Vanderbilt Journal of Transnational Law

Volume 3
Issue 2 *Spring 1970*

Article 3

1970

The Case for a Seagoing Workmen's Compensation Act

Parker B. Smith

THE CASE FOR A SEAGOING WORKMEN'S COMPENSATION ACT

Parker B. Smith

I. INTRODUCTION

At the present time no comprehensive workmen's compensation statute exists to provide coverage for seamen injured in the course of their employment. The seaman's only existing remedies consist of an action for maintenance and cure, an action for breach of the shipowner's warranty of seaworthiness, and an action for negligence under the Jones Act. These remedies offer unsatisfactory protection to the seaman for several reasons. Under the existing remedies the seaman may be unable to obtain any recovery because the shipowner has the traditional right to "limit liability" to the seaman at the outset of the seaman's action for recovery. Furthermore, the seaman is under pressure not to file claims; fellow employees are under pressure not to testify; ill will and poor employment relations are thereby encouraged. In addition, the seaman must litigate to recover, and must follow a procedure which is time-consuming, complex, and inefficient. Thus it is apparent that injured seamen will not have effective remedies until either the remedies available to the seaman are improved or new remedies are created.

The current system of maritime workmen's compensation is also unsatisfactory to the shipowner. When unable to limit liability, the owner has been subject to extremely high liability for tort damages under both the Jones Act and the warranty of seaworthiness for conduct substantially less serious than common law negligence. Recoveries have been unpredictable, both because the current system is judicially created and based on broad and amorphous policy considerations, and because courts differ considerably in their interpretations of the current remedies.

At the same time, the marine industry has been experiencing serious financial problems in recent years. The unpredictability and uninsurability of potential damage recoveries have magnified those financial problems. A definite workmen's compensation plan is necessary. Under the traditional remedies, the seaman, the shipowner, and the maritime industry lack substantial protection and certainty of results. Such deficiencies can only be eliminated by legislative guidelines which balance all three interests.

This article will examine in detail the traditional remedies available to seamen injured in the course of their employment, with emphasis on recent court decisions affecting those remedies. An alternative system will be proposed which consists of a workmen's compensation act for injuries incurred by seamen in the course of their employment and one which allows retention of the seaman's traditional right to maintenance and cure. Current remedies for breach of warranty of seaworthiness and for negligence of owner, master, or fellow crewman under the Jones Act have been eliminated in the proposed act. The proposed revisions will be analyzed together with the consequences of the act's adoption.

II. CURRENT REMEDIES AVAILABLE TO SEAMEN INJURED IN THE COURSE OF THEIR EMPLOYMENT

A. Maintenance and Cure

A seaman who suffers injury or illness "in the service of his ship" is entitled to "maintenance and cure" at the expense of the owner. The right includes: (1) unearned wages for the duration of the voyage (or, according to some authorities, for the duration of the seaman's contract of employment); (2) medical expenses actually incurred in treatment of the seaman, or those likely to be incurred in the future; and (3) a living allowance until maximum recovery has been achieved.[1]

The injury or illness need not be causally related to the seaman's shipboard duties. It is generally sufficient that the seaman suffer the injury or illness during his employment period without his deliberate misconduct.[2] Furthermore, the right is not dependent on any fault of the shipowner in causing the injuries or illness.[3] This right is a valuable one indeed and has long been available

---

[1]G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 262-71 (1957) [hereinafter cited as GILMORE & BLACK].

[2]GILMORE & BLACK, supra note 1, at 257; cf. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 529, 1938 A.M.C. 341.

[3]The Osceola, 189 U.S. 158, 168-70 (1903).

to the seaman.[4] The Supreme Court, in Calmar Steamship Corp. v. Taylor, 303 U.S. 525, 528, 1938 A.M.C. 341, 343-44, summed up the policy behind the right to maintenance and cure in the United States:

> [The right was founded upon] the protection of seamen who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service.

The seaman's right to maintenance and cure itself does not guarantee adequate compensatory recovery. The right has been palatable to the shipowner probably because recoveries under this right tend to be minimal. Consequently, owners are generally prompt to initiate maintenance and cure payments, even absent a judgment requiring the payment.

Prompt payments by shipowners are made also because of the Supreme Court's ruling in Vaughan v. Atkinson, 369 U.S. 525, 1962 A.M.C. 1131, in which the Court held a shipowner liable for damages of a punitive nature and for counsel fees in the event of a wilful and wanton failure to initiate maintenance and cure. In addition, earlier cases established that any failure to initiate maintenance and cure would create liability for any illness or injury caused or aggravated by the failure.[5]

It is not possible precisely to define the content and extent of the current right to maintenance and cure. Substantially all American courts agree that the seaman is entitled to living expenses, wages, and medical expenses during the period of illness until his maximum cure.

---

[4] Id. at 169; N. HEALEY & B. CURRIE, CASES AND MATERIALS ON ADMIRALTY 250 (1965) [hereinafter cited as HEALEY & CURRIE].

[5] See, e.g., Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 1932 A.M.C. 1437.

However, amounts awarded as "maintenance" lie in the discretion of the trial judge and vary with the forum. For example, some courts award a flat per diem allowance, frequently $6.00 or $8.00 per day.[6] Other courts award only that amount actually needed to "maintain" the seaman and require strict proof of the seaman's actual out-of-pocket expenses before allowing any award.[7] Still other courts may follow provisions of the seaman's contract which fix the amount of the allowance.[8] In general, the recoveries are substantially smaller than damage recoveries or workmen's compensation payments.

The current right to maintenance and cure has been compared to workmen's compensation. In one respect, the right is broader than most forms of workmen's compensation, since the owner's liability under maintenance and cure is not restricted to injuries or illness "arising out of" or causally related to the seaman's shipboard duties. To recover the seaman need only show he was "in the service of the ship" at the time of his injuries. Although there is some disagreement as to the outer limits of the "service of the ship," the construction applied by modern American courts has been extremely liberal. Thus a seaman on shore leave during a period of rest or relaxation, or even when intoxicated, has been considered "in the service of the ship."[9]

Yet in other respects, the right is considerably narrower than most forms of workmen's compensation. There is no recovery available under maintenance and cure for the death of a seaman. And the purpose of the award is not compensation, but rather protection and care for the seaman during a limited period. Maintenance and cure payments

---

[6]DeGagne v. Love's Fisheries, Inc., 125 F. Supp. 632, 1955 A.M.C. 339 (D.Mass.) ($6/day); Irwin v. United States, 111 F. Supp. 912,1953 A.M.C. 913 (E.D.N.Y.) ($8/day).

[7]Robinson v. Isbrantsen Co., 230 F.2d 514, 1953 A.M.C. 306 (2d. Cir.).

[8]Curd v. United States, 118 F. Supp. 921, 922, 1954 A.M.C. 484, 486 (E.D.La.); Sulimen v. Black Diamond S.S. Corp., 1949 A.M.C. 1419, 1423 (Sup. Ct. N.Y. County 1948).

[9]Aguilar v. Standard Oil Co., 318 U.S. 724, 1943 A.M.C. 451.

continue only until the point of maximum cure is reached, or until the seaman is diagnosed as incurable.[10]

Although the right of maintenance and cure is in some respects narrower than the right of workmen's compensation, the right as one part of a comprehensive system is particularly valuable. It fulfills a necessary function by assuring temporary though minimal assistance to the traditionally poor and improvident seamen who are often injured at sea or in a foreign port. The remedy itself is simple, immediately available, and easy to administer. The seaman need not prove any fault on the part of the owner in order to recover. The seaman forfeits his right only by conduct "whose wrongful quality even simple men of the calling would recognize--insubordination, disobedience to orders, and gross misconduct."[11]

B. The Shipowner's Warranty of Seaworthiness

Separate from and not limited by the recovery available under maintenance and cure is the remedy available to seamen for injuries caused by the "unseaworthiness" of the vessel. The concept that the shipowner"warrants" his vessel to be "seaworthy" is non-statutory and only recently developed by American courts. Consequently the content of the warranty is not immutably fixed, and has undergone considerable alteration in recent years. Basically, the shipowner's warranty of seaworthiness is a liability-creating promise by shipowner to seaman that the ship and the ship's gear (possibly including gear brought on board for temporary use in port)are reasonably fit for the voyage in question or for their intended use, and that the personnel aboard ship are equal in seamanship and disposition to ordinary seafaring men.[12]

The duty undertaken by the shipowner is essentially one of liability without fault, unlimited by conditions contained in the seaman's contract of employment, and unlimited by traditional concepts of negligence (including the concepts of contributory negligence, fault, and proximate

---

[10] See GILMORE & BLACK, supra note 1, at 264-65.

[11] Farrell v. United States, 336 U.S. 511,516, 1949 A.M.C. 613, 617 (dictum).

[12] Keen v. Overseas Tankship Corp., 194 F.2d 515, 1952 A.M.C. 1281 (2d Cir.).

cause).[13] The remedy is derived from the general maritime law. Hence, in the event the seaman dies as a result of his injuries, there can be no cause of action under the warranty of seaworthiness since the general maritime law recognizes no cause of action for wrongful death.[14] Nevertheless, the concept and the reasoning of the courts which created it indicate that the shipowner's warranty of seaworthiness is potentially very inclusive and a valuable weapon in the seaman's arsenal of remedies against the shipowner.

Unfortunately for both seaman and owner, the warranty of seaworthiness is incapable of precise definition. The landmark decision commonly cited as establishing the warranty, The Osceola, provided that "[t]he law may be considered settled upon the following propositions. . . (2) that the vessel and her owner are both by English and American law liable to an indemnity for injuries received by a seaman 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] As the seaworthiness of The Osceola had been conceded by all parties, the above statement was dictum. Nevertheless, subsequent decisions approved it, and American courts have begun a long, yet unfinished, process of shaping the remedy.

The most important inclusion in the warranty, from the standpoint of the seaman, was made in Mahnich v. Southern Steamship Co., 321 U.S. 96, 1944 A.M.C. 1, which is illustrative of the sharp reversals of precedent which typify the warranty of seaworthiness and seamen's remedies in general. Before Mahnich, unseaworthiness and negligence were entirely separate concepts. If the proximate cause of the seaman's injury was the negligence of the master, officer, or fellow crew members, the remedy for unseaworthiness became unavailable, eo instante.[16] In Mahnich the issue was whether or not a seaman should be indemnified by the owner of the ship for an injury suffered because of defective staging. The rope supporting the staging was found

---

[13] Cf. Seas Shipping Co. v. Sieracki, 328 U.S. 85, 1946 A.M.C. 698.

[14] See Kernan v. American Dredging Co., 355 U.S. 426, 428, 1958 A.M.C. 251, 254.

[15] The Osceola, 189 U.S. 158, 175 (1903).

[16] Plamals v. S.S. Pinar Del Rio, 277 U.S. 151, 1928 A.M.C. 932.

to have been supplied by a ship's mate, who negligently overlooked sound rope on board. The Court indicated that unseaworthiness would henceforth include "operating negligence," with the result that the seaman would no longer lose his remedy for unseaworthiness against the owner even though negligence was proven to be the proximate cause of his injury. As a result, the presence or absence of the mate's negligence was immaterial because the owner would henceforth be liable for injuries caused by defective or unseaworthy equipment even when he had exercised due care in its selection, and even when it had not been furnished by him negligently. The shipowner's duty to furnish a seaworthy ship became absolute. Justice Stone indicated that the vessel was unseaworthy, because the staging was not fit for its purpose, and the owner had therefore breached his duty to furnish a seaworthy ship.[17]

The reasoning which has propelled the warranty of seaworthiness into the forefront of the current remedies available to seamen is found in the Mahnich opinion. Justice Stone emphasized the conditions of the seaman's employment which made him a ward of the admiralty, thus placing large responsibility for his safety on the owner.[18] The Supreme Court continued the expansion initiated in Mahnich through its decision in Seas Shipping Co. v. Sieracki.[19] Reasoning that the shipowners are "in a position to distribute the loss over the industry," the Court extended the warranty to include longshoremen employed by independent stevedoring companies, even when the injury resulted from the negligence of the stevedores themselves.[20]

Some courts have attempted to carve exceptions to the

---

[17]Mahnich v. Southern S.S. Co., 321 U.S. 96, 103, 1944 A.M.C. 1, 7.

[18]Compare the similar policy which supports the right of maintenance and cure, text accompanying notes 1-11 supra.

[19]328 U.S. 85, 1946 A.M.C. 698. See also Comment, Expanding the Warranty of Seaworthiness: Social Welfare or Maritime Disaster?, 9 VILL. L. REV. 422 (1964)

[20]Comment, supra note 19, at 426; Shields & Byrne, Application of the "Unseaworthiness" Doctrine to Longshoremen, 111 U. PA. L. REV. 1137, 1141, 1142 (1963).

warranty, or to define the warranty as governed by traditional common law negligence concepts. Those courts have recognized that the possible extent of the warranty under Mahnich and following cases is unfair to the shipowner. One enduring exception to the warranty of seaworthiness is the concept of "transitory unseaworthiness," introduced in Cookingham v. United States, 184 F.2d 213, 1950 A.M.C. 1793 (3d Cir.). In that case, the plaintiff seaman had slipped on Jell-O which had been spilled on the ship's stairway. The court held that the ship was not unseaworthy because the Jell-O was a foreign substance which was not an inherent or essential part of the ship's gear. The Supreme Court gave added impact to the "transitory unseaworthiness" exception in Morales v. City of Galveston, 370 U.S. 165, 1962 A.M.C. 1450, in which it held that the shipowner's warranty encompassed only the ship itself and did not include injuries received from defective cargo alone. However, in Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 1963 A.M.C. 1649, the Court extended the warranty to injuries caused by defective cargo containers and indicated that the warranty was not confined solely to the ship itself.

The Mahnich and Seas Shipping Co. cases indicate that potentially there are very few injuries aboard ship which may not be covered by the warranty. Yet some lower federal courts and the Supreme Court in a few instances have recognized the extreme inequity of holding the owner to absolute liability for injuries which he could not have foreseen or prevented. It is possible that the broad policy of protecting the improvident seaman from the perils of the sea, which policy has been operative in the expansion of the warranty of seaworthiness, may be recognized as insufficient to justify the extremely high damage recoveries now available regardless of the owner's negligence in causing the injury or protecting the seaman. Until then, the warranty remains amorphous, broad, and unpredictable.

A. The Jones Act

When Osceola was decided, the seaman had no remedy against the shipowner for injuries caused by negligence of master, owner, or fellow crewmen other than for maintenance and cure. To give the seaman such a remedy, Congress

passed the Jones Act in 1920. The Act provided:

> 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 personl injury to railway employees shall apply. . . .[21]

Even a casual reading of the statute indicates it was loosely drafted, and soon after its enactment, American courts were confronted with a large number of Jones Act actions which raised basic questions concerning the nature and extent of the remedy. After fifty years of judicial interpretation, it is still impossible to state categorically the meaning of certain portions of the Jones Act, though several aspects of the Act have been interpreted fairly consistently by the courts. There is some indication that the Act was intentionally drafted in general terms to permit the courts to develop and alter the seaman's remedies under the statute in light of changing conditions within the maritime industry and changing concepts of the maritime industry's duty to its employees.[22] An evaluation of how well the Act has provided the seaman remedies proportionate to his changing needs can only be made after an examination of courts' interpretations of ambiguous portions of the Act.

1. Election. The Jones Act provides that the seaman may maintain an action "at his election." A long series of cases established that the phrase entitled the seaman to maintain a Jones Act suit or an unseaworthiness action in addition to his claim for maintenance and cure, but that the seaman was not entitled to have cumulative damage recoveries under the Jones Act and the warranty of seaworthiness.[23]

---

[21] 46 U.S.C. § 688 (1964).

[22] Kernan v. American Dredging Co., 355 U.S. 426, 1958 A.M.C. 251.

[23] GILMORE & BLACK, supra note 1, at 288; cf. Pacific S.S. Co. v. Peterson, 278 U.S. 130, 1928 A.M.C. 1932.

That is, he may plead both claims in the same action and may go to the jury on both claims. Any favorable jury verdict will be upheld on appeal if supportable under either claim.[24] The plaintiff must elect whether to sue "in admiralty" without a jury, or "in law" in state or federal court with or without a jury. But if the plaintiff elects to sue "in law" with a jury, he may obtain a jury determination of an unseaworthiness claim, even though unseaworthiness is a concept arising from the general maritime law, which does not permit jury determinations, and not from the common law, which does permit jury determinations.[25]

2. Conditions Precedent: Employment and Injury. The remaining terms of the Jones Act have undergone substantial judicial interpretation. The act covers any seaman who shall suffer personal injury "in the course of his employment." The courts have given an extremely broad definition to the seaman's "course of employment," and that phrase can no longer be considered equivalent to its counterpart in most workmen's compensation statutes. In fact the definition has become the equivalent of the "service of the ship" formula used in maintenance and cure actions.[26] Thus, the seaman may be "in the course of employment" when returning to the ship from shore leave, when engaging in recreational activities during shore leave, when first reporting for duty, or when leaving the ship after being discharged.[27]

Predictably, the courts have given a very inclusive definition of those injuries which are compensable under the Jones Act. Assaults by superior officers or fellow crewmen are included as well as injuries caused by a negligent omission to furnish medical care or maintenance.[28]

---

[24] GILMORE & BLACK, supra note 1, at 289.

[25] Romero v. International Terminal Operating Co., 358 U.S. 354, 1959 A.M.C. 1603.

[26] See Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129, 133, 1960 A.M.C. 2, 5 (1959).

[27] Id. at 132, 1960 A.M.C. at 4.

[28] Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 1932 A.M.C. 1437; Jamison v. Encarnacion, 281 U.S. 635, 1930 A.M.C. 1243; Kowhler v. Presque-Isle Transportation Co., 141 F.2d 490, 1944 A.M.C. 432 (2d Cir.), cert. denied, 322 U.S. 764.

The courts have consistently imposed high tort damages against owners under the Jones Act, including lump sum awards based on life expectancy.[29]

3. Negligence. At the same time, the inclusive definition of "negligence" under the Jones Act has approached that of strict liability. For example, a plaintiff suing under the Jones Act must establish the traditional elements of a negligence action--duty, breach of duty, causation, damage. However, the seaman's burden of showing the existence of a duty is easily satisfied because the owner's duty is statutory and automatically applies to seamen working in the course of their employment. Consistent with the holdings under actions for maintenance and cure and unseaworthiness, courts in construing the Jones Act have made it abundantly clear that seamen are wards of admiralty, and that the owner's duty to the seaman is a duty of "fostering protection."[30]

The breach of duty of "fostering protection" is easily proven by the seaman. The courts frequently define the breach as a "negligent" failure to provide a safe place to work or a seaworthy ship, and include within the breach of all negligent acts (both misfeasance and nonfeasance) by masters, officers, or fellow crewmen.[31] The extremely broad definition of "negligence" has tended to create a form of strict liability or an absolute duty on the part of the owner.[32]

The seaman's burden of proving causation, the third

---

[29]Neal v. Saga Shipping, 407 F.2d 481, 1969 A.M.C. 280 (5th Cir.) ($53,587); Maillard v. American Export Isbrandtsen, 406 F.2d 322, 1969 A.M.C. 45 (2d Cir.) ($50,000); Vaccaro v. Alcoa S.S. Co., 405 F.2d 1133, 1969 A.M.C. 503, (2d Cir.) ($15,000); Naglis v. Waterman S.S. Co., 390 F.2d 178, 1968 A.M.C. 626 (3d Cir.) ($35,000); Putnam v. Mathilde Bolten, 298 F. Supp. 660, 1969 A.M.C. 951 (D. Md.) ($27,500); The Midnight Sun, 291 F. Supp. 353, 1968 A.M.C. 2474 (D. Mass.) ($3,500; $8,000; $4,000; $12,000; $1,860; $24,000; $3,400; $14,000; $2,000; $17,460).

[30]Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 372-76, 1932 A.M.C. 1437, 1441-45.

[31]GILMORE & BLACK, supra note 1, at 312.

