THE MAGAZINE OF THE LOS ANGELES COUNTY BAR ASSOCIATION

# Los Angeles Lawyer

DECEMBER 2014 / $4

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Los Angeles lawyers Kevin Boyle (left) and Robert Glassman evaluate what effect *Purton v. Marriott International, Inc.*, may have on respondeat superior litigation

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Los Angeles Lawyer
*the magazine of*
*the Los Angeles County*
*Bar Association*
*December 2014*
*Volume 37, No. 9*

**COVER PHOTOGRAPH:**
**TOM KELLER**

*Cover location: Montage Beverly Hills*

LOS ANGELES LAWYER (ISSN 0162-2900) is published monthly, except for a combined issue in July/August, by the Los Angeles County Bar Association, 1055 West 7th Street, Suite 2700, Los Angeles, CA 90017 (213) 896-6503. Periodicals postage paid at Los Angeles, CA and additional mailing offices. Annual subscription price of $14 included in the Association membership dues. Nonmember subscriptions: $28 annually; single copy price: $4 plus handling. Address changes must be submitted six weeks in advance of next issue date. POSTMASTER: Address Service Requested. Send address changes to Los Angeles Lawyer, P. O. Box 55020, Los Angeles CA 90055.


## DEPARTMENTS



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*by Carlos Felipe Llinás Negret*

# Sea WORTHY

## *To protect seafarers, Congress and the federal courts have created a strong set of common law rights and privileges*

**THE MARITIME INDUSTRY** employs in excess of 1.2 million crew members who assist with the transportation of approximately 90 percent of global trade.[1] The work of these men and women is the main engine that drives economic activity in ports across the United States; however, the work of a seafarer[2] has always been difficult and extremely dangerous, requiring long stays working away from home and exposure to the perils of the sea. Under conditions that have been described as a jail with the chance of drowning,[3] seafarers are vulnerable to exploitation and abuse, nonpayment of wages, noncompliance with contracts, exposure to poor diet and living conditions, and even abandonment at foreign ports.[4] Thus, from the earliest times, special protections have been enacted relating to seafarers, with these protections in the United States and Britain going back over 200 years.[5]

In *Isbrandtsen Company v. Johnson*, the U.S. Supreme Court explained why our historic national policy, both legislative and judicial, has made seafarers a protected class for over two centuries:

> Whenever congressional legislation in aid of seamen has been considered since 1872, this Court has emphasized that such legislation is largely remedial and calls for liberal interpretation in favor of the seamen….Our historic national policy, both legislative and judicial, points the other way (from burdening seamen). Congress has generally sought to safeguard seamen's rights. The maritime law, by inveterate tradition has made the ordinary seafarer a member of a favored class. He is a "ward of the admiralty," often ignorant and helpless, and so in need of protection against himself as well as others….The ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly.[6]

Since the foundation of the republic, therefore, "[t]he policy of Congress, as evidenced by its legislation, has been to deal with [seamen] as a favored class."[7] In 1790, the First Congress enacted laws to prevent shipowners from indiscriminately withholding a seafarer's wages.[8] These laws were subsequently strengthened in scope for the benefit of seafarers in amendments passed in 1872, 1898, and 1915.[9] Congress also enacted the Merchant Marine Act, also known as the Jones Act,[10] in 1920 to give seafarers a cause of

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action for negligence against employers and shipowners who fail to provide a safe work environment to their crewmembers.

From the beginning, federal courts, acting similarly to Congress, have remained guardians of seafarers.[11] The Fifth Circuit explained in *Castillo v. Spiliada Maritime Corporation*: "We are convinced that federal courts must remain vigilant in protecting the rights of seamen, whether foreign or domestic, in their relationship with their employer. This protection comports with our nation's long history of concern and solicitude for seamen with employment disputes."[12]

In conjunction with their historic role, federal courts have produced a rich body of common law rights and privileges specifically applicable to seafarers under the general maritime law of the United States. As the Supreme Court has stated, "'Drawn from state and federal sources, the general maritime law is an amalgam of traditional common law rules, modifications of those rules, and newly created rules.'"[13] This includes an employer's duty to pay maintenance and cure, as well as the shipowner's duty to provide a seaworthy vessel.

