowner, having knowledge—actual or constructive—that certain activity will occur, is imposed with an absolute duty of supplying equipment for permitting the conduct and accomplishment in reasonable safety of that activity; the other where the equipment actually supplied by the owner for doing the ship's work proves incapable of performing its function in the manner for which it was designed. The Court then exhaustively annotates the two categories.
ous officers and crew and has come to include almost all forms of operating negligence. The only clear exception to the term is in the case of an injury caused by the unwise order of an otherwise competent officer on an admittedly seaworthy ship. Such a circumstance would rarely arise.

The duty to provide a seaworthy ship is absolute, continuing and non-delegable. A shipowner is not absolved by the exercise of due diligence. The shipowner is liable therefor even in cases where control of a portion or all of the vessel is completely relinquished to repairmen. The requirement of notice of the unseaworthy condition to the master or shipowner has gradually disappeared. In the case of transitory or temporary unseaworthiness such as soap, oil, grease, food, etc. on the deck, the requirement of notice is unnecessary but there is authority to the effect that sufficient opportunity to remedy the situation must be present. However, it was recently held that absolute liability applies to transitory unseaworthiness but that the shipowner need only furnish a vessel and appurtenances reasonably fit for their intended use and not an accident-free ship.

As in the case of maintenance and cure, if both the shipowner and a third party are negligent, the shipowner has no right to indemnification from the negligent third party because there is no contribution between joint tortfeasors. Generally, if the unseaworthy condition was caused solely by the negligence of the third party and was not such that the shipowner should have known of it or the injuries occurred while the vessel or concerned area was within the exclusive control of the third party tortfeasor, the shipowner is granted the right of indemnification. However, this is a general statement and will be delved into in more detail subsequently in the discussion as to longshoremen and harbor workers.

C. SEAMEN—NEGLIGENCE—JONES ACT

The third, and perhaps the most publicized, remedy of the injured seaman against the shipowner is his right to recover damages for injuries caused by negligence under the Merchant Marine Act of 1920, commonly called the Jones Act. Under the general maritime law, a seaman had no remedy for injuries caused by the negligence of those

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63 Mitchell v. Trawler Racer, Inc., supra note 3; but the 4th Circuit has interpreted this to do away with the necessity for virtually any proof other than fact of accident to the seaman, Grzybowski v. Arrow Barge Co., 283 F. 2d 481 (4th Cir. 1960); Puerto Seguro Cia. Naviera, S.A. v. Pitsillos, 279 F. 2d 599 (4th Cir. 1960).
64 See, supra note 50.
aboard the ship. This again was authoritatively stated by Justice Brown in 1903 in *The Osceola*. In 1915 Congress sought to remedy this situation by abolishing the fellow servant doctrine as to seamen. In 1918 the United States Supreme Court held that this was insufficient and that seamen still had no remedy for injuries by negligence. In 1920 Congress passed the Jones Act, which states as follows:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Perhaps the best way to study the Jones Act is to consider it phrase by phrase. The word "seamen" has been liberally construed, as in the case of maintenance and cure, and includes the master, officers and members of the crew employed upon a vessel. In 1957 the United States Supreme Court held that a handyman on a dredge was a seaman under the Jones Act. Longshoremen are not now included under the Jones Act because the right under that act is against the employer. However, they may or may not be seamen for certain purposes. They were held to be seamen to bring them within the unseaworthiness doctrine originally. They were once even held to be seamen under the Jones Act but six months later the Longshoremen and Harbor Workers Compensation Act was passed as an exclusive remedy for longshoremen. The term includes seamen employed by the United States Government, and on United States ships operated by a general agent, the right is against the United States. However, when the Federal Employees Compensation Act is applicable, it is exclusive. Foreign flag seamen do not fall within the Jones Act in most situations although all have not as

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65 See, *supra* note 1.
67 Senko v. La Crosse Dredging Corp., *supra* note 7; authorities concerning who is a seaman entitled to Jones Act remedies are extensively reviewed in Tuder v. Material Service Corp., 177 F. Supp. 71 (N.D. Ill. 1959) ; also see Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129 (1959).
69 Seas Shipping Co. v. Sieracki, *supra* note 60.
72 See, *supra* note 17; Mills v. Panama Canal Co., 272 F. 2d 37 (2d Cir. 1959).
yet been determined. Courts in this country will assume jurisdiction where the seaman is a United States citizen or the ship is registered in the United States or the shipowner owes allegiance to this country.73

