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Admiralty--Maintenance and Cure--Successive Shipowner-Employers Equally Liable to Seaman for Injuries Incurred During First Employment and Aggravated During Second Employment (Gooden v. Sinclair Refining Co., 378 F.2d 576 (3d Cir. 1967))

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RECENT DECISIONS

ADMIRALTY—MAINTENANCE AND CURE—SUCCESSIVE SHIPOWNER-EMPLOYERS EQUALLY LIABLE TO SEAMAN FOR INJURIES INCURRED DURING FIRST EMPLOYMENT AND AGGRAVATED DURING SECOND EMPLOYMENT—A seaman who had injured his back in an accident aboard a vessel owned by Texaco, Inc. subsequently aggravated that injury in the normal course of his new employment with the Sinclair Refining Company. The seaman libeled Sinclair and Texaco separately to recover maintenance and cure for the disability occasioned by the aggravation of the prior injury, and Sinclair impleaded Texaco in the action against it. The two actions were consolidated for trial and the district court awarded the seaman a full recovery against Sinclair, but allowed Sinclair full indemnity against Texaco. The United States Court of Appeals, Third Circuit, vacated the indemnification award and remanded the case for further proceedings *holding* that Sinclair was not entitled to full indemnification unless the original injury aboard the Texaco vessel resulted from Texaco's negligence or the unseaworthiness of its ship; in the absence of such a showing, Texaco and Sinclair would be required to share equally the obligation to pay the seaman maintenance and cure. *Gooden v. Sinclair Refining Co.*, 378 F.2d 576 (3d Cir. 1967).

Seamen have traditionally been regarded as "wards of the admiralty," and have, therefore, enjoyed the paternalistic favor of the courts.[1] One of the benefits which has accrued to them is the protection afforded by the ancient doctrine of maintenance and cure[2] which is tantamount to a judicially imposed "system of acci-

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[1] Harden v. Gordon, 11 F. Cas. 480, 485 (No. 6047) (C.C.D. Me. 1823): "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel, because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overreached." *See also* Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 377 (1932).

[2] The concept of affording seamen special protection is approximately 2500 years old. Note, *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 YALE L.J. 243, 247 (1947). The Anglo-American theory of maintenance and cure can be traced to the twelfth century Laws of Oleron, reprinted in *Reed v. Canfield*, 20 F. Cas. 426, 428 (No. 11,641) (C.C.D. Mass. 1832). *See generally* appendix 30 F. Cas. 1171 (1897). The traditional reason for giving seamen this remedy was outlined by Mr. Justice Story in *Harden v. Gordon*, 11 F. Cas. 480, 483 (No. 6047) (C.C.D. Me. 1823):

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour.

dent and health insurance. . . ." [3] By this doctrine a seaman is entitled to maintenance, which is "sustenance and a berth while aboard ship and the payment in cash to the ill or injured seaman the cost of his board and lodging while ashore actually expended by him for the liability which he incurred," [4] and cure, which is such medical treatment as is necessary to treat the seaman [5] if he " 'falls sick, or is wounded, in the service of the ship,' if such misfortune attacks him while he is attached to the ship as part of her crew." [6] It is not necessary that the illness or injury be the result of anyone's negligence,[7] or that it be caused by the seaman's work or employment.[8] All that is required is that the seaman become disabled during his period of employment. This requirement has been construed to mean merely that he be in the service of the ship at the time the disability arises;[9] and, to be in the service of the ship, the seaman need only be on call for duty.[10] Following this broad construction, the United States Supreme Court has declared that a seaman may be entitled to maintenance and cure even though injured while off the ship for personal reasons.[11]

The courts have rarely denied a seaman maintenance and cure, generally allowing him the benefit of any doubt.[12] Virtually the only way a seaman's claim for maintenance and cure may be defeated is for the shipowner to show that the injury or illness

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> 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 for the want of suitable nourishment. . . . Beyond this, is the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation.

[3] G. GILMORE & C. L. BLACK, THE LAW OF ADMIRALTY § 6-6, at 254 (1957).

[4] M. NORRIS, MARITIME PERSONAL INJURIES § 13 (2d ed. 1966).

[5] Raymond v. The Ella S. Thayer, 40 F. 902, 904 (N.D. Cal. 1887).

[6] The Bouker No. 2, 241 F. 831 (2d Cir.), *cert. denied*, 245 U.S. 647 (1917).

[7] Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938); Smith v. Lykes Bros.-Ripley S.S. Co., 105 F.2d 604 (5th Cir.), *cert. denied*, 308 U.S. 604 (1939); Rowald v. Cargo Carriers, Inc., 243 F. Supp. 629 (E.D. Mo. 1965); Perdikouris v. S.S. Olympos, 196 F. Supp. 849 (E.D. Va. 1961).

[8] Loverich v. Warner Co., 118 F.2d 690, 692 (3d Cir.), *cert. denied*, 313 U.S. 577 (1941); Diaz v. Gulf Oil Corp., 237 F. Supp. 261, 263 (S.D.N.Y. 1965).

[9] *See* Warren v. United States, 340 U.S. 523 (1951); The Osceola, 189 U.S. 158, 175 (1903).

[10] Farrell v. United States, 336 U.S. 511 (1949); The Bouker No. 2, 241 F. 831, 833 (2d Cir.), *cert. denied*, 245 U.S. 647 (1917); Hunt v. The Trawler Brighton, Inc., 102 F. Supp. 300 (D. Mass. 1952).

[11] Aguilar v. Standard Oil Co., 318 U.S. 724 (1943).

[12] Dragich v. Strika, 309 F.2d 161 (9th Cir. 1962); Diddlebock v. Alcoa S.S. Co., 234 F. Supp. 811 (E.D. Pa. 1964).

was caused by the seaman's own willful or gross misconduct, or was the result of insubordination or disobedience to orders.[13]

Problems of indemnity and contribution for maintenance and cure payments arise out of the fact that the obligation to pay maintenance and cure is a continuing one.[14] Unlike most actions to recover money, lump sum payments are not sufficient to satisfy the obligation to pay maintenance and cure.[15] A shipowner is required to maintain and care for the disabled seaman until he has reached a maximum recovery or cure.[16] And it is well settled that the mere fact that a seaman obtains subsequent employment does not terminate his right to maintenance and cure.[17] Consequently, it is possible for a shipowner to hire a seaman who is still entitled to payments from a prior employer.[18]

This continuing liability has created difficulties where the seaman, after obtaining employment with a second shipowner, aggra-

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[13] Farrell v. United States, 336 U.S. 511, 516 (1949); Aguilar v. Standard Oil Co., 318 U.S. 724 (1943); Rolph Navigation & Coal Co. v. Kohilas, 299 F. 52, 55 (9th Cir.), *cert. denied*, 266 U.S. 614 (1924); Peterson v. The Chandos, 4 F. 645, 651 (D. Ore. 1880).

[14] Loverich v. Warner Co., 118 F.2d 690, 693 (3d Cir.), *cert. denied*, 313 U.S. 577 (1941).

[15] Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938).

[16] Vaughan v. Atkinson, 369 U.S. 527, 531 (1962); Farrell v. United States, 336 U.S. 511, 517 (1949); Wilson v. United States, 229 F.2d 277, 280 (2d Cir. 1956); Diddlebock v. Alcoa S.S. Co., 235 F. Supp. 811, 814 (E.D. Pa. 1964). The issue of exactly how long after the voyage a shipowner might have to pay maintenance and cure was in doubt until 1938. In *The Osceola*, 189 U.S. 158 (1903), the leading American case on maintenance and cure, the Court stated that when "a seaman falls sick, or is wounded, in the service of the ship, [the shipowner is liable] to the extent of his maintenance and cure, and wages, at least so long as the voyage is continued." *Id.* at 175. The question of whether it was the obligation to pay maintenance and cure that terminated at the end of the voyage, or only the obligation to pay the seaman his wages, was finally settled in Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938). There the Court, faced with a seaman afflicted with an incurable disease, held that the obligation to pay maintenance and cure extended beyond the end of the voyage for such a period of time as may be necessary "to effect such improvement in the seaman's condition as reasonably may be expected. . . ." *Id.* at 530.