[32]For an illustration of "negligence without fault," see Kernan v. American Dredging Co., 355 U.S. 426, 1958 A.M.C. 251. Cf. GILMORE & BLACK, supra note 1, at 314.

element of an action under the Jones Act, has been ameliorated substantially by the admiralty equivalent of res ipsa loquitur. The concept was initiated in Johnson v. United States, 333 U.S. 46 (1948), and was described as a rule granting seamen "permissible inferences from unexplained events." Like the doctrine of res ipsa loquitur, the "permissible inference" concept is not always usable, and does not guarantee success even when usable. Nevertheless, the rule has often been invoked in Jones Act cases, and the seaman has often satisfied the causation element by proving injury, and by showing that it could have been caused by the negligence of owner, master, or fellow crewman.

The seaman's burden of proving damage is no more difficult than that of proving damage in a common law negligence action. A long series of cases has established that the Jones Act was a compensatory statute, with recoveries in the event of the seaman's death limited to the pecuniary benefits which the beneficiaries might reasonably have received had deceased not died from his injuries.[33] Nevertheless, the recent case of Petition of Den Norske Amerikalinge A/S, 276 F.Supp. 168, 1967 A.M.C. 1965 (N.D. Ohio), has indicated that punitive damages may be available under the Jones Act where the master of a vessel exhibited wilful and wanton misconduct toward the crew, and where the owner ratified the misconduct. Although the case has been reversed, the reasoning of the district court allowing punitive damages has been allowed to stand. That reasoning, based on the broadest possible policy considerations--protection of the improvident seaman as a ward of admiralty--has injected unpredictability into the remedies of maintenance and cure, unseaworthiness, and the Jones Act. The reasoning is representative of the reasoning of the Supreme Court in seaman's personal injury actions generally, and it is reasonable to assume that in the future, owners will be faced with punitive damages under the Jones Act, and based on the same policy considerations, under the warranty of seaworthiness.

---

[33] See Petition of Southern S.S. Co., 135 F. Supp. 358, 360, 362 (D. Dela. 1955).

II. THE CURRENT SYSTEM: DISADVANTAGES TO THE SEAMAN

Current remedies available to the seaman injured in the course of his employment are broad, inclusive, and subject to further judicial expansion. However, some inherent disadvantages are built into the current system for the seaman seeking to recover for injuries suffered in the course of his employment.

A. Jones Act

In a suit under the Jones Act, the seaman must prove the elements of a traditional negligence action.[34] Although the Supreme Court has reduced the causation element by adopting the doctrine of "permissible inferences from unexplained events," the seaman is not guaranteed recovery by that doctrine, and in some cases the seaman may have considerable difficulty in proving the causation element. Although the courts have alleviated the seaman's burden of proving breach of duty,[35] he is required, except in cases involving the breach of a safety statute, to prove some type of knowledge on the part of the master or owner of the unsafe condition which caused the injury.

In addition, there are some disadvantages to a seaman bringing suit under the Jones Act. The Jones Act is enforceable by an action at law, usually in federal court. The trials tend to be expensive and time-consuming. The dockets are already overcrowded in many jurisdictions. Often the seaman waits years until his action is brought and even longer for his case to be decided. Such conditions must be improved.

B. Warranty of Seaworthiness

Possibly because of the above disadvantages, suits under the Jones Act have become less popular in recent years than actions under the warranty of seaworthiness. The seaman's action for unseaworthiness also contains some serious disadvantages.

---

[34] Text accompanying notes 29-30 *supra*.

[35] Notes 31-32 *supra* and accompanying text.

The extent of the shipowner's warranty is not well-defined. Many courts have been unable to accept the potentially wide definition of the warranty suggested by some recent Supreme Court decisions.[36] The result has been a growing uncertainty and confusion surrounding the extent of the warranty.

In addition, there are serious inequities to the seaman common to both the action for unseaworthiness and the action for negligence under the Jones Act. Under the present system claims are discouraged or settlements are encouraged for reduced amounts; fellow employees are discouraged from testifying; ill will and poor employment relations are engendered.[37] Finally, under the present system, counsel fees tend to be high, witnesses tend to be difficult to locate because of the mobile nature of the maritime industry, and evidence tends to be difficult to obtain. Most of the disadvantages arise because the current system is a judicially-created one, enforceable by traditional actions at law.

C. Maintenance and Cure

The remedy of maintenance and cure is the most acceptable to the seaman, but the recoveries are relatively small and, in most cases, insufficient to compensate the seaman for his illness or injuries. Nevertheless, the payments are assured. They do insure payment of the seaman's medical bills, payment of the seaman's wages, at least for the duration of the voyage, and payment of a per diem allowance which enables the seaman to convalesce without acute financial worries.

D. The Shipowner's Right to Limitation of Liability

All three of the current remedies available to the seaman injured in the course of his employment may be restricted or eliminated by the peculiar right of the shipowner to "limit his liability" to the seaman at the outset of the seaman's action for relief. The shipowner's right is defined by federal

---

[36] See Diamond, Maritime Personal Injury: What Court, Judge or Jury?, 28 ALA. LAW 387, 394 (1967).