Maintenance and cure is the policy of providing a seafarer who is disabled by injury or illness while in the service of the ship with medical care and treatment and maintenance during convalescence.[14] Under the doctrine of unseaworthiness, the vessel, the owner, and the vessel's operator are liable for injuries received by a seafarer in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship.[15]

A maritime worker who suffers injury must assert and provide "seaman" status in order to secure special remedies for negligence, unseaworthiness, and maintenance and cure.[16] Anyone who works at sea in the service of a ship, contributing to the function of the vessel or to the accomplishment of its mission, qualifies as a seaman. The definition thus comprises not just the officers and crewmembers who aid in the navigation of the vessel but also any other crewmembers on board, including, but is not limited to, cooks, waiters, security personnel, housekeepers, life guards, singers, nurses, dancers, and customer service representatives.

The leading cases in this regard are *McDermott International, Inc. v. Wilander*[17] and *Chandris, Inc. v. Latsis*.[18] Under *Wilander* and *Chandris* the Supreme Court established a specific test of seaman status. First, an employee's duties must contribute to the function of a vessel or to the accomplishment of its mission.[19] Second, to qualify as a seaman, an employee must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both duration and nature.[20] In other words, the nature of the work must be substantially connected to sea-based (as opposed to land-based) work.[21] What is a substantial connection? In *Chandris*, the Supreme Court cited with approval the following rule of thumb: "[F]or the ordinary case…a worker who spends less than 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman."[22]

## The Jones Act

The Jones Act, enacted in 1920 by Congress to grant qualified seafarers—foreign and domestic—a cause of action against employers for negligence, provides:

> A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of a trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.[23]

Thus, the Jones Act grants seafarers who suffer personal injury in the course of their employment the right to seek damages in a jury trial against their employers in the same manner as railroad employees may under the Federal Employers Liability Act (FELA).[24] Just as provided under FELA, the employer under the Jones Act is liable in damages for injury or death resulting in whole or in part from the negligence of its officers, agents, or employees.[25] This means that if a qualified seafarer is injured by the negligent act of a fellow crew member or the captain, the employer is vicariously liable.[26] Further, under the Jones Act, the employer has a fundamental duty to provide a seafarer with a reasonably safe place to work.[27] The duty to provide a reasonably safe place to work is absolute and nondelegable.[28]

The Jones Act also benefits from FELA's "featherweight" standard of causation. Recently reaffirmed by the Supreme Court in the matter of *CSX Transportation, Inc. v. McBride,* under the featherweight standard, employers are liable for employee injuries resulting from the negligence "no matter how small" of the carrier.[29] Under this standard, if negligence by the carrier is proved and shown to have played even the slightest part in producing the injury, the carrier is liable for damages whether or not the injury was probable or foreseeable. That the injury may be attributable to other causes is not relevant.[30]

The Jones Act also provides for a claim for the failure to treat medical claims. The shipowner or employer has a duty to take all reasonable steps to provide a seafarer who qualifies as a seaman with prompt, proper, and adequate medical care.[31] A seafarer's cause of action for "failure to provide prompt, adequate or proper medical treatment" is a negligence claim against the employer.[32] Under these principles, a shipowner is vicariously liable for the negligence of a physician (whether a shipboard or shore side doctor) selected by it to treat an injured or sick qualified seafarer.[33]

A Jones Act lawsuit may be properly filed only against the seafarer's employer.[34] Although the employer and the shipowner are usually the same, in some cases a seafarer may be employed by a company other than the shipowner. In such a case, the shipowner is liable in rem.[35] Resolving who constitutes the proper Jones Act employer is a mixed question of law and fact, within the province of the jury upon instructions by the trial court.[36] The questions of fact include ascertaining 1) who had the power to engage the seafarer, 2) who determined the wage to be paid, 3) who had the power of dismissal, and 4) who had the right to control the seafarer's on-the-job conduct.[37] Thus, a seafarer may have "more than one Jones Act employer, and under the borrowed servant doctrine a seafarer may sue a number of employers, forcing these to argue their culpability to the jury."[38] In that respect, the borrowed servant doctrine is the functional rule that places the risk of a worker's injury on his or her actual rather than nominal employer.[39] The rationale for the rule is to prevent the use of nominal employers (entities that exist only on paper) to hide or shield the workers' actual employer. Otherwise, real employers could simply form shell companies with no assets as fronts, leaving the seafarer without the ability to recover.