[17] Vaughan v. Atkinson, 369 U.S. 527 (1962); Permanente S.S. Corp. v. Martinez, 369 F.2d 297, 298-99 (9th Cir. 1966); Yates v Dann, 223 F.2d 64 (2d Cir. 1955); Loverich v. Warner Co., 118 F.2d 690, 693 (3d Cir.), *cert. denied*, 313 U.S. 577 (1941).

[18] A seaman who has become disabled and therefore entitled to maintenance and cure is eligible for free medical services at a United States Public Health Service Hospital, during which time he does not receive actual payments from the shipowner. M. NORRIS, MARITIME PERSONAL INJURIES § 13 (2d ed. 1966). These hospitals issue fitness for duty slips, and it is the general practice of shipowners not to hire a seaman unless he possesses such a slip. But it is well settled that the fact that a seaman is declared fit for duty and possesses such a slip is not conclusive as to whether he is still entitled to maintenance and cure. Diaz v. Gulf Oil Corp., 237 F. Supp. 261, 265 (S.D.N.Y. 1965). *See* Koslusky v. United States, 208 F.2d 957 (2d. Cir. 1953).

vates a prior injury. It has long been held that the aggravation of a prior injury[19] or the reactivation of a pre-existing illness, including a pre-existing latent condition,[20] will give rise to the present shipowner's duty to pay maintenance and cure. The only requirement in such cases is that the aggravation or reactivation result from some activity while in the service of the ship.[21] Thus, where the seaman aggravates his condition while employed on a second ship, a situation arises in which two employers may be liable for the seaman's maintenance and cure for the same disability.

It should be noted, however, that two distinct situations may give rise to this dual liability depending upon how the injury aboard the first ship occurred, *i.e.*, the original injury may have been caused by the shipowner's negligence or the unseaworthiness of his vessel or by a fortuitous accident occasioned by no negligence or unseaworthiness. Although the cause of the injury may vary, the obligation to pay maintenance and cure nevertheless arises, since it attaches irrespective of culpability.[22] However, the cause of the injury may give rise to additional problems concerning primary liability.

Maintenance and cure is but one of three remedies available to the seaman as the result of a maritime injury; the other two are actions for unseaworthiness, or for negligence (a cause of action under the Jones Act).[23] Both the unseaworthiness claim and a claim under the Jones Act sound in tort[24] and, therefore, the seaman is required to elect his remedy; he may not

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[19] *See* Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959) (pre-existing tubercular condition); United States v. Robinson, 170 F.2d 578 (5th Cir. 1948) (pre-existing arteriosclerosis condition); Diaz v. Gulf Oil Corp., 237 F. Supp. 261 (S.D.N.Y. 1965) (pre-existing asthmatic condition); Arvanitis v. Bassa Transp. Corp., 183 F. Supp. 741 (S.D.N.Y. 1960) (pre-existing back injury); White v. Campbell, 96 F. Supp. 195 (W.D. Pa. 1951) (pre-existing arthritic condition).

[20] *See* Renner v. United States, 132 F. Supp. 810 (E.D.N.Y. 1955) (reactivation of tubercular condition); Albano v. United States, 98 F. Supp. 150 (D. Mass. 1951) (latent psychoneurotic condition).

[21] *See* Miller v. Lykes Bros.-Ripley S.S. Co., 98 F.2d 185 (5th Cir.), *cert. denied*, 305 U.S. 641 (1938); Brown v. Dravo Corp., 157 F. Supp. 265 (W.D. Pa. 1957), *aff'd*, 258 F.2d 704 (3d Cir. 1958), *cert. denied*, 359 U.S. 960 (1959); Capurro v. The All America, 106 F. Supp. 693 (E.D.N.Y. 1952).

[22] Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938).

[23] La Fontaine v. The G.M. McAllister, 101 F. Supp. 826 (S.D.N.Y. 1951). *See generally* Comment, *Seamen's Injuries: The Jones Act, Unseaworthiness, and Maintenance and Cure—The Siamese Triplets*, 51 CALIF. L. REV. 412 (1963). The cause of action for unseaworthiness is a traditional maritime remedy, *see* The Osceola, 189 U.S. 158 (1903), whereas the negligence action is statutory, *see* 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964) (popularly known as the Jones Act).

