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ADMIRALTY LAW

Expert Analysis

Mischievous Seamen Sometimes Get no Treat

By **James E. Mercante**

Seamen have traditionally been regarded as 'wards' of the admiralty court and often treated with the tenderness of a guardian.1 As a 'protected' class, seamen have been afforded remedies in the most bizarre circumstances, from jumping out a brothel window ashore, to taking a fall while cavorting in a shoreside dance hall. A seaman who was accidentally shot by another seaman aboard ship, however, did not fare so well.

The seafaring life is not easy. Seamen spend weeks or months at sea and sometimes have only hours ashore to enjoy some of life's simple pleasures that may otherwise be unavailable aboard ship. The seaman's proclivities ashore are well documented by even the most unlikely of sources—state and federal judges. Courts historically have used such terms as "poor and friendless" and apt to acquire "habits of gross indulgence, carelessness and improvidence"[2] to describe seamen and not condemn behavior that might be unacceptable in other walks of life.

Even the standard for shipowner liability still remains a "featherweight" test. Thus, courts have allowed recovery in suits by seamen against shipowners under the Jones Act[3] for even the slightest negligence or for breaching the general maritime law duty to provide a seaworthy vessel. A seaman is anyone employed aboard a vessel that substantially contributes to its mission whether captain, cook, deckhand, or engineer.

Shipboard life today, however, leads one to question whether the 'protection' of seamen is necessary in a high-tech world where ships are no longer made of wood and powered by sails; shipboard equipment and accommodations are greatly advanced; voyages are shorter, and ships contain most of the creature comforts of home.

Nevertheless, there is no 'accident-free' ship and seamen still get injured. An injured seaman also has the right to recover 'maintenance' and 'cure' expenses under maritime law from the shipowner employer.

Maintenance and Cure

"Maintenance" is the right of a seaman to food and lodging if he or she falls ill or becomes injured while in the service of the ship or while subject to the call of duty. "Cure" is the right of the seaman to have his or her medical expenses covered.[4] The reasoning for a 'maintenance' remedy is that while a seaman is gainfully employed, eating and sleeping aboard a vessel, he or she will not incur any expenses for food and lodging and therefore, if required to leave the ship as a result of injury, the seaman's expenses of food and lodging while convalescing ashore should be reimbursed by the employer. The shipowner's obligation to reimburse maintenance and cure expenses is based on the employment relationship and is without regard to fault.[5]

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Under the general maritime law, an action for maintenance and cure may even be maintained if the injury or illness occurs while on shore leave—and that's where peculiar circumstances have resulted in some interesting court decisions. As mentioned, to be eligible for this remedy, the seaman must be "in the service of the ship at the time of the illness or injury" or otherwise subject to

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the call of duty pursuant to the U.S. Supreme Court's decision in *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724. According to this 1943 decision, "shore leave is an elemental necessity in the sailing of ships, a part of the business as old as the art, not merely a personal diversion."

The Second Circuit clarified long ago that the mere fact that two seaman are in the course of their employment in terms of time and place is not sufficient; the shipowner is not liable unless the particular act performed negligently was also in the scope of employment of the negligent employee.

The dynamic combination of seamen being treated as 'wards' of the court and the somewhat flexible 'in the service of the ship' standard have coupled to allow a seaman to recover maintenance expenses in some rather odd circumstances. In 1951, the U.S. Supreme Court allowed 'maintenance' to a seaman found to be in the service of the ship while ashore drinking alcohol when he leaned out and fell from an unprotected dance hall balcony.[6] In 1948, a New York court afforded recovery to a seaman found to be in the service of the ship while on shore leave in Yugoslavia visiting a prostitute. He was locked in the prostitute's room when he changed his mind about why he was there and refused to pay her fee. He was injured when he jumped from her window to escape.[7]

The seaman recovered maintenance and cure despite the shipowner's argument that he was not entitled to sue because of his 'immoral intent.' The judge disagreed and found that courts (at that time) had been liberal in their attitude toward seamen who received injuries on shore leave through their 'notorious penchants' so long as it did not stem from intoxication or deliberate acts of indiscretion.[8]

Jones Act

Similarly, a seaman's employer will be held vicariously liable under the Jones Act when a co-worker injures another seaman but only when the fellow seaman was acting in the course of employment at the time of the accident. In this regard, the Supreme Court has held that the 'course of employment' as it is used in the Jones Act is equivalent in meaning to the 'service of the ship,' as it has been defined in seamen's actions for maintenance and cure.[9]

An incident held to be outside the course of a seaman's employment (and thus derivative liability of the vessel owner did not attach) occurred when the ship's chief cook had a violent altercation with another seaman who continually showed up late for meals. This culminated in the cook, after being insulted by the seaman's profane language, slashing several of the seaman's fingers off with a large butcher knife. There, the court found that the chef was motivated by anger and revenge rather than for reasons related to her employment.[10]

You're Fired!!

And, in an admiralty decision this year, *Beech v. Hercules Drilling Co., LLC*, a seaman violated company policy by bringing a firearm aboard the vessel, then accidentally firing the gun in the break room while watching television, killing a fellow seaman. The U.S. Court of Appeals for the Fifth Circuit reversed the district court's decision against the shipowner finding that a seaman leaving his duty station to retrieve a loaded firearm and showing it off when he was supposed to be working "took him outside the course and scope of his employment."[11]

The result in *Beech* would likely be the same in the Second Circuit which requires that both the injured employee and the employee whose conduct caused the injury be within the scope of employment. Other courts deny recovery when an employee acts "entirely upon his own impulse, for his own amusement, and for no purpose of or benefit to the employer."[12] Indeed, the Second Circuit clarified long ago that the mere fact that two seaman are in the course of their employment in terms of time and place is not sufficient; the shipowner is not liable unless the particular act performed negligently was also in the scope of employment of the negligent employee. That was the holding in *Trost v. American Hawaiian S.S. Company*, 324 F.2d 225 (1963) where the ship's purser blindly followed the captain returning to the ship from a shoreside café and fell into an open trap door that the captain neglected to warn him about. While the two employees were in the course of their employment returning to the ship, in terms of time and place, it was not an element of the captain's employment to be "on guard for the errant footsteps of his purser" or to act as a "nautical seeing-eye dog." Id. at 227. Thus, derivative liability was not imposed on the shipowner.

Conclusion

People say that there is 'something sexy' about the life of a seaman, but from these and many similar cases, there can be something very scary about it, too. Just ask any commercial vessel owner.

1. *Koistinen v. American Export Lines, Inc.*, 83 N.Y.S.2d 297, 301 (1948).
2. G. Gilmore, C. Black, THE LAW OF ADMIRALTY, § 6-6 (2d Ed. 1975).
3. Jones Act, 46 U.S.C. §30104.
4. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527 (1938).
5. *Pacific S.S. Co. v. Peterson*, 278 U.S. 130, 138 (1928).
6. *Warren v. United States*, 340 U.S. 523 (1951).
7. *Koistinen*, supra, 83 N.Y.S.2d 297 (1948).
8. Id. at 301.
9. *Braen v. Pfeifer Transportation Co.*, 361 U.S. 129, 133-134 (1959).
10. *Stoot v. D&D Catering Serv., Inc.*, 807 F.2d 1197 (5th Cir. 1987).
11. ___ F.3d ___, 212 WL 3324283 (5th Cir. 2012).
12. *Gallose v. Long Island R.R. Co.,* 878 F.2d 80, 82-83 (2d Cir. 1989).

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