[37] E. CHEIT & M. GORDON, OCCUPATIONAL DISABILITY AND PUBLIC POLICY 958 (1963) [hereinafter cited as CHEIT & GORDON].

statute which provides in part:

> (a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing, loss damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner or owners shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.[38]

Before the statute was enacted the doctrine of limitation of liability was specifically rejected by many early American courts, which held the owner's liability was limited only by the amount of the loss and his ability to pay.[39] In 1848, the full extent of the potential liability under those early cases was exposed in The Lexington, 47 U.S. 344, (1848), and there soon followed the First Limitation of Liability Act. The act was vaguely worded and provided the basis for judicial lawmaking on a grand scale.[40] The shipowner was favored by the judiciary at the outset,[41] but a 1935 amendment gave greater protection to the seaman.[42] The amendment, however, only applied to seagoing vessels and was

---

[38]42 U.S.C. § 183 (1958). For an interesting discussion of the history of the doctrine, which originated in the Seventeenth Century, see Baer, Down to the Seas Again, 40 N.C.L. REV. 377, 397 (1962).

[39]See The Main v. Williams, 152 U.S. 122, 126 (1894); Comment, Shipowner's Limitation of Liability--New Directions for an Old Doctrine, 16 STAN. L. REV. 370-71, 372 (1964).

[40]See Comment, supra note 39, at 374.

[41] The City of Norwich, 118 U.S. 468 (1886) (value of shipowner's interest determined at end of the voyage and did not include insurance or freight).

[42]46 U.S.C. § 183(b) (1964) (limitation fund of $60 per ton to be provided by shipowner).

soon recognized as insufficient even where applicable.[43]

Under the current statute, limitation of liability is not available in the event the owner had "privity or knowledge" of the cause of the loss. The requirement is sufficiently vague that courts have interpreted it in light of changing conditions within the maritime industry. Nevertheless, at least some generalizations are possible:"The 'privity or knowledge' must be that of the owner himself."[44] Where the vessel is owned by a corporation, the corporate owner will be held to have the requisite knowledge if a corporate officer "sufficiently high" in the corporate management is chargeable with the knowledge or is responsible for the loss on a negligence rationale.[45] The corporate owner may delegate certain duties to inferior officers and thereby insulate the owner from liability. However, certain duties are non-delegable and will not insulate the corporation from financial responsibility. The duty of providing a seaworthy ship is such a non-delegable duty.[46] Similarly, the owner has a non-delegable duty to select a properly qualified crew and master, and at least where the incompetence of master, officers, or fellow crewmembers is known to the owner, limitation of liability will be denied.[47] Even where such incompetence is not directly known by the owner, limitation may be denied on the basis the shipowner committed "statutory fault" by failing to properly man the vessel.[48]

In general, the concept of limitation of liability has shown considerable vitality in recent years, even though the policy favoring limitation is basically contrary to the policy favoring liberal recoveries for the seaman injured in the course of his employment.[49] In most situations involving

---

[43]J. F. Gerrity, A current review of attacks and defenses concerning the right of shipowners to claim limitation of liability in the United States, speech delivered Oct. 3, 1968, before the Association of Average Adjusters of the United States, at 4-6.

[44]GILMORE & BLACK, supra note 1, at 698.

[45]Id. at 701.

[46]The Osceola, 189 U.S. 158 (1903).

[47]GILMORE & BLACK, supra note 1, at 702 n. 96.

[48]Id. at 702-03.

[49]See, e.g., In re Colonial Trust Co., 124 F. Supp. 73, 1955 A.M.C.1290 (D. Conn.1954).

the injury of a seaman, the shipowner will not be able to obtain the benefits of the limitation statute since the owner's interest in the vessel and pending freight is usually greater than the claims against the owner and the vessel, and, furthermore, because the owner's "privity or knowledge" may deny limitation in the case of seagoing vessels. However, many courts continue to construe the statute liberally in favor of the owner in order to effectuate the purpose of the Act, which is the encouragement of investment in the maritime industry and the development of a strong merchant marine. In addition, the judicial expansion of remedies available to seamen injured in the course of their employment, in combination with other economic factors affecting the maritime industry, has caused the industry to marshall opposition to any modification of the current statute.[50] The result has given renewed vitality to the peculiar concept of limitation of liability, with foreclosure or significant restriction of recovery where plaintiff seaman suffered injury aboard a small vessel of light tonnage or aboard any vessel reduced to insignificant value following a collision, fire, or other marine disaster.[51]

III. THE CURRENT SYTEM: DISADVANTAGES TO THE OWNER

The current tripartite system of remedies available to the seaman injured in the course of his employment presents some serious inequities to the shipowner. In most cases, the owner will not be able to limit liability under 46 U.S.C. § 183 (1964), either because his interest in the vessel exceeds claimants' demands, or because his "privity or knowledge" forecloses the statutory right of limitation. When unable to limit his liability, the owner is confronted by two serious inequities in the present system: (1) the possible imposition of extremely high damage recoveries for conduct substantially less serious than common law negligence, and (2) the lack of predictability concerning both the amount of claimants' recoveries and the extent of the owner's responsibility.

---

[50] J. F. Gerrity speech, supra note 43, at 9.

[51] Cf. California Yacht Club v. Johnson, 65 F.2d 245, 1933 A.M.C. 943 (9th Cir.).

Those basic inequities have been discussed in relation to the extent of the current remedies available to the seaman injured in the course of his employment. Those inequities are compounded by two factors: (1) the declining financial condition of the marine industry, and (2) the increasing unavailability of insurance adequate to cover the owner's liability to the seaman under the current system.[52] The unavailability of adequate insurance is of intense importance to the maritime industry, which has always been extremely conscious of the need for comprehensive insurance to cover the myriad risks attendant to marine work.

There are other disadvantages. The present system is enforceable by actions at law or in admiralty, usually in federal court. The trials tend to be expensive and time-consuming for the owner as well as the seaman. Rights and liabilities are often not fully determined for a period of years following the seaman's injuries. For the owner as well as the seaman, counsel fees tend to be high, witnesses are difficult to locate, and evidence seems to be difficult to obtain. Furthermore, litigation encourages ill will and poor employment relations within the marine industry.[53]

IV. THE PROPOSAL: A SEAGOING WORKMEN'S COMPENATION ACT

A. The Constitutional Power of Congress to Enact a Seaman's Compensation Act

Congress has been given broad powers to alter the maritime law as changing conditions require.[54] The courts have often recognized the Congressional power to alter or modify the maritime law. An example is O'Donnell v. Great Lakes Dredge and Dock Co., 318 U.S. 36, 1943 A.M.C. 149, which provided:

---

[52]J. F. Gerrity speech, supra note 43, at 6, 12 & 13.

[53]CHEIT & GORDON, supra note 37, at 58.

[54]UNITED STATES CONSTITUTION art. III, § 2: "The judicial power [of the United States] extends to all cases of admiralty or maritime jurisdiction . . . . Congress [has] the power to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the government of the United States."

> There is nothing in that grant of jurisdiction . . . to preclude Congress from modifying or supplementing the rules of that law as experience or changing conditions may require. This is so at least with respect to those matters which traditionally have been within the cognizance of admiralty courts.[55]

A compensation act of the type proposed by this article would not contrave the "Savings to Suitors" clause of the Judiciary Act of 1789, First Session, First Congress, Chapter 20, section 9, 1 Stat. 76-77: "[The district courts] shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

There could be no contravention because certain pre-existing common law remedies have been made unavailable in state courts. Other remedies available to seamen are not common-law remedies which could be "saved" under the above quoted section. For example, today the seaman's exclusive remedy for negligence is a statutory remedy in the form of the Jones Act. 46 U.S.C.A. § 688 (1964). The companion remedy for unseaworthiness is exclusively provided by the general maritime law and not the common law. Both these major remedies do not fall within the purview of actions that must be "saved" for the district courts under the Judiciary Act. Thus, assuming that changing conditions require the adoption of an exclusive seaman's compensation act, Congress could constitutionally provide such an act.

B. Effects of Adoption

Today the concept of workmen's compensation has achieved tremendous acceptance in the United States. Over 78 per cent of the total labor force in the United States is now covered by some form of workmen's compensation.[56] The various forms of compensation vary widely, but most acts attempt to provide in the most dignified, efficient and certain form, financial and medical benefits for victims of work-connected injuries.[57]

---

[55] Accord United States v. Matson Navigation Co., 210 F.2d 610, 1953 A.M.C. 272 (9th Cir.).

[56] CHEIT & GORDON, supra note 37, at 2.

[57] I LARSON, THE LAW OF WORKMEN'S COMPENSATION § 2.20, at 5.

Most acts also attempt to allocate the burden of recoveries to the consumer of the industry's product.[58] The more modern workmen's compensation acts have two functions: wage restoration and rehabilitation. That is, they attempt to insure that the worker will not be a burden to society, and they perform their function by assuring the worker a limited recovery, and by requiring the assumption of limited, non-fault liability on the part of the employer.[59]

There is no comprehensive workmen's compensation statute applicable to seamen injured in the course of their employment. The current remedies available to the seaman are unsatisfactory both to the seaman and to the shipowner. Adoption of a comprehensive, liberal workmen's compensation act to apply to seamen injured in the course of their employment would have the following effects:

(1) Uniformity would be achieved. Recoveries under workmen's compensation acts are generally governed by payment schedules. Owners and seamen would be able more accurately to predict recoveries under the proposed system.

(2) The burden of payments could be placed on the consumer. Today employers insure against liabilities created under workmen's compensation. The security records of private carriers are remarkably stable.[60] More important, any employer can obtain compensation coverage at competitive rates, and can thus pass the cost on to the consumer.

(3) Efficiency would be increased. The modern compensation acts impose on an insurer, state fund, or private carrier, primary obligations for the efficient administration of their provisions. The rights of the workmen are intially enforceable through commission hearings, which are characterized by informality and speed. In addition, counsel fees generally are regulated, and procedural and administrative expenses are minimized.

(4) Fairness to all parties would be ensured. The modern compensation acts recognize that fairness to the employee demands the recovery of lost wages and the provision for effective rehabilitation, with foreclosure of the possibility of dramatic recoveries available under traditional judicial procedures. The

---

[58] Id.

[59] CHEIT & GORDON, supra note 37, at 99.