[24] Smith v. Lykes Bros.-Ripley S.S Co., 105 F.2d 604, 606 (5th Cir.), *cert. denied*, 308 U.S. 604 (1939).

recover for both.[25] On the other hand, no election need be made between either of these tort actions and maintenance and cure, for they are considered consistent cumulative remedies.[26] This rule has been justified on the basis that unseaworthiness or Jones Act actions sound in tort, whereas the courts have traditionally viewed an action to recover maintenance and cure as sounding in contract.[27] As was stated by Mr. Justice Story in *Harden v. Gordon*,[28] prompting the acceptance of maintenance and cure by the American bar,[29] maintenance and cure "constitutes, in contemplation of the law, a part of the contract for wages, and is a material ingredient in the compensation for the labour and services of the seaman." [30] This implied contract [31] may not be abrogated by the parties [32] and has provided broad remedial powers to compensate the seaman for his medical expenses. But, although the seaman may pursue both his remedies in tort and contract, he may not obtain a double recovery,[33] the possibility of which arises because a recovery for either unseaworthiness or negligence may include compensation for the same expenses covered by an award for maintenance and cure.[34] Where two employers are involved, the difficulties inherent in allocating financial responsibility for the same disability are manifest. This is the wellspring of problems concerning the right to indemnification or contribution among shipowners where both are liable for what may be, in effect, maintenance and cure.

The issue of the respective liabilities of successive shipowners to pay maintenance and cure to a single seaman has never been

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[25] Pacific S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928). The Jones Act provides that "[a]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages. . . ." 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1961).

[26] Pacific S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928); Smith v. Lykes Bros.-Ripley S.S. Co., 105 F.2d 604, 605 (5th Cir.), *cert. denied*, 308 U.S. 604 (1939).

[27] Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928).

[28] 11 F. Cas. 480 (No. 6047) (C.C.D. Me. 1823).

[29] G. GILMORE & C. L. BLACK, THE LAW OF ADMIRALTY § 6-6, at 253 (1957).

[30] Harden v. Gordon, 11 F. Cas. 480, 481 (No. 6047) (C.C.D. Me. 1823).

[31] Aguilar v. Standard Oil Co., 318 U.S. 724 (1943).

[32] Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371 (1932).

[33] Vickers v. Tumey, 290 F.2d 426, 435 (5th Cir. 1961); Bartholomew v. Universe Tankships, Inc., 279 F.2d 911 (2d Cir. 1960).

[34] Fitzgerald v. United States Lines, 374 U.S. 16 (1964); Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927). The court stated, in McCarthy v. American Eastern Corp., 175 F.2d 727, 729 (3d Cir. 1949), *cert. denied*, 338 U.S. 911 (1950), that

> when an injured seaman recovers full damages in an action for indemnity based upon unseaworthiness and negligence in which he has claimed loss of wages including the value of the board and lodging which form a part thereof and medical expenses, if any, he has thereby recovered the maintenance and cure to which he is entitled up to the time of trial, at least.

directly before the courts. However, some direction may be obtained from the analagous issue of shipowner indemnification from third-party tort-feasors for maintenance and cure payments to seamen whose injuries are precipitated by the third-party's tort.[35] This situation is similar to one in which a second shipowner is compelled to pay maintenance and cure to a seaman who aggravates an injury originally incurred on another ship due to negligence or the unseaworthiness of that ship.

The right of a shipowner to indemnification and recovery of maintenance and cure payments from third-party tort-feasors is uncertain due to two circuit court of appeals decisions, *The Federal No. 2* [36] and *Jones v. Waterman Steamship Co.*,[37] which reached opposite conclusions on this issue. In *The Federal No. 2*,[38] where indemnification was denied, a seaman employed on libelant's barge had been injured in a collision negligently caused by the tug Federal No. 2. The barge owner libeled the Federal No. 2 to recover hospital and other expenses which it had paid pursuant to its obligation to maintain and care for the seaman. The court, relying on the traditional concept of maintenance and cure as a contractual obligation, concluded that "[t]he cause of the responsibility is the contract; the tort is the remote occasion." [39] Consequently, the court held that the payments made to cure the seaman were a personal obligation, subject to a contingency, "and the law does not predicate liability upon the party occasioning a contingency contemplated in [the] contract of employment." [40] The only means perceived by the court by which a libelant in such a situation might recover damages was if there were either some express statutory provision or contractual right of subrogation present.

