nonexistence of certain other facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts from a preponderance of all the evidence, both direct and circumstantial.

When knowledge of technical subject matter may be helpful to the jury, a person who has special training or experience in that technical field—he is called an expert witness—is permitted to state his opinion on those technical matters. However, you are not required to accept that opinion. As with any other witness, it is up to you to decide whether to rely upon it.

In deciding whether to accept or rely upon the opinion of an expert witness, you may consider any bias of the witness, including any bias you may infer from evidence that the expert witness has been or will be paid for reviewing the case and testifying, or from evidence that he testifies regularly as an expert witness and his income from such testimony represents a significant portion of his income.

[Any notes that you have taken during this trial are only aids to memory. If your memory should differ from your notes, then you should rely on your memory and not on the notes. The notes are not evidence. A juror who has not taken notes should rely on his or her independent recollection of the evidence and should not be unduly influenced by the notes of other jurors. Notes are not entitled to any greater weight than the recollection or impression of each juror about the testimony.]

When you retire to the jury room to deliberate on your verdict, you may take [this charge with you as well as] exhibits which the Court has admitted into evidence. Select your Foreperson and conduct your deliberations. If you recess during your deliberations, follow all of the instructions that the Court has given you about/on your conduct during the trial. After you have reached your unanimous verdict, your Foreperson is to fill in on the form your answers to the questions. Do not reveal your answers until such time as you are discharged, unless otherwise directed by me. You must never disclose to anyone, not even to me, your numerical division on any question.

If you want to communicate with me at any time, please give a written message or question to the bailiff, who will bring it to me. I will then respond as promptly as possible either in writing or by having you brought into the courtroom so that I can address you orally. I will always first disclose to the attorneys your question and my response before I answer your question.

After you have reached a verdict, you are not required to talk with anyone about the case unless the Court orders otherwise. [You may now retire to the jury room to conduct your deliberations.]

PATTERN JURY INSTRUCTIONS

ADMIRALTY

4. ADMIRALTY

4.1

SEAMAN STATUS

The plaintiff is seeking damages from the defendant for injuries that he allