6.1
Jones Act - Unseaworthiness
General Instruction
(Comparative Negligence Defense)

The Plaintiff seeks to recover under a federal statute known as the Jones Act. The Jones Act provides a remedy to a seaman who, while employed as a member of the crew of a vessel in navigation, suffers personal injuries due to the negligence of his employer, or his employer's officers, agents or other employees.

More specifically, the Plaintiff alleges that the Defendant [describe the specific act(s) or omission(s) asserted as the defendant's negligence].

So, in order to prevail on the Jones Act claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That at the time of the alleged injury the Plaintiff was acting in the course of employment as a member of the crew of a vessel in navigation;

Second: That the Defendant was "negligent," as claimed; and

Third: That such negligence was a "legal cause" of damage sustained by the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

[In this case the parties have stipulated and agreed that, at the time of the alleged injury, the Plaintiff was acting in the course of employment as a member of the crew of a vessel in navigation, and you should accept that fact as proven.]

[A seaman is injured "in the course of employment" when, at the time of the injury, the seaman was doing the work of the employer, that is, working in the service of the vessel as a member of the crew.]

[In order for the Plaintiff to prove membership in the crew of a vessel, the Plaintiff must a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature such that [his] [her] employment regularly exposed [him] [her] to the perils of the sea. The Plaintiff must also prove that the capacity in which [he] [she] was employed or that the duties [he] [she] performed contributed to the function of the vessel's regular operation or to the accomplishment of its mission.]

[The primary meaning of the term "vessel" is any watercraft or other contrivance used, or capable of being used, as a means of transportation on water. Although mere floatation may not be sufficient in and of itself to make a structure a vessel, if a structure is buoyant and capable of being floated from one location to another it may be found

to be a vessel even though it may have remained in one place for a long time and even though there are no plans to move it in the foreseeable future.]

[The term "vessel" may also include various special purpose craft (such as barges and dredges) that do not operate as vehicles for transportation, but serve as floating bases or vessels that may even be submerged so as to rest on the bottom and be used for stationary operations such as drilling or dredging. In considering whether a special purpose craft is a vessel, the determinative factors are the purposes for which the craft was constructed and the business in which it is engaged, that is, was the craft designed for and used in navigation and commerce? A craft not designed for navigation and commerce, however, may still be classified as a vessel if at the time of the accident it had actually been engaged in navigation or commerce.]

[In considering whether a special purpose craft is a vessel, the manner in which a party or parties may have referred to or denominated the craft in contracts or other documents is not necessarily determinative of its status as a vessel, but is simply a factor for you to consider along with all of the other evidence.]

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care that a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a reasonably careful person would not do under like circumstances, or in failing to do something that a reasonably careful person would do under like circumstances.

For purposes of this action, negligence is a "legal cause" of damage if it played any part, no matter how small, in bringing about or actually causing the injury or damage. So, if you should find from the evidence in the case that any negligence of the Defendant contributed in any way toward any injury or damage suffered by the Plaintiff, you may find that such injury or damage was legally caused by the Defendant's act or omission. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if it occurs at the same time as the negligence and if the negligence played any part, no matter how small, in causing such damage.

If a preponderance of the evidence does not support the Plaintiff's Jones Act claim for negligence, then your verdict should be for the Defendant. If, however, a preponderance of the evidence does support

the Plaintiff's claim, you will then consider the defense raised by the Defendant.

The Defendant contends that the Plaintiff was also negligent and that such negligence was a legal cause of the Plaintiff's own injury. This is a defensive claim so that the Defendant must prove, by a preponderance of the evidence:

First: That the Plaintiff was also "negligent;" and

Second: That such negligence was a "legal cause" of the Plaintiff's own damage.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

The law requires you to compare any negligence you find on the part of both parties. So, if you find in favor of the Defendant on this defense, that will not prevent recovery by the Plaintiff. It will only reduce the amount of the Plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the Plaintiff, that the Plaintiff's own negligence was, for example, 50% responsible for the Plaintiff's own damage, then you would fill in that percentage as your finding on the special verdict form I will explain in a moment. Such a finding would

not prevent the Plaintiff from recovering; the Court will merely reduce the Plaintiff's total damages by the percentage that you insert. Of course, by using the number 50% as an example, I do not mean to suggest to you any specific figure at all. If you find that the Plaintiff was negligent, you might find 1% or 99%.

The Plaintiff's second claim is for "unseaworthiness." Specifically, the Plaintiff alleges that the vessel was "unseaworthy" because [describe the specific conditions asserted as the basis for the claim].

So, in order to prevail on the unseaworthiness claim, the Plaintiff must prove each of the following facts by a preponderance of the evidence:

First: That the vessel was unseaworthy, as claimed; and

Second: That the unseaworthy condition was a legal cause of damage to the Plaintiff.

[In the verdict form that I will explain in a moment, you will be asked to answer a series of questions concerning each of these factual issues.]

A claim of "unseaworthiness" is a claim that the vessel owner has not fulfilled a legal duty owed to members of the crew to provide a vessel reasonably fit for its intended purpose. The duty to provide a

seaworthy ship extends not only to the vessel itself, but to all of its parts, equipment and gear; and also includes the responsibility of assigning an adequate crew.

The owner's duty under the law to provide a seaworthy ship is absolute. The owner may not delegate the duty to anyone. If the owner does not provide a seaworthy vessel, then no amount of due care or prudence will excuse that fault, whether or not the owner knew or could have known of the deficiency.

If, therefore, you find that the vessel was in any manner unsafe or unfit, and that such condition was a legal cause of damage to the Plaintiff, then you may find that the vessel was unseaworthy and the owner liable whether the owner was negligent or not.

The owner of the vessel is not required, however, to furnish an accident-free ship. A vessel is not called on to have the best of appliances and equipment, or the finest of crews, but only such gear as is reasonably proper and suitable for its intended use, and a crew that is reasonably competent and adequate.

An unseaworthy condition is a "legal cause" of damage only if it directly and in natural and continuous sequence produces, or contributes substantially to producing such damage, so it can

reasonably be said that, except for the unseaworthy condition, the loss, injury or damage would not have occurred. Unseaworthiness may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if it occurs at the same time as the unseaworthiness and if the unseaworthiness contributes substantially to producing such damage.

Similar to the response made to the Plaintiff's first claim, the Defendant denies that any unseaworthiness existed at the time of the incident, and alternatively states that if the vessel was unseaworthy, then the unseaworthiness did not cause any injury or damage to the Plaintiff. The Defendant further alleges that some contributory negligence on the part of the Plaintiff was also a cause of any injuries the Plaintiff may have sustained. Since I have already explained to you the meaning and effect of a finding of contributory negligence on the part of the Plaintiff, I will not do so again, except to remind you that the Defendant has the burden of establishing this defense by a preponderance of the evidence.

You should also remember that the Plaintiff has asserted two separate claims. The first is for negligence under the Jones Act; and the second is for unseaworthiness. The Plaintiff may be entitled to

recover damages provided the Plaintiff can establish either of those claims.

So, if the evidence proves negligence or unseaworthiness on the part of the Defendant that was a legal cause of damage to the Plaintiff, you will then consider the issue of the Plaintiff's damages.

In considering the issue of the Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages, no more and no less. Compensatory damages are not allowed as a punishment and must not be imposed or increased to penalize the Defendant. Also, compensatory damages must not be based on speculation or guesswork because it is only actual damages that are recoverable.

On the other hand, compensatory damages are not restricted to actual loss of time or money; they cover both the mental and physical aspects of injury - - tangible and intangible. Thus, no evidence of the value of such intangible things as physical and emotional pain and mental anguish has been or need be introduced. In that respect it is not value you are trying to determine, but an amount that will fairly compensate the Plaintiff for those claims of damage. There is no exact

standard to be applied; any such award should be fair and just in the light of the evidence.

You should consider the following elements of damage, to the extent you find them proved by a preponderance of the evidence, and no others:

(a) Net lost wages and benefits to the date of trial

(b) Net lost wages and benefits in the future [reduced to present value]

(c) Medical and hospital expenses, incurred in the past [and likely to be incurred in the future]

(d) Physical and emotional pain and mental anguish

[(e) Punitive damages, if any (as explained in the Court's instructions)]

[You are instructed that any person who claims damages as a result of an alleged wrongful act on the part of another has a duty under the law to "mitigate" those damages - - that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize the loss or damage.

So, if you should find from a preponderance of the evidence that the Plaintiff failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you should reduce the amount of the Plaintiff's damages by the amount that could have been reasonably realized if the Plaintiff had taken advantage of such opportunity.]

[The Plaintiff also claims that the acts of the Defendant were done willfully, intentionally or with callous and reckless indifference to the Plaintiff's rights so as to entitle the Plaintiff to an award of punitive damages in addition to compensatory damages.

If you find for the Plaintiff, and if you further find that the Defendant did act with malice, willfulness or callous and reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against the Defendant as punishment and as a deterrent to others.

If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive

damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].]

6.1
Jones Act - Unseaworthiness
General Instruction
(Comparative Negligence Defense)

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence:

1. That the Defendant was negligent in the manner claimed by the Plaintiff and that such negligence was a legal cause of damage to the Plaintiff?

Answer Yes or No _____

2. That the vessel was unseaworthy in the manner claimed by the Plaintiff and that such unseaworthiness was a legal cause of damage to the Plaintiff?