In *Jones v. Waterman Steamship Co.*,[41] which allowed indemnification, a seaman who had been on shore leave was walking on the pier to which libelant's ship was moored and, when the lights suddenly went out, fell into an open ditch along a railroad siding owned and operated by the Reading Railroad. The seaman, after instituting a common-law negligence action against the rail-

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[35] *See generally* G. GILMORE & C. L. BLACK, THE LAW OF ADMIRALTY §§ 6-14 to 6-18 (1957).

[36] 21 F.2d 313 (2d Cir. 1927).

[37] 155 F.2d 992 (3d Cir. 1946).

[38] 21 F.2d 313 (2d Cir. 1927).

[39] *Id.* at 314. *See* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927), where the Court states:

> as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong. . . . The law does not spread its protection so far.

[40] The Federal No. 2, 21 F.2d 313, 314 (2d Cir. 1927).

[41] 155 F.2d 992 (3d Cir. 1946).

road and settling for $750.00, instituted an action to recover maintenance and cure from his employer, Waterman, who in turn impleaded the railroad seeking indemnification. The court, after disposing of Waterman's allegation that the release given by the seaman to the railroad barred his action against it for maintenance and cure,[42] proceeded to hold the railroad liable to indemnify Waterman for any maintenance and cure which it would have to pay the seaman. In contrast to the court in *The Federal No. 2*, the *Jones* court viewed the relationship between the ship and seaman as an exceptional "status," to be likened to that of parent and child or husband and wife.[43] Therefore, as in those cases where the parent or husband is entitled to indemnity for expenses incurred on the child's or wife's behalf, the shipowner should be indemnified by the tort-feasor for maintenance and cure payments to the injured seaman.[44]

While the division on this particular issue has persisted, with both *Jones v. Waterman Steamship Co.*[45] and *The Federal No. 2*,[46] providing precedent, it should be noted that the disputed question of law in those cases was whether a shipowner has an *independent* cause of action for indemnification against the third-party tort-feasor for maintenance and cure payments. The law seems settled, however, that, if the seaman sues both the tort-feasor and the shipowner in the same action as co-defendants, the obligation of the tort-feasor to fully compensate the seaman is primary, whereas the shipowner's

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[42] *Id.* at 995-96. The court held that, although a release of one joint tort-feasor would release the other, since the obligation of Waterman did not sound in tort whereas the railroad's did, the release did not affect the seaman's right to recover maintenance and cure from Waterman.

[43] The court in *The Federal No. 2* believed that the parent-child and husband-wife relationships were a social condition which, because of their natural existence and unity, a tort-feasor is perforce aware of. Such did not exist according to the court in the seaman-ship relationship. It was solely contractual, not really different from the employer-employee relationship. 21 F.2d 313, 314 (2d Cir. 1927).

[44] 155 F.2d at 1000-01: "We prefer to impose a higher degree of dignity upon the ship-seaman relationship, awarding to it a status or a 'social condition' in excess of that given under the ruling in *The Federal No. 2.*" *Id.* at 1001. The court's view that the seaman stands in a special relation to the ship is a logical conclusion to be drawn from the very reasons for affording seamen such protection and is not without precedent. *See* Powery v. Emergency Fleet Corp., 280 F. 726 (S.D. Ala. 1922).

[45] *See* Myles v. Quinn Menhaden Fisheries, Inc., 302 F.2d 146 (5th Cir. 1962) (dictum); Valentine v. Wiggins, 242 F. Supp. 870 (E.D.N.C. 1965); Pure Oil Co. v. Geotechnical Corp., 129 F. Supp. 194 (E.D. La. 1955); Babellon v. Grace Line, Inc., 12 F.R.D. 123 (S.D.N.Y. 1951).

[46] *See* H-10 Water Taxi Co. v. United States, 252 F. Supp. 592 (S.D. Cal. 1966); Gomes v. Eastern Gas & Fuel Ass'n, 127 F. Supp. 435 (D. Mass. 1954); Irwin v. United States, 111 F. Supp. 912 (E.D.N.Y. 1953); Houston Belt & Terminal Ry. v. Burmester, 309 S.W.2d 271 (Tex. Civ. App. 1957).

obligation to pay maintenance and cure is but secondary.[47] The basic concept is that the seaman may not receive a double recovery.[48] These considerations have led to the well-settled rule that although prior recovery from the tort-feasor does not bar the seaman from an action against the shipowner, the shipowner may set off against his maintenance and cure liability any items which constitute a part of maintenance and cure already recovered from the tort-feasor.[49] The existence of these rules has led to the conclusion that to deny indemnification in instances where the shipowner has paid maintenance and cure *prior* to an action by the seaman against the tort-feasor, as occurred in *The Federal No. 2*, unfairly relieves the wrongdoer.[50]

As previously stated, there is no clear rule of law which would govern the situation of successive shipowner liability for maintenance and cure where the first shipowner tortiously caused the seaman's injuries; nor do analogous cases supply a definitive solution. However, one court has concerned itself with an attempt to allocate responsibility for maintenance and cure between two shipowners where the injuries caused the seaman on the first ship were not caused by the tortious conduct of its owner. In *Pyles v. American Trading & Production Corp.*,[51] a seaman injured his back while on the defendant's ship, subsequently obtained employment on a second vessel and was reinjured. The second ship paid him maintenance and cure for his disability resulting from the reinjury. Nonetheless, the seaman libeled the first shipowner to recover maintenance and cure for the entire period, dating from the original injury.[52] The court held that if he reimbursed the second shipowner for the amount received as maintenance and cure he could recover fully from the first. Since the second shipowner was not a party to the litigation it cannot be authoritatively said that the court would have done the same in an action in which he was a party. The case is significant, however, in that the court sanctioned a process whereby, provided the seaman does not obtain a double recovery, he may determine who shall bear the ultimate

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[47] The Jefferson Myers, 45 F.2d 162 (2d Cir. 1930); Seely v. City of New York, 24 F.2d 412 (2d Cir. 1928); Thibeault v. Boston Towboat Co., 28 F. Supp. 152 (D. Mass. 1939), *aff'd sub nom.*, Mystic Terminal Co. v. Thibeault, 108 F.2d 813 (1st Cir. 1940); Sillanpa v. Cornell S.S. Co., 1954 A.M.C. 1189 (N.Y. Sup. Ct. 1954).

[48] *See* Muise v. Abbott, 160 F.2d 590, 592 (1st Cir. 1947).

[49] Gomes v. Eastern Gas & Fuel Ass'n, 127 F. Supp. 435 (D. Mass. 1954).

[50] G. GILMORE & C. L. BLACK, THE LAW OF ADMIRALTY § 6-18, at 277 (1957).

[51] 244 F. Supp. 685 (S.D. Tex. 1965), *rev'd on other grounds*, 372 F.2d 611 (5th Cir. 1967).

[52] The seaman's libel also alleged unseaworthiness and negligence on the part of the first ship, but the jury found against him on these issues.

liability, without any consideration of the shipowners' rights *inter sese*.[53]

In the instant case, *Gooden v. Sinclair Refining Co.*,[54] the court was required to determine the liability of two successive shipowners who were being libeled for maintenance and cure. The ultimate claim was for the period of disability following the aggravation of the seaman's back condition, originally occasioned on Texaco's vessel. The aggravation, which occurred while the seaman was employed on the second ship (Sinclair), was not caused by any accident, whereas the original injury was. The lower court, faced with two separate suits consolidated for trial, with Sinclair impleading Texaco in the suit against it, had awarded the seaman judgments against both shipowners. However, because of the double recovery problem, the judgment against Texaco was not entered.[55] Without determining whether Texaco had breached any legal duty owed the seaman in causing the original injury, the district court held Texaco liable to indemnify Sinclair for *all* maintenance and cure payments to the seaman, from which judgment Texaco appealed.