The term "personal injury" has come to include all "industrial accident" types of injuries. It covers injuries occasioned by perils of the sea. It includes assaults by superior officers74 and, in certain instances, even by fellow seamen.75 It includes aggravation of an existing illness or injury from failure to provide proper maintenance and cure or from negligent treatment by a ship's doctor.76 In this particular instance the injured seaman has two remedies because he has the right to recover damages also under the maintenance and cure remedy. The phrase "in the course of his employment" has been given a broader meaning than in state workmen's compensation acts. It has come to mean that the seaman was injured while answerable to the call of duty or while in the service of the ship. It depends upon the maritime nature of the employment and not upon the injury having resulted from a maritime tort.77 It includes injuries due to the shipowner's negligence even when the injury occurs on a wharf alongside the ship.78 It must be remembered, however, that by its very words the phrase includes only actions by an employee against his employer.

The phrase "at his election" caused considerable trouble down through the years. It was always clear that no election was required between maintenance and cure and the Jones Act. Originally it was thought to require election between negligence under the Jones Act and recovery for unseaworthiness.79 However, decisions holding that such an election was necessary but that the one remedy was res judicata to the other were anomalous. The weight of authority gradually came to approve the view of the Third Circuit that the election required is between a suit in admiralty, without a jury, and an action at law, with or without a jury.80 This was indirectly, but probably conclusively, approved by the United States Supreme Court in 1958.81

"An action for damages at law, with the right of trial by jury", has

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78 See cases, supra note 77.
79 Pacific S. S. Co. v. Peterson, 278 U.S. 130 (1928).
been interpreted to mean much more than it actually says. Even though there is no mention of an admiralty action, the United States Supreme Court has held that the injured seaman has the right to bring an in personam action in admiralty in the United States District Court located where the employer resides or his principal place of business is located. This was decided in order to avoid holding the Jones Act unconstitutional because it deprived admiralty courts of jurisdiction over maritime causes of action. It is interesting to note that the injured seaman only has a right to bring in an in personam action in admiralty so that he has no lien against the vessel and no preferred status in limitation of liability proceedings. As is stated in the act, the injured seaman has a right to bring a civil action at law in the federal district court where the employer resides or his principal place of business is located. Because the action is brought under the Jones Act, diversity of citizenship is unnecessary but the $10,000.00 amount in controversy limitation does apply. State courts have concurrent jurisdiction over such actions. The term "jurisdiction" in the last sentence of the Jones Act has been held to mean "venue". Any action brought under the Jones Act is subject to being marshalled with other claims into a limitation of liability proceeding.

The Jones Act incorporates by reference the Federal Employers Liability Act. As to what provisions of the Federal Employers Liability Act apply under the Jones Act, the United States Supreme Court has developed what Professors Gilmore and Black refer to as a "rule of reason". It seems that the courts will apply the provisions of the Federal Employers Liability Act to Jones Act actions where their application appears to be reasonable and will not apply them where their application appears to be unreasonable. The usual determining factor is what is best for the injured seaman. It is undecided as to whether or not amendments to the Federal Employers Liability Act are incorporated into the Jones Act. One amendment changing the statute of limitations under the Federal Employers Liability Act from two years to three years has been incorporated into the Jones Act. The three year limitation is jurisdictional and cannot be waived or extended by agreement. The cause of action accrues on the date of injury. Filing an action within three years meets the requirement if service is made within a

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82 Panama R. Co. v. Johnson, 246 US. 375 (1924).
83 McCarthy v. American Eastern Corp., supra note 80; Van Camp Sea Food Co. v. Nordyke, 140 F. 2d 902 (9th Cir. 1944).
85 See, supra note 82.
87 See, supra note 54, at 298-99.
reasonable time thereafter.\footnote{89} Assumption of risk is not a defense.\footnote{90} The fellow servant doctrine is inapplicable. Contributory negligence is not a bar but merely operates to reduce recovery as in the case of comparative negligence.\footnote{91} There is no removal of a Jones Act action from a state court to a federal court. Even though that provision was dropped from the Federal Employers Liability Act in 1948, the Fifth Circuit has held that it still applies to Jones Act actions.\footnote{92} Hence, a Jones Act count combined with causes of action for unseaworthiness and maintenance and cure will make the entire action non-removable from state court, but in order to insure that the action cannot be removed, it is best to keep the claim for maintenance and cure below the jurisdictional limit of $10,000.00.

"Negligence" under the Jones Act has been given a very broad interpretation overlapping unseaworthiness because of the expressed intention in the Federal Employers Liability Act for broad coverage.\footnote{93} Decisions have adopted the attitude that common law standards of negligence, even as applied under the Federal Employers Liability Act, do not apply to maritime employment because the shipowner has a "higher degree" of duty than other employers.\footnote{94} Though this is a harsh doctrine as to shipowners, it fits in with the absolute duty of the shipowner to provide seamen with a seaworthy vessel. The range of negligence is wide. It includes almost all types of unseaworthiness including failure to hire a competent crew and failure to exclude from a crew incompetent or dangerous persons.\footnote{95} In this respect, decisions often speak of it as the "negligent failure to provide a seaworthy ship" or the "violation of the duty to provide a safe place to work".\footnote{96} It is probable that in time it will be expanded to include shore injuries as well. It does not include unseaworthiness for which the shipowner is not at fault. Negligence under the Jones Act includes the negligent acts of commission or omission of the master, officers and members of the crew of the vessel. It does not as yet include the negligent acts of independent contractors such as stevedores and repairmen or their employees, but of course these

\footnotesize{\begin{itemize}
\item \footnote{89} Sgambati v. United States, 172 F. 2d 297 (2d Cir. 1949), cert. denied, 337 U.S. 938 (1949).
\item \footnote{92} Pate v. Standard Dredging Corp., 193 F. 2d 498 (5th Cir. 1952).
\item \footnote{94} Cortes v. Baltimore Insular Line, supra note 44; also see supra note 54, at 310-11.
\item \footnote{96} See, supra note 54, at 313.
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could cause unseaworthiness. It includes failure to provide proper maintenance and cure.\textsuperscript{97}

As to negligence under the Jones Act, along with the “higher degree” of duty doctrine, courts have developed a doctrine of “permissable inferences from unexplained events” similar to the res ipsa loquitur doctrine.\textsuperscript{98} Together these two doctrines give rise to an interesting conclusion for Jones Act actions. The burden of proof is on the seaman-plaintiff. He must prove duty and breach, or negligent violation of the duty, but proof of duty has been lightened by the “higher duty” doctrine. He must also prove causation and injury but the burden here has been lightened by the “permissable inferences” doctrine. We have almost reached the point where the injured seaman need not show much more than that he was injured and that the injury could have been caused by the negligence of the shipowner. Actually whether or not the plaintiff can sustain the burden is really only important now in actions under the survival provisions of the Jones Act. According to some writers, the Jones Act is obsolete since almost all forms of operating negligence fall within the unseaworthiness remedy.\textsuperscript{99} They look for the Jones Act to be abandoned completely within not too many years. This may not be the case, however, because early in 1959 the Fourth Circuit very firmly held that courts have not as yet extended the doctrine of unseaworthiness to include the negligent use of seaworthy appliances,\textsuperscript{100} and the United States Supreme Court still emphatically distinguishes between the two remedies.\textsuperscript{101}

D. SEAMEN—SUMMARY

In summary as to his remedies, the injured seaman has the right to recover maintenance and cure to the point of maximum cure and wages to the end of the term of employment from the shipowner. He can do this in an action in admiralty in rem against the ship or in personam against the shipowner or both. This action would be brought in federal court without a jury. The injured seaman can also enforce this right at law in federal court, at his election with or without a jury, provided service of process can be had upon the shipowner and the jurisdictional requisites of diversity of citizenship and the amount in controversy being more than $10,000.00 can be met. Provided he can serve the shipowner, the injured seaman can also enforce his right in state court with

\textsuperscript{97} See, supra note 76.

\textsuperscript{98} Johnson v. United States, 333 U.S. 46 (1948).

\textsuperscript{99} See, supra note 54, at 315.

\textsuperscript{100} Penedo Cia Naviera S.A. v. Maniatis, 262 F. 2d 284 (4th Cir. 1959) ; however, on remand the trial court then held the appliance unseaworthy, Maniatis v. The Archipelago, 176 F. Supp. 63 (E.D. Va. 1959), and the appellate court affirmed, 273 F. 2d 618 (4th Cir. 1960) ; also see Billeci v. United States, 185 F. Supp. 711 (N.D. Cal. 1960), and 9th Cir. decisions cited therein.

\textsuperscript{101} See, supra note 58; Mitchell v. Trawler Racer, Inc., supra note 3.
or without a jury. As to his right to recover damages for injuries received on account of the unseaworthiness of the vessel, the seaman has the same remedies as he does to recover maintenance and cure. The seaman's third remedy is under the Jones Act to recover damages for injuries received through negligence. This remedy can be enforced in admiralty in an action in personam against the shipowner without a jury trial but the action must be commenced in the district where the shipowner-employer resides or his principal place of business is located. The injured seaman can also enforce his rights under the Jones Act in an action at law in federal court with or without a jury, provided the amount claimed is in excess of $10,000.00 and the action is commenced in the district where the shipowner-employer resides or his principal place of business is located. An action under the Jones Act can also be brought in state court, with or without a jury, provided service of process can be had upon the shipowner. The usual procedure is to combine all three causes of action, for maintenance and cure, damages from unseaworthiness, and damages from negligence, in one action. This can be brought in state court where service of process can be had upon the shipowner. As was pointed out previously, in an action in state court it would be wise to hold the claim for maintenance and cure below $10,00.00 so that the case cannot be removed to federal court. All three causes of action can be combined at law in one action in federal court provided the amount in controversy is over $10,000.00. Since claim for maintenance and cure is rarely as high as $10,00.00, in such cases it is best to combine all three counts but bring the counts for unseaworthiness and negligence at law with a jury demand and the count for maintenance and cure in admiralty. Of course, the venue, because of the Jones Act limitation, must be in the district where the shipowner resides or his principal place of business is located. Since venue can be waived, many shipowners are willing to appear voluntarily in other districts in order to have the suit in federal district court rather than in a local state court where it would be subject to local rules of procedure.

III. PASSENGERS

Passengers are those persons carried on a vessel pursuant to an express or implied contract with payment of fare or some equivalent. As to passengers the ship is a common carrier and the duty of the shipowner to his passengers is to provide them with safe passage or transportation. A passenger injured during the course of his passage or transportation is not owed the duty by the shipowner of being pro-

102 The Vueltabajo, 163 Fed. 594 (S.D. Ala. 1908); also see The Main v. Williams, 152 U.S. 122 (1894); Black's Law Dictionary, p. 1280 (4th ed. 1951).
103 Weade v. Dichmann, Wright & Pugh, 337 U.S. 801 (1949); also see New Jersey Steamboat Co. v. Brockett, 121 U.S. 637 (1887); The "City of Panama," 101 U.S. 453 (1879).
vided with a seaworthy vessel. As a result, he does not have a right to recover damages for injuries received because of the unseaworthiness of the vessel and has no maritime lien against the vessel.

An injured passenger can bring an action in admiralty or at law against the shipowner for negligence or fault resulting in injury. As to passengers, it is generally stated that the shipowner owes a "high degree of care" but the carrier is not an insurer. The ship must be navigated with skill, care and competence, and the shipowner must use reasonable care to protect the passengers from harm. The shipowner must warn the passengers of danger, must provide a reasonably safe means of embarking and disembarking, and must provide adequate medical services. If a doctor is maintained aboard the ship, he must be competent and well supplied. If there is no doctor aboard the ship but one is required by an injured person, the shipowner must furnish one at the nearest available port. If there is no doctor aboard the ship, the ship's medicine chest must be made available for the use of passengers. Generally, contributory negligence is not a bar but only serves to reduce recovery and most courts apply the general maritime law of comparative negligence in the case of an injured passenger. An injured passenger also may bring an action in admiralty or at law against the shipowner for breach of the express or implied contract to transport the passenger safely.

A carrier cannot contract against liability or limit its liability by contract. A carrier cannot limit its liability or absolve itself from liability by requiring notice of injury within a period of less than six months from the date of the injury. Even if notice is properly required within a period in excess of six months from the date of the injury, such restrictions will be waived if the carrier was not prejudiced by failure to receive notice of injury. Also, the carrier cannot limit the time for commencement of legal proceedings to less than one year from the date of injury.

104 The recent decision of Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959), makes this quite clear.
105 Moore v. American Scantic Line, 121 F. 2d 767 (2d Cir. 1941); Moore-McCormack Lines, Inc. v. Russak, 266 F. 2d 573 (9th Cir. 1959).
106 Voltman v. United Fruit Co., 147 F. 2d 514 (2d Cir. 1945); Moore v. American Scantic Line, supra note 105.
107 The Korea Maru, 254 Fed. 397 (9th Cir. 1918); Savage v. New York, N. & H. S. S. Co., 185 Fed. 778 (2d Cir. 1911).
109 See, supra note 19, at 234-36.
110 The decision in Kermarec v. Compagnie Generale Transatlantique, supra note 104 would appear to force this result; see supra note 19, at 246.
111 The "City of Panama," supra note 103.
IV. VISITORS AND BUSINESS INVITEES

Visitors aboard a ship are owed the duty of reasonable care by the shipowner, whether such visitors are on business in connection with the cargo or vessel management or are friends or relatives visiting passengers or members of the crew.115 This would include such categories of passengers who commonly come aboard ships as vessel agents, members of the Coast Guard, immigration officials, ship chandlers, marine surveyors and even the ship's lawyers.

V. LONGSHOREMEN AND HARBOR WORKERS

One of the largest categories of persons who are apt to receive maritime injuries is that of longshoremen and harbor workers. The duty of a shipowner to provide a seaworthy vessel extends to longshoremen and almost all types of harbor workers aboard the vessel provided they are there to serve the ship.116 The duty of reasonable care is owed to all longshoremen and harbor workers. One cannot consider injuries to longshoremen and harbor workers without studying the Longshoremen and Harbor Workers Compensation Act passed by Congress in 1927.117 It established a compensation commission which was to appoint deputy commissioners to administer the act. The functions of the commission have since been transferred to the Secretary of Labor.

The Longshoremen and Harbor Workers Act provides that compensation is payable for disability or death resulting from injuries arising out of and in the course of employment,118 provided that the death or disability results from an injury occurring on the navigable waters of the United States, including any drydock, and that recovery may not validly be provided by state law.119 No compensation is payable to the master or members of the crew of any vessel, any person engaged by the master to load or unload and repair any small vessel under 18 tons net, an officer or employee of the United States Government or any agency thereof or any state or foreign government or any political subdivision thereof, and any person injured or killed solely by reason of his intoxication or his wilful intent to injure or kill himself or another.120 In the case of the last restriction there is a presumption against the presence of intoxication or wilful intent to injure or kill in the absence of convincing evidence otherwise.121 Horseplay has been held not to bar recovery under the act.122

There is absolute liability for the employer based upon recovery

115 Kermarec v. Compagnie Generale Transatlantique, supra note 104.
116 See, supra notes 69 and 115.
120 Ibid.
122 General Accident Fire & Life Assur. Corp. v. Crowell, 76 F. 2d 341 (5th Cir. 1935).
schedules setting up recovery for temporary partial, temporary total, permanent partial and permanent total disability. In the case of an employer who is a subcontractor, his contractor is liable unless the subcontractor has secured payment. The injured worker's remedy under the Longshoreman and Harbor Workers Act is exclusive as against his employer. For that reason the employer who has not complied with the act may be held liable in an action for damages and in such action the defenses of fellow servant, contributory negligence and assumption of risk are abolished.

The Longshoremen and Harbor Workers Act has had an interesting development. In three different cases in 1917 the United States Supreme Court held Workmen's Compensation Acts in New York, Iowa and Washington to be constitutional. Two months later in that same year the Supreme Court held the New York act to be unconstitutional as applied to a longshoreman because he was injured aboard ship while performing maritime work under a maritime contract and so came within admiralty jurisdiction. The court held that to apply the state act would be contrary to a national uniformity of the maritime law, that the power to modify maritime law was in Congress, that only common law remedies were covered by the "saving to suitors" clause and not statutory compensation acts, and that a state compensation remedy was inconsistent with the policy of Congress to encourage investment in shipping evidenced by the limitation of liability acts of 1851. Later in 1917 Congress amended the "saving to suitors" clause to include claimants' rights and remedies under state workmen's compensation laws but in 1920 that amendment was held unconstitutional as an invalid delegation of federal power to the state. In 1922 a second amendment was also held unconstitutional. Early in 1927 the United States Supreme Court held longshoremen to be "seamen" under the Jones Act, but six months later Congress passed the Longshoremen and Harbor Workers Act as an exclusive remedy against the employer and that decision of the Supreme Court was nullified.

In 1932 the United States Supreme Court held the Longshoremen and Harbor Workers Compensation Act to be constitutional. In that

124 Ibid.
127 Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).
130 See, supra note 70.
131 For complete, concise and interesting coverage of this history see supra note 54, at 333-37.
same decision the court held that deputy commissioners' findings of fact are not reviewable unless they are not supported by the evidence but made an exception as to "fundamental" or "jurisdictional" facts. Questions as to the existence of an employer-employee relationship and whether or not the injury occurred on navigable waters were held to be fundamental questions of fact reviewable by the courts. All other questions have since been held not to be reviewable. Whether a claimant is a member of a crew,\(^{133}\) whether an injury arose out of the "course of employment"\(^ {134}\) and whether the employer had proper notice\(^ {135}\) have been held to be facts not subject to review. The findings of fact of the deputy commissioner as to the employment relationship and the question of navigable waters probably are the only findings which may still be reviewed by a court.

From the passage of the act in 1927 until 1942 the Supreme Court developed the "maritime but local" theory and applied it to each specific case which came along.\(^ {136}\) Under that theory where the claimant's occupation was maritime but so local in nature as not to relate to navigation and commerce, the application of the state compensation law was required because such would not affect the uniformity of the maritime law. This caused all sorts of trouble because of limitations of actions. A claimant would seek his remedy under the Longshoremen and Harbor Workers Act and find that he really belonged under the state workmen's compensation act or vice-versa with the result that when he finally found out where he was supposed to be, his time for bringing an action or making claim had run out. The "maritime but local" theory proved so unsatisfactory that in 1942 the United States Supreme Court expounded and subsequently developed the "twilight zone" doctrine.\(^ {137}\) This was to the effect that there is a twilight zone of cases between the area where the Longshoremen and Harbor Workers Act is the exclusive remedy against the employer and where the state workmen's compensation act is exclusive. Within that twilight zone there is a presumption of constitutionality of the state statute. Whether or not the case falls within the twilight zone is a question of fact and not of law. Though this doctrine has numerous complications, its application has generally proved much more satisfactory than the old "maritime but local" theory.

Since pronouncement of the theory, the courts have steadily broadened the twilight zone category.\(^ {138}\) If the state's compensation

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\(^{133}\) South Chicago Coal & Dock Co. v. Bassett, \textit{supra} note 8.


\(^{136}\) See, \textit{supra} note 54, at 344–48.

\(^{137}\) Davis v. Department of Labor, 317 U.S. 249 (1942).

\(^{138}\) See Rodes, \textit{Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone}, 68 \textit{Harv. L. Rev.} 637 (1955); also see, \textit{supra} note 54, at 350–58.
commission declines jurisdiction, it will be reversed, such being a question of fact. If the worker who has incurred a twilight zone injury seeks his remedy under the Longshoremen and Harbor Workers Act, the deputy commissioner's findings will be final if supported by the evidence and are not reviewable by the courts. This has simplified matters considerably and has led to many more claimants seeking their remedies under the applicable state workmen's compensation act which is usually more liberal than the Longshoremen and Harbor Workers Act. There is authority that if recovery is made first under the state workmen's compensation act, and the recovery permitted under the Longshoremen and Harbor Workers Act is greater, the excess may be sought under the federal act even though there has already been recovery under the state act.\(^1\)

Written notice of the injury must be served upon the employer and the deputy commissioner within thirty days after the date of injury or death.\(^2\) Claim must be made within one year after the accident, death or last voluntary payment by the employer, if any.\(^3\) The requirement of written notice within thirty days may not bar recovery under the act if the employer knew of the injury and is not prejudiced by failure to receive notice or if the deputy commissioner wishes to excuse the necessity of written notice for some satisfactory reason.\(^4\) The objections of failure to give written notice or failure to file claim within one year must be raised at the first hearing or they are waived.\(^5\) No election is necessary as between compensation under the act and an action against a third party.\(^6\) Acceptance of compensation benefits under an award by the deputy commissioner operates as an assignment to the employer of all of the injured worker's rights to recover damages against a third party unless the employee commences an action against the third party within six months after the award is made.\(^7\) If the employer or his assignee recovers from the third party, four-fifths of the excess over the amount of the compensation, medical expenses and expenses of suit are to be turned over to the employee.\(^8\) Where an insurer assumes the compensation payments, the insurer is subrogated to the employer's rights.\(^9\)