Answer Yes or No _____

[Note: If you answered No to both Question No. 1 and Question No. 2, you need not answer any of the remaining questions.]

3. That the Plaintiff was also negligent in the manner claimed by the Defendant and that such negligence was a legal cause of the Plaintiff's own damage?

Answer Yes or No _____

4. If you answered "Yes" to Question Three, what proportion or percentage of the Plaintiff's damage do you find from a preponderance of the evidence to have been legally caused by the negligence of the respective parties?

Answer in Terms of Percentages

The Defendant _____%

The Plaintiff _____%

[Note: The total of the percentages given in your answer should equal 100%.]

5. If you answered "Yes" to Question One or Question Two, what sum of money do you find to be the total amount of the Plaintiff's damages (without adjustment by application of any percentages you may have given in answer to Question Four)?

(a) Net lost wages and benefits to the date of trial $_____

(b) Net lost wages and benefits in the future [reduced to present value] $_____

(c) Medical and hospital expenses, incurred in the past [and likely to be incurred in the future] $_____

(d) Physical and emotional pain and mental anguish $_____

[(e) Punitive damages, if any (as explained in the Court's instructions) $_____]

SO SAY WE ALL.

_____
Foreperson

DATED: _____

ANNOTATIONS AND COMMENTS

Chandris, Inc. v. Latsis, 515 U.S. 347, 368, 115 S.Ct. 2172, 2189-90, 132 L.Ed.2d 314 (1995) (providing requirements for seaman status under the Jones Act).

The Jones Act refers to the Federal Employers Liability Act ("FELA"), 45 USC § 51 et seq., in affording recovery rights to Jones Act plaintiffs. See Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331, 335 (5th Cir. 1997) (en banc). Under some prior Fifth Circuit precedent binding on the Eleventh Circuit, employees under FELA only had to exercise a "slight duty of care" toward their own safety, effectively placing a higher standard, comparatively speaking, upon the employer. See Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975); Allen v. Seacoast Products, Inc., 623 F.2d 355 (5th Cir. 1980).

Clarifying and overruling those prior Fifth Circuit cases, the Fifth Circuit concluded that both the employer and employee are held to the same standard of care, (i.e., an employee is obligated under the FELA to act with ordinary prudence). Gautreaux, 107 F.3d at 335 (5th Cir. 1997). The Fifth Circuit has noted that "[i]n Gautreaux, we held that 'nothing in the text or structure of the FELA-Jones Act legislation suggests that the standard of care to be attributed to either an employer or an employee is anything different than ordinary prudence under the circumstances." Crawford v. Falcon Drilling Co. Inc., 131 F.3d 1120, 1125 (5th Cir. 1997) (citing Gautreaux, 107 F.3d at 338).

However, the relaxed rule concerning the issue of causation under the Jones Act remains the same as it was before Gautreaux. Under that rule, reflected in this instruction, an employer's negligence is actionable if it "played any part, even the slightest, in producing the injury or death for which damages are sought." Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (citing Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957)).

With regard to reduction to present value of damages to be awarded for future losses, see Supplemental Damages Instruction No. 5.1, infra, and the Annotations and Comments that follow it, for commentary on when that instruction should be given.

Jones v. CSX Transp., 337 F.3d 1316 (11th Cir. 2003) (in Jones Act cases, as with FELA, a plaintiff does not need to make a showing of an objective manifestation of his or her emotional injury in order to recover for negligently inflicted emotional distress). Plaintiff can recover if the alleged fear is "genuine and serious". Norfolk & Western Ry. Co. v. Ayers, 538 U.S. 135, 157, 123 S.Ct. 1210, 1223, 155 L.Ed.2d 261 (2003).

Gifford v. American Canadian Caribbean Line, Inc., 276 F.3d 80 (1st Cir. 2002) (holding that unseaworthiness determination did not require that vessel be unseaworthy at precise time of injury but rather that the unseaworthiness was a direct and substantial cause of the plaintiff's injury).

6.2
Jones Act - Unseaworthiness
Maintenance And Cure

The Plaintiff's [third] claim is that, as a seaman, the Plaintiff is entitled to recover what the law calls "maintenance and cure." This claim is completely separate from both the Jones Act and the unseaworthiness claims of the Plaintiff, and must be decided entirely apart from your determination of those claims.

[The only common element of the three claims is the "seaman" status of the Plaintiff, and the test for seaman status is the same for all claims. Therefore, if the Plaintiff has proven employment as a "seaman" on the date of the accident for the purposes of the other claims, then you must find that the Plaintiff is a seaman for the purposes of "maintenance and cure." On the other hand, if you find that Plaintiff was not a seaman with regard to the other claims, then you may not find that the Plaintiff was a seaman entitled to "maintenance and cure."]