In analyzing the problem of indemnification the court reviewed the respective liabilities of the two shipowners. The obligation of Sinclair, the second shipowner, to pay the seaman maintenance and cure was not appealed. Texaco, however, took the position that when the contingent obligation to pay maintenance and cure descended upon Sinclair, *i.e.*, when it hired the seaman, its own liability ceased. The court was of the opinion that the seaman's subsequent employment by another shipowner was not controlling in determining when Texaco's obligation ceased. Texaco was obligated to pay until the seaman was cured, and the fact of subsequent employment was of only evidentiary value on the issue of the seaman's recovery from his injury.[56] Since the district court had determined that the libelant had not been cured, it was concluded that the seaman was entitled to payments from either shipowner, with a prohibition, however, against double recovery.

The court then considered the lower court's holding that, due to equitable considerations, the total liability should fall upon the shipowner upon whose vessel the original accident occurred. Noting that no determination had been made by the lower court upon the issue of fault or breach of duty, the court held that

> the mere fact that the disability was caused by an accident on . . . . [Texaco's] ship rather than on another vessel should not be the basis

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[53] *See also* Diaz v. Gulf Oil Corp., 237 F. Supp. 261 (S.D.N.Y. 1965). *Cf.* Permanente S.S. Corp. v. Martinez, 369 F.2d 297 (9th Cir. 1966).

[54] 378 F.2d 576 (3d Cir. 1967).

[55] Gooden v. Texaco, Inc., 255 F. Supp. 343 (E.D. Pa. 1966).

[56] 378 F.2d at 579.

for placing upon Texaco the entire maintenance and cure obligation for the period when its obligation was coextensive with Sinclair's.[57]

The court then, based on its own views of the equities, concluded that where no fault could be placed on the prior shipowner the two shipowners should share the liability equally.

The court then turned to the problem of the respective shipowners' liability if the seaman's original injury had been caused by the first shipowner's negligence or the unseaworthiness of his vessel. No determination had been made by the district court on this issue. Noting prior case law, which had established the principle that where a seaman joins two defendants in a suit, asking damages of one and maintenance and cure of the other, the defendant liable for damages is primarily liable to the seaman, whereas the other is only secondarily liable, the court stated:

> It would thus appear to be equitable to allow Sinclair, the shipowner which paid the seaman maintenance and cure, to seek exoneration from Texaco to the extent of the seaman's damages rights (if any) against Texaco.[58]

Noting the analogous situations dealt with in *The Federal No. 2*,[59] and *Jones v. Waterman Steamship Corp.*,[60] but declining to follow either, the court declared that it was within its equity powers as a court sitting in admiralty to compel indemnification:

> And the relief here proposed is designed to achieve the equitable result of assuring that the ultimate liability of shipowners remains the same regardless of how seamen choose or happen to seek recovery.[61]

The court was unimpressed by the argument that the granting of indemnity here might lead to multiple litigation, believing that the interests of uniformity and consistency in placing ultimate liability must prevail.[62]

The court distinguished *Halcyon Lines v. Haenn Ship Corp.*,[63] in which the United States Supreme Court had declared that to allow contribution among joint tort-feasors in non-collision maritime cases would impinge on legislative policy since Congress had entered the area and had not provided for such contribution. There the Supreme Court was dealing with longshoremen and their employers, the liability of the latter having been limited by statute.[64]

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[57] *Id.* at 580.
[58] *Id.* at 581.
[59] 21 F.2d 313 (2d Cir. 1927).
[60] 155 F.2d 992 (3d Cir. 1946).
[61] 378 F.2d at 582.
[62] *Id.* at 582-83.
[63] 342 U.S. 282 (1952).
[64] 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1964) (The Longshoremen's and Harbor Workers' Compensation Act).

To compel contribution by the employer in that case would increase his liability in contravention of the statute. Here, on the other hand, the court was dealing with an existing liability, and to compel contribution or indemnification would in no way increase it.[65] Consequently the district court's judgment was vacated, and the case was remanded for further consideration on the issue of the first shipowner's possible breach of duty to the seaman.