In 1946 the United States Supreme Court held that a longshoreman could sue a shipowner, whether or not the shipowner was negligent, for

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\(^1\) Western Boat Bldg. Co. v. O'Leary, 198 F. 2d 409 (9th Cir. 1952); Newport News Shipbuilding & Drydock Co. v. O'Hearne, 192 F. 2d 968 (4th Cir. 1951).
damages for unseaworthiness in addition to his receiving compensation from his stevedore-employer under the Longshoremen and Harbor Workers Act. This decision opened up an entirely new field of litigation in the maritime law. In 1953 the doctrine was extended to almost all types of harbor workers, even including the carpenter-employee of a repairman. In this same decision the court held that longshoremen and harbor workers also have the privilege of business invitees aboard ship to recover damages for operating negligence. In 1952 the Supreme Court considered a situation wherein an injured worker sought to recover damages for negligence from the shipowner and the shipowner in turn sought indemnification from the stevedore-employer of the worker. Though the shipowner was found to be only 25% responsible and the stevedore was found to be 75% responsible, the shipowner was denied indemnification from the stevedore because of the ancient prohibition against contribution between joint tortfeasors. This was then taken to mean that an injured longshoreman or harbor worker could recover damages from a shipowner for unseaworthiness and, even if the unseaworthiness was caused solely by the operating negligence of the stevedore, the shipowner had no right of indemnification against the stevedore. This placed the ultimate burden on the shipowner who really was not negligent in any respect but such was considered appropriate on the basis that stevedores should be entitled to limit their liability which is absolute under the Longshoremen and Harbor Workers Act. This resulted in considerable injustice to shipowners and in 1955 the United States Supreme Court held that a shipowner's claim against a stevedore-employer of an injured longshoreman is not because of the injury but is based upon a contractual right of indemnification, express or implied. It was held that the contract between the stevedore and the shipowner contains a warranty of workman-like service, express if written in and implied if not. This was held to extend to the handling of cargo and later even to equipment incidental to cargo handling. It has been held that the warranty may be breached when the stevedore's negligence only serves to call into play the vessel's unseaworthiness, provided the injury occurs within the area over which the stevedore has exclusive control and the unseaworthiness is not completely latent. At first it was held that there must be a direct contractual relationship between the shipowner and the stevedore but that has since been held unnecessary and the warranty of workmanlike service applies even if

148 See, supra note 69.
150 See, supra note 50.
153 See, supra note 19 for the cases gathered in footnotes to §§59, 60; also see Santomarco v. United States, 277 F. 2d 255 (2d Cir. 1960).
the stevedore is hired by a charterer or the consignee of the cargo. The result is that both the vessel and the shipowner are third party beneficiaries of the unloading or loading contract, no matter by whom the contract is made. The stevedore now ultimately bears the risk in case of injury to his employee unless the shipowner is negligent. Because of the diversified nature of the work and the areas wherein it is carried on in the case of longshoremen and harbor workers, the employer, usually a stevedore, now should carry liability insurance, workmen's compensation insurance and longshoremen and harbor workers compensation insurance.

VI. Wrongful Death

Any phase of personal injuries, even that connected with the maritime law, cannot be examined without at least briefly considering wrongful deaths. Under the general maritime law, seamen had no remedy for wrongful death and there was no survival of actions. Seamen now have two remedies, one under the Federal Employers Liability Act incorporated into the Jones Act which makes state death acts inapplicable and the other under the Death on the High Seas Act. Under the Federal Employers Liability Act incorporated into the Jones Act, the carrier, if negligent, is liable to the personal representative of the deceased seaman for the benefit of certain classes. The first class includes the widow or husband and children; the second class includes the parents; the third class includes the next of kin dependent upon the seaman-employee. There is priority as between the classes and the measure of recovery is pecuniary loss. The right of action for injury survives for the benefit of those same classes. The Death on the High Seas Act covers death "caused by wrongful act, neglect or default occurring on the high seas beyond a marine league from the shore of any state". The remedy is exclusively an action in admiralty. There is one class of beneficiaries including the wife, husband, children, parents and dependent relatives. The measure of recovery is pecuniary loss based upon life expectancy, probable earnings and the amount of contribution to the members of the class. The time limitation for commencing suit under the Death on the High Seas Act is two years after the wrongful act, neglect or default causing death with provision

