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COVID-19: Vessel Owner Obligations, Part I

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Vessel owners may have liability to their employees who become ill in the service of the ship and who may also expose other crew members. Vessel owners may also have obligations to third-party visitors and passengers exposed to COVID-19 while on board. Part I of this series will outline remedies available under the Jones Act and vessel owner liabilities.

What Remedies Are Available When an Employee or a Third Party Becomes Ill While on a Vessel?

The crew of a vessel have several remedies when they become ill while performing their work. Some remedies are based on fault; others are not. These remedies include maintenance and cure, the general maritime law of unseaworthiness, and the Jones Act. In *Mitchell v. Trawler Racer, Inc.,* 362 U.S. 539 (1960), the Supreme Court held that a crew member had remedies against his employer/vessel owner under the Jones Act, 46 U.S.C. §50101, for negligence and also under the general maritime law of unseaworthiness for failing to provide a vessel that was reasonably fit under the circumstances. A Jones Act seaman is also entitled to recover maintenance and cure regardless of fault. Maritime workers, such as stevedores, ship repairmen, and harbor workers, are entitled to workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901, *et seq.*, against their employers and under 33 U.S.C. §905(b) against vessel owners under certain circumstances. Passengers and invitees who become exposed to COVID-19 may also have remedies under the general maritime law.

1. Maintenance and Cure

A seaman who manifests an illness or disease while in the service of a ship is entitled to recover maintenance and cure. "Maintenance" is the equivalent of the food and lodging that a seaman would have been provided onboard a vessel. *Calmar S.S. Corp. v. Taylor,* 58 S.Ct. 651 (1938). "Cure" includes the necessary and reasonable medical expenses related to the illness or disease. *Farrell v. U.S.,* 69 S.Ct. 707 (1949). A seaman must bear the slight burden of showing that the illness manifested itself while he was in the service of the ship. *Warren v. U.S.,* 340 U.S. 523 (1951); *Vaughan v. Atkinson,* 82 S.Ct. 997 (1922). Maintenance and cure must be paid until a seaman reaches maximum medical recovery — that point at which the condition plateaus or is not curative. *Vella v. Ford Motor Co.,* 95 S.Ct. 1381 (1975); *Kossick v. United Fruit Co.,* 365 U.S. 731 (1961). Palliative care does not extend to cure obligations even if the seaman cannot return to

work. *Pelotto v. L&N Towing Co.,* 604 F.2d 396 (5th Cir. 1999).

In addition to maintenance and cure, an employer must pay wages to the end of the voyage for a seaman who must cut his hitch short because of his illness.

Failure to pay maintenance and cure without just cause may lead to punitive damages. *Atlantic Sounding v. Townsend,* 557 U.S. 404 (2009).

2. Unseaworthiness

Under the general maritime law, vessel owners have a non-delegable duty to provide a vessel reasonably fit for its intended use. *Mahnich v. So. S.S. Co.,* 321 U.S. 96 (1944). This is distinguished from operational negligence which creates an unsafe place to work. *Usner v. Luckenbach Overseas Corp.,* 400 U.S. 494 (1971). An unseaworthy condition can include incompetent crew members, such as members who are ill or not fit for service. *Szymanski v. Columbia Transportation Co.,* 154 F.3d 591 (6th Cir. 1998). Thus, a seaman who is ill can create an unsafe place to work, without stretching the law's intent. Given notice of the ill seaman, the employer must ensure the seaman is quarantined to avoid a claim of providing an unseaworthy vessel. After the ill seaman is evacuated, the vessel should also be cleaned to avoid any unseaworthy condition.

3. Jones Act

A seaman is entitled to recover damages under the Jones Act if his employer's unreasonable acts or omissions cause or aggravate in the slightest an injury or illness. *Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331 (5th Cir. 1997). The Jones Act employer also has a duty to provide a reasonably safe place to work. Protocols should be in place to avoid unnecessary social interaction, to respond to any illness, and to remediate any "hazards" or "germs" after an ill seaman is diagnosed or evacuated.

When a seaman becomes ill in the service of a ship, the employer has a duty to provide adequate medical care to the crew. *Picou v. Am. Offshore Fleet, Inc.,* 576 F.2d 585 (5th Cir. 1978). What is adequate medical care under the circumstances?

In *Randall v. Crosby Tugs*, 911 F.3d 280 (5th Cir. 2008), the court held that a Jones Act employer was not negligent with respect to medical care provided after calling 9-1-1 when the vessel was located at a dock after an employee reported fatigue and light-headedness. The US Court of Appeals for the Fifth Circuit initially recognized that a Jones Act employer had a duty to provide reasonable medical care under the circumstances. Further, a vessel owner could be liable for the misdiagnosis or malpractice of a shipboard doctor or a shoreside doctor the employer chose. *See also Fitzgerald v. A.L. Burbank & Co.,* 451 F.2d 670 (2nd Cir. 1997); *Central Gulf S.S. Corp. v. Sanbula,* 405 F.2d 291 (5th Cir. 1996). However, in *Randall*, the court found that the Jones Act employer was neither negligent for calling 9-1-1 nor liable for the care provided by the 9-1-1 hospital that it did not choose. Courts have also held that an employer is not liable for the negligence of a doctor that an employee has selected independently. *Joiner v. Diamond M Drilling Co.,* 688 F.2d 256 (5th Cir. 1982).

In addition to proper medical care, a Jones Act employer must provide a reasonably safe place to work. Thus, reasonable precautions should be taken to avoid exposure to disease, to treat any illness, and to remediate or clean after an illness is discovered. What, then, is the standard of care that a Jones Act employer owes? Although it is based upon reasonableness, courts often look to see what the industry practice is or what guidance various governmental agencies have provided. For

COVID?19, the Centers for Disease Control and Prevention (CDC) has provided the following guidance, among others:

- Interim Guidance for Ships Managing Suspected Coronavirus Disease 2019
- Management of Ill Persons/Crew
- Guidance for Healthcare Infection Prevention and Control, FAQ for COVID-19
- Ship Sanitation Certificate Information
- Maritime Resources

Both the CDC and the US Coast Guard also have special reporting requirements for the COVID-19 virus. Under the Jones Act, an employer could have potential liability for not properly taking precautions or giving warning as well as for failing to remediate and provide subsequent medical care. Under the general maritime law, a claim for unseaworthiness can also be asserted for proving that a vessel is an “unfit” environment. Jones Act remedies are based on negligence standards, while unseaworthiness is an absolute and non-delegable duty.

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