The Third Circuit Court of Appeals in the instant case has accomplished, through the use of its equity powers as an admiralty court,[66] what it had previously attempted in *Jones v. Waterman Steamship Corp.*[67] However, that case was somewhat tarnished by the subsequent reversal of a case upon which the court had greatly relied in its rationale,[68] and has, therefore, been somewhat unpersuasive in its attack upon the conceptual fiction of maintenance and cure as a contract between ship and seaman.[69] The theory, espoused by the court in *The Federal No. 2*, that the relationship between the seaman and the shipowner is essentially one of contract, and therefore the owner cannot object when required to perform the obligation he has undertaken, certainly has some historical validity. The court in the principal case, however, by equitably allowing indemnification and contribution, has necessarily rejected the contract theory. In disregarding this legal fiction the court has placed maintenance and cure on sounder footing. Maintenance and cure should be viewed for what it is, a judicially imposed strict liability not dependent on contract whatsoever[70] which, like statutory workmen's compensation, depends upon the will of its originator for the effect of its provisions.[71] The instant case is a realistic acceptance of that fact and an attempt by the court to administer its own creation in an equitable manner not inconsistent with its purposes.

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[65] 378 F.2d at 583.

[66] Vaughan v. Atkinson, 369 U.S. 527, 530 (1962); Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959).

[67] 155 F.2d 992 (3d Cir. 1946).

[68] United States v. Standard Oil Co., 60 F. Supp. 807 (S.D. Cal. 1945), *rev'd*, 332 U.S. 301 (1947).

[69] *See* Gomes v. Eastern Gas & Fuel Ass'n, 127 F. Supp. 435 (D. Mass. 1954). *But see* Pure Oil Co. v. Geotechnical Corp., 129 F. Supp. 194 (E.D. La. 1955).

[70] Powery v. Emergency Fleet Corp., 280 F. 726, 727 (S.D. Ala. 1922).

[71] For this reason it is manifest that the fact that Congress has not enacted legislation to provide for a right of subrogation, contribution or indemnification is irrelevant. Cases holding that such is necessary before one may recoup payments made under workmen's compensation and other similar legislation are by no means controlling since in those instances the legislatures imposed the obligation and chose not to provide for such remedies. *See* Crab Orchard Improvement Co. v. Chesapeake & O. Ry., 115 F.2d 277 (4th Cir. 1940), *cert. denied*, 312 U.S. 702 (1941). In fact, if anything, they illustrate the point that the courts are free to act since Congress has not entered the area.

The decision serves additionally to lighten the burden placed on shipowners for maintenance and cure without abrogating the benefits to the seaman or shifting that burden to any party not deserving the obligation. By allowing full indemnification against a prior shipowner whose culpability has precipitated the second shipowner's liability, the court affirms and applies traditional rules of fault liability. It also coincides with the almost universal policy of workmen's compensation to allow the innocent employer to place the burden of his obligation upon the culpable individual.[72] And by allowing contribution where neither shipowner is guilty of any culpable misconduct the court spreads the burden throughout the industry so as to do the least harm to an individual shipowner. The court recognized that if the single shipowner must bear the obligation, he will be unable to pass the cost on to his customers and remain in a competitive position in the industry. Since he has not been guilty of misconduct towards his employee, it would seem inequitable to place him at a competitive disadvantage.

The court has taken a step which hopefully will lead to the ultimate demise of such cases as *The Federal No. 2*. The doctrine of maintenance and cure is an ancient one which, although forward-looking at its inception (having antedated modern workmen's compensation laws by hundreds of years), has been applied without regard to changing times. The thrust of modern social legislation is to compensate the injured employee regardless of fault; but the purpose is to compensate the injured, not to do away with the concept of fault.[73] That maintenance and cure, which is, in effect, maritime workmen's compensation, should do away with the concept of fault liability solely because of an outdated need to neatly pigeonhole legal concepts into readily cognizable causes of action is totally unjustifiable.[74]

Unlike workmen's compensation programs which are the creations of legislatures, maintenance and cure is a creation of the admiralty courts. As such, those courts ought to seek to apply the doctrine as equitably as possible. The instant case represents a step in that direction, and it is hoped that other courts will follow the example.

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[72] 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 71.00 (1961).
[73] *Id.* at § 71.10.
[74] Maritime law should be determined "free from inappropriate common-law concepts." Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959).