## The Seaman's Wage Act

To shield qualified seafarers against unfair conduct by shipowners, Congress enacted special wage protection statutes and did not limit this statutory coverage to American seafarers who qualify as seamen; rather, Congress extended protection to all qualified seafarers who serve on a foreign vessel when located in a U.S. harbor.[40] Two relevant portions of the Seaman's Wage Act govern when a shipowner must pay a seafarer's wages: "At the end of a voyage, the master shall pay each seafarer the balance of wages after he or she is discharged, whichever is earlier."[41] If a shipowner withholds a seafarer's wages and lacks "sufficient cause" for withholding them, "the master or owner shall pay to the seafarer 2 days' wages for each day payment is delayed."[42] Under Section 10313(f) of the act, a qualified seafarer is entitled to reimbursement of all wages unlawfully withheld by the shipowner, and Section 10313(g) authorizes payment of additional penalty wages if the withholding is found to be

without sufficient cause.

Once the seafarer establishes a wrongful deprivation of his or her wages, the burden of proof shifts to the shipowner to demonstrate that its failure to pay the wages was justified.[43] If the defendant shipowner fails to meet its burden to show that the withholding was made with sufficient cause, "the unadorned language of the statute dictates that the shipowner '*shall pay* to the seaman' the sums specific *for each and every day* during which payment is delayed."[44]

A withholding is without sufficient cause when it is premised on bad faith, or a negligent, willful, unreasonable or arbitrary attitude upon the master or shipowner in refusing to pay earned wages.[45] In the seminal statutory penalty wages case, *Griffin v. Oceanic Contractors,* the Supreme Court explained the statutory intent behind the penalties, stating that "Congress has chosen to secure prompt payment of seamen wages through the use of potentially punitive sanctions designed to deter negligent or arbitrary delays in payment."[46] Applying this reasoning, the Supreme Court ordered a statutory penalty of $302,790.40, to an employer who had failed to pay $412.50 for 4 years.[47]

## The Duty to Provide Maintenance and Cure

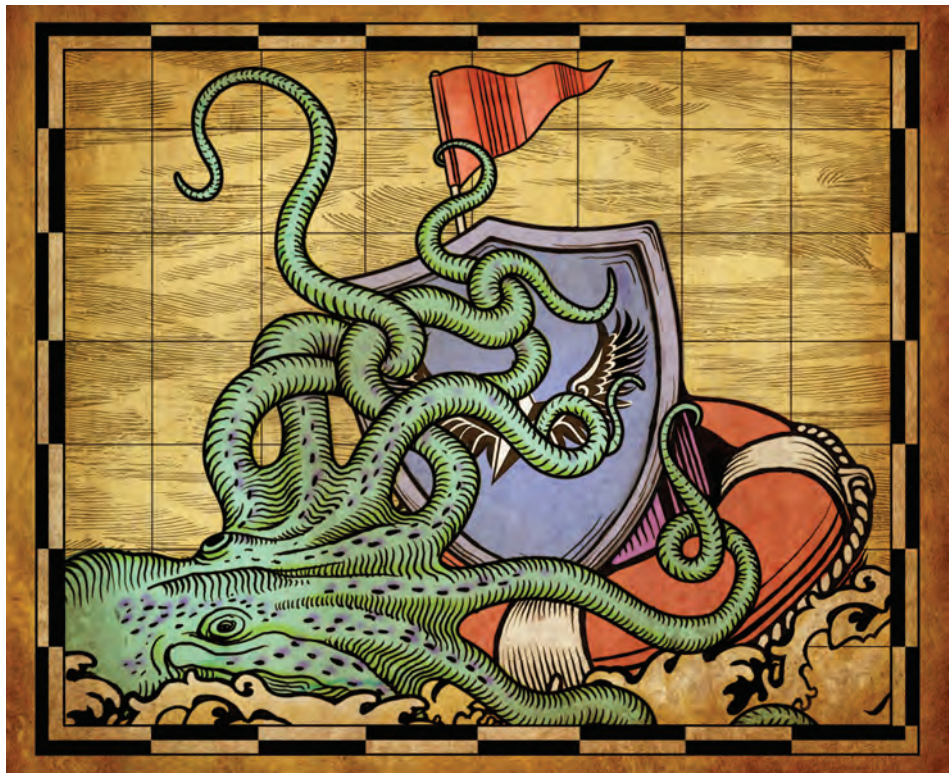
In *Flores v. Carnival Cruise Lines*, the Eleventh Circuit explained the maintenance and cure policy as follows:

> The seaman's action for maintenance and cure may be seen as one designed to put the sailor in the same position he would have been had he continued to work: the seamen receives a maintenance remedy because working seamen normally are housed and fed aboard ship; he recovers payment for medical expenses in the amount necessary to bring him to maximum medical cure; and he receives an amount representing his unearned wages for the duration of his voyage or contract period.[48]

"Maintenance" represents a per diem subsistence allowance designed to provide the seafarer with compensation sufficient to cover his or her food and lodging until the time of "maximum medical improvement."[49] It is intended to encompass the cost of food and lodging comparable to that received aboard the vessel.[50]

"Cure" represents the cost of medical and nursing care during the seafarer's affliction, again until the point of maximum medical improvement. This includes the cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines, and medical apparatus.[51]

A shipowner's obligation to provide cure to an injured seafarer is an implied term of a maritime-employment contract and does not depend on any determination of fault. Thus, an owner of a vessel is almost automatically liable for the cost of medical treatment when a seafarer in its employ is injured.[52] In other words, a seafarer is entitled to maintenance and cure even if the seafarer is unable to establish that an injury was the result of any negligence on the part of the employer or an unseaworthy condition existing on the vessel. Indeed, the cause of injury or sickness is irrelevant, and tort rules of contributory negligence, comparative fault, assumption of the risk and unseaworthiness do not apply.[53]



The shipowner's obligation to pay for the seafarer's maintenance and cure, however, is generally not indefinite. Instead, the seafarer is entitled to receive maintenance and cure from the date of departure from the vessel until the seafarer reaches the point of "maximum possible cure" or "maximum medical improvement" under the circumstances—the point at which no further improvement in the seafarer's medical condition is to be reasonably expected from medical treatment.[54]

"Maximum medical improvement" is a medical determination, not a legal one. As a matter of procedure, therefore, the rule requires the shipowner to seek a written declaration stating that the seafarer has reached the point of maximum medical cure from the seafarer's treating physicians. The obligation usually ends when a qualified medical opinion provides that maximum possible cure has been effected.[55]

The duty of payment is imposed on the seafarer's employer.[56] The determination of who is the seafarer's employer for the purpose of claiming maintenance and cure is the same as for liability under the Jones Act.[57] Therefore, even though the employer and the shipowner are usually the same, in cases in which the seafarer is employed by a person or company other than the shipowner, the ship is liable for medical costs in rem.

Additionally, the Supreme Court in *Atlantic Sounding v. Townsend* recently reaffirmed a qualified seafarer's right to an award of punitive damages and attorney's fees due to a shipowner's willful, callous, or arbitrary refusal to provide maintenance and cure.[58]

## The Duty to Provide a Seaworthy Vessel

Under the maritime doctrine of seaworthiness the vessel, its owner, and the vessel's operator are liable for injuries received by a seafarer in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.[59] The duty of seaworthiness is absolute and independent of negligence. Indeed, unseaworthiness is fundamentally a defective condition, not the result of an isolated negligent act.[60]

The test for an unseaworthy condition is whether the vessel, equipment, or appurtenances were reasonably fit for their intended use.[61] In order to state a cause of action for unseaworthiness, the seafarer must allege his or her injury was caused by a defective condition of the ship, its equipment, or appurtenances. This description extends to the hull of the ship, the ship's cargo handling machinery, hand tools aboard the ship, ropes and

tackle, and all kinds of equipment either belonging to the ship or brought on board by stevedores.[62] It also includes the ships' stores—provisions of food, water, furniture, apparel—on board for the crew's consumption or use, as well as the materials in which the ships' stores are wrapped.[63]