[60] Id. at 94.

modern acts also ensure fairness to the employer by providing non-fault liability limited to a certain amount, with foreclosure of certain common law defenses which could eliminate responsibility under traditional judicial procedures.

C. One Possible Approach: A Proposed Act

It should be noted at this point that the purpose of this paper is the encouragement of some legislation which would have the beneficial results discussed herein. Therefore, the author has attempted to suggest what form that legislation might take.[61] The appended text should be considered as evidence of a satisfactory statute, and not as the final form of such a statute.

The proposed act, as written, contains a number of special features which would encourage its acceptance by the maritime industry. The proposed act applies only to "seamen" because primarily remedies available to "seamen" are unsatisfactory. The remedies available to other maritime workers injured in the course of their employment may also be unsatisfactory. If that is the case, the coverage of the act should be extended to include those other maritime workers.

Coverage under the proposed act may not be avoided under the shipowner's right of limitation of liability. The act displaces the need for limitation, by making the risks of the owner predictable, and therefore insurable. In addition, the right of the shipowner to obtain limitation of liability has worked considerable injustice under the current system of remedies, and should be eliminated.

The liability under the proposed act is exclusive. A workmen's compensation act cannot be successful unless it is exclusive. The only exception is the provision for the continuation of the seaman's traditional right of maintenance and cure. As discussed previously, the traditional right of maintenance and cure is a useful temporary form of relief. It has long been acceptable to both shipowner and seaman and has usually worked efficiently and without undue delay. Provision could be made for deduction of payments under the proposed act which would also be available under maintenance and cure, thus foreclosing any possibility of double recoveries under the new system.

---

[61] Appendix A.

V. SUMMARY

A new system to adequately insure seamen injured in the course of their employment is needed for reasons apparent to anyone who has examined the nature of the seaman's remedies against the shipowner in the event he is injured. This article has proposed a system consisting of a Seaman's Compensation Act, with retention of the seaman's traditional right of maintenance and cure, and rejection of the seaman's rights under the Jones Act and warranty of seaworthiness. The proposed system would require abrogation of the shipowner's right of limitation of liability with respect to seamen covered by the proposed act. The proposed system hopefully could be fair and adequate to both shipowners and seamen. It could substantially improve the current remedies available to seamen injured in the course of their employment. Any seaman should be able to expect nothing less than proper remedies. No reason exists to exclude the workmen on the sea from proper medical coverage and wage compensation in the event of his injury when modern workmen's compensation plans exist throughout the world to protect land-based workmen.

APPENDIX A

PROPOSED SEAMAN'S COMPENSATION ACT

01. Definitions.

a. For the purposes of this act, the term "employee" includes any seaman who does any sort of work aboard a ship in navigation, and includes the master, officers, or crewmembers of said ship.
b. The term "employer" includes any person, partnership, corporation, or association, any of whose employees are employed in marine employment, in whole or in part, upon the navigable waters of the United States, or between any state and territory of the United States, or between any foreign nation and the United States.

02. Coverage.

a. Compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring in the course of said employee's employment, and if compensation for the disability or death may not validly be provided by the legislation of any state of the United States.
b. Compensation shall be payable irrespective of fault as the cause of injury or death.
c. Compensation shall not be subject to any limitation of liability inuring to the benefit of owner or insurer under any statute of the United States, any provision of any insurance contract, or any court decision.

03. Exclusiveness of Liability.

a. The ability of an employer described in section 02 of this act shall be exclusive and in place of all liability of such employer to the employee, his legal representative, and anyone entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that the employee shall retain his right of maintenance and cure, provided there is no double recovery for expenses or medical bills under the combination of this act and the right of maintenance and cure.

04. Compensation for Disability and Death.

a. Compensation for disability and death of an employee shall be paid on a schedule as specified in sections 908, 909 of the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. 901 (1957).

05. Commission

In order to interpret and effectuate the provisions of this Act, a Seaman's Commission for Compensatory Matters shall be established.

a. Compensatory claims submitted by employees to their employers which are not settled shall be adjudicated by the Commission. The Commission shall have original jurisdiction over any actions arising under the Act.

b. Any party to an action arising under the Act shall have the right to judicial review by direct appeal to the United States Court of Appeals for the circuit in which the Commission hears the claim, The United States Supreme Court shall have the right to review any final adjudication of a Court of Appeals in an action arising under the Act.

c. The Commission shall be composed of five members appointed by the President of the United States on the basis of merit and experience attained in the maritime industry. Such members shall serve a three-year term. Appointments may be successive as the President so elects. The Commission shall be located in_____.

d. Suits based on a cause of action arising under the Act shall not be allowed unless filed within eighteen (18) months of the occurrence giving rise to the Employee's claim.

e. The Commission shall have the authority to promulgate rules and regulations consistent with the provisions of this Act and through such rules and regulations to

effectuate and clarify the provisions of the Act.

f. The Commission shall have the authority to establish procedures whereby investigatory actions may be instituted to provide full evidentiary production of all relevant facts pertinent to a particular action. Such procedures shall include, but not be limited to, the appointment of Commis sion examiners to investigate and file documented reports of events surrounding any particular claim before the Commission.