156 Cortes v. Baltimore Insular Line, cited supra note 44.
160 Supra note 93.
for an additional ninety days to secure jurisdiction.\footnote{165}{\textit{Stat.} 537 (1920), 45 U.S.C. §763 (1958).} Under the Jones Act the time limitation for commencement of an action is three years from the date of death.\footnote{166}{See, \textit{supra} note 88.} On the Great Lakes and Inland Waters the personal representative of the deceased seaman has only the remedy under the Jones Act. For death on the high seas, the personal representative has a remedy under both the Jones Act and the Death on the High Seas Act. In such cases in order to reap the benefit of the survival provisions of the Jones Act, as set forth in the Federal Employers Liability Act, and the fact of only one large class of beneficiaries under the Death on the High Seas Act, causes of action under both acts are frequently combined in admiralty without a jury.

In the case of passengers, the remedy for wrongful death on the high seas is under the Death on the High Seas Act\footnote{167}{See, \textit{supra} note 159.} and in state territorial waters the remedy for wrongful death is under the applicable state wrongful death act. The same situation applies to all visitors and business invitees aboard a vessel. Longshoremen and harbor workers have a remedy under the applicable state death act in the case of local and twilight zone deaths and the remedy under the Longshoreman and Harbor Workers Compensation Act where the state death act is inapplicable.\footnote{168}{See, \textit{supra} note 118.}

As a general rule, it can be said that the general maritime law is the substantive law applied by the courts, no matter whether state or federal, in considering all of these remedies, with exception as to the application of state wrongful death acts.\footnote{169}{Kermarec \textit{v. Compagnie Generale Transatlantique, supra} note 104; Seas Shipping Co. \textit{v. Sieracki, supra} note 60; Garrett \textit{v. Moore-McCormack Co., 317 U.S. 239 (1942); Chelentis \textit{v. Luckenbach S. S. Co., supra} note 66; Southern Pacific Co. \textit{v. Jensen, supra} note 127.} Where the state wrongful death act is applicable, there is considerable confusion which has been brought about by four recent decisions of the United States Supreme Court.\footnote{170}{Goett \textit{v. Union Carbide Corp., 361 U.S. 340 (1960); Hess \textit{v. United States, 361 U.S. 314 (1960); Halecki \textit{v. United New York & New Jersey Pilots Ass'n, 358 U.S. 613 (1959); Tungus \textit{v. Skovgaard, 358 U.S. 588 (1959).} An excellent discussion of the four cases, \textit{supra} note 170, is found in Harolds, \textit{Maritime Death Claims and the Applicability of State Law, 35 Tulane L. Rev. 85 (1960).}} To this date it is somewhat uncertain as to whether the court applying the state wrongful death act should apply state law or the general maritime law within the confines and restrictions of the state act.\footnote{171}{An excellent discussion of the four cases, \textit{supra} note 170, is found in Harolds, \textit{Maritime Death Claims and the Applicability of State Law, 35 Tulane L. Rev. 85 (1960).}} It is hoped that this situation will be clarified by the United States Supreme Court within the very near future.

VII. CONCLUSION

This article is only meant to serve as a basic outline for the general
consideration of attorneys and other interested persons who are not thoroughly familiar with this particular area of the admiralty and maritime law. Comment has led the author to hope that it may also prove of value to the maritime industry as a practical working guide with which to approach the general field of maritime personal injuries. Questions concerning maritime personal injuries are frequently complex but not insurmountable. Volumes have been written on the subject and should be consulted with reference to specific situations as they arise. This is probably the most active and changing field embraced within the so-called maritime law. The practitioner within it must constantly be alert to keep abreast of the latest developments.

172 As well as the various texts cited throughout the course of this article, Edelman, Maritime Injury and Death (1960), released for distribution since the text of this article was prepared, should prove to be a useful tool in the hands of practitioners within this field.