Members of the crew are also warranted as seaworthy, and there may be liability of the shipowner for crew assaults, brutality, negligent orders, or utilizing an understaffed or ill-trained crew.[64] Thus, a vessel is unseaworthy if facts show that a crew member has a savage and vicious nature, a propensity to evil conduct, or a wicked disposition.[65]

All in all, while seaworthiness is a relative term, the general rule is that the vessel must be staunch, strong, well-equipped for the intended voyage, and manned by a competent and skillful master of sound judgment and discretion.[66]

Traditionally, the doctrine of seaworthiness only protected maritime workers who could claim seaman status under the law. Thus, persons who came aboard a vessel, such as passengers and visitors, could not benefit from the doctrine because they were not "seamen."[67] In *Seas Shipping Co. v. Sieracki*,[68] the Supreme Court expanded the scope of the class to whom the duty of seaworthiness was owed. In *Sieracki*, the Court accorded a longshoreman not directly employed by the vessel seaman status because he was facing the hazards of seamen and performing a function essential to maritime service aboard ship.

In 1972 Congress amended the Longshore and Harbor Workers' Compensation Act (Longshore Act),[69] prohibiting harbor workers from asserting causes of action under *Sieracki* for unseaworthiness. Despite the statutory prohibition, however, in *Aparacio v. Swan Lake*[70] the Fifth Circuit held that persons excluded from the Longshore Act (because they are beyond its territorial limits, federal employees, or other persons otherwise not covered) may qualify as seamen under *Sieracki* for the warranty of seaworthiness.

In simple terms, the *Sierkacki* seaman doctrine protects workers in limbo: those who do not fall under the traditional definition of seaman—a worker who spends more than 30 percent of his or her time in the service of a vessel in navigation—and who are also excluded from the Longshore Act.[71]

### Seafarer's Wrongful Death and Survival

If a seafarer dies in the service of the vessel, his estate and survivors can bring a claim for wrongful death under the Jones Act.[72] The appropriate party to bring suit for wrongful death under the Jones Act is the personal representative of the deceased. The beneficiaries are the surviving spouse and children.[73] Damages for wrongful death under the Jones Act are limited to pecuniary losses. As a result, the decedent's beneficiaries cannot recover damages for loss of society and consortium.[74] Instead, their damages are limited to financial support and contribution, monetary value of services around the home, funeral expenses, lost past and future wages, and predeath medical expenses. Survival recovery is also allowed under the Jones Act. This gives the personal representative the opportunity to seek damages for the decedent's conscious pain and suffering before death.[75]

The hazards of working and living on a ship have not changed much in the last century. Seafarers still work 6- to 10-month contracts, isolated and far away from the scrutiny of governments and regulators. In *Aguilar v. Standard Oil Company*, the Supreme Court eloquently described the unique nature of maritime work:

> From the earliest times, maritime nations have recognized that unique hazards emphasized by unusual tenure and control, attend the work of seamen. The physical risks created by natural elements and the limitations of human adaptability to work at sea enlarge the narrower and more strictly occupational hazards of sailing and operating vessels. And the restrictions which accompany living aboard ship for long periods at a time combine with the constant shuttling between unfamiliar ports to deprive the seafarer of the comforts and opportunities for leisure, essential for living and working that accompany most land occupations. Furthermore, the seafarer's unusual subjection to authority adds the weight of what would be involuntary servitude for others to these extraordinary hazards and limitations of ship life.[76]

The laws enacted by Congress and the general maritime law doctrines developed by the federal courts—maintenance and cure and unseaworthiness—seek to ameliorate these problems with the aim of creating fair employment practices and safer working conditions for seafarers. ■

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[1] *See* International Labour Standards on Seafarers, International Labour Organization. http://www.ilo.org.

[2] In general, the gender-neutral term "seafarer" has been used in the narrative instead of the legal term "seaman," which is found in the statutes and much of the case law cited herein. However, since the establishment of seaman status, as defined in law, is an essential prerequisite to the legal rights under discussion, the term is applied when application of the legal theory is required.