"Maintenance and cure" is the policy of providing to a seaman who is disabled by injury or illness while in the service of the ship medical care and treatment, and the means of maintaining one's self, during the period of convalescence.

A seaman is entitled to maintenance and cure even if the seaman is unable to establish that an injury was a result of any negligence on the part of the employer or an unseaworthy condition existing aboard the vessel. Generally speaking, in order to recover maintenance and cure, the Plaintiff need only show that an injury or illness occurred while the Plaintiff was in the service of the vessel on which the Plaintiff was employed as a seaman and that the injury or illness occurred without willful misbehavior by the Plaintiff. The injury or illness need not be work-related so long as it occurs while in the service of the ship. Neither maintenance nor cure may be reduced because of any negligence on the part of the seaman; and assumption of the risk is no defense to a claim for maintenance and cure.

"Maintenance" is defined as the cost of food and lodging, and transportation to and from a medical facility. However, a seaman is not entitled to maintenance for any period of time while admitted as an inpatient in any hospital because the cure provided by the employer through hospitalization includes the food and lodging of the seaman, and, therefore, the maintenance obligation of the employer is also discharged.

The "cure" to which a seaman may be entitled includes the cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines and medical apparatus. However, the employer does not have a duty to provide cure payments for any period of time during which a seaman is hospitalized in a United States Marine Hospital, or in any other hospital at the employer's expense. With regard to the period of time covered by the claim, a seaman is entitled to receive maintenance and cure from the date of departure from the vessel until the seaman reaches the point of "maximum possible cure" under the circumstances, that is, the point at which no further improvement in the seaman's medical condition is to be reasonably expected. The obligation usually ends when qualified medical opinion is to the effect that maximum possible cure has been effected.

The owner is not an insurer that a cure will be effected. The date when a seaman resumes employment is one factor you may consider in deciding when the period, if any, during which a seaman may be entitled to maintenance and cure, ends. In a case in which the evidence warrants a finding that the seaman was forced by economic necessity to return to work prior to reaching maximum possible cure,

that fact may be taken into account in determining the date on which maintenance and cure should terminate.

It is important to note here that if you find that the Plaintiff is entitled to an award of damages under either the Jones Act or the unseaworthiness claims, and if you include either loss of wages or medical expenses in the damage award, then maintenance and cure cannot be awarded for the same period of time. In other words, there can be no double recovery for the Plaintiff. However, the Plaintiff may recover for any "willful or arbitrary" failure on the part of the employer to have paid maintenance and cure when it was due.

When the Defendant willfully and arbitrarily fails to pay maintenance or provide cure to a seaman up to the time that the seaman receives maximum cure, and such failure results in an aggravation of the seaman's injury, then the seaman may recover damages for prolongation or aggravation of the seaman's injury, pain and suffering, additional medical expenses incurred as a result of the failure to pay, and a reasonable attorney's fee and costs.

Therefore, in order to award additional damages to the Plaintiff for a willful failure of the shipowner to provide maintenance and cure, you must find:

First: That the Plaintiff was entitled to maintenance and cure;

Second: That it was not provided;

Third: That the Defendant willfully and arbitrarily failed to provide cure up to the time that the seaman reached maximum cure; and

Fourth: That such failure resulted in injury to the Plaintiff.

An employer has a duty to investigate a seaman's claim in good faith and with reasonable diligence. But, an employer is not obligated to pay maintenance and cure to a seaman just because the seaman claims an injury, and the employer has a right to contest the claim in good faith. Thus, an employer acts "willfully and arbitrarily" only when the employer acts without reason, or with callous disregard for the claim of the seaman. You may award damages for any failure of the employer to pay maintenance and cure to the Plaintiff only if, on the basis of all the facts and opportunities known to and available to the Defendant during the time in question, the refusal to pay maintenance and cure was arbitrary and capricious, or in callous disregard of the Plaintiff's claim.

[Finally, it is important to remember that the Plaintiff cannot recover attorney fees for the prosecution of either the Jones Act or the

unseaworthiness claims, but only for the prosecution of the maintenance and cure claim, if warranted.]

6.2
Jones Act - Unseaworthiness
Maintenance And Cure

SPECIAL INTERROGATORIES
TO THE JURY

Do you find from a preponderance of the evidence?

1. That the Plaintiff was a "seaman" at the time of his [illness] [injury]?

Answer Yes or No _____

2. That the Defendant willfully and arbitrarily failed to provide maintenance and cure up to the time that the Plaintiff reached maximum cure:

Answer Yes or No _____

3. That the Plaintiff should be awarded the following damages:

[Enumerate the recoverable elements of damages] $_____

SO SAY WE ALL.

_____
Foreperson

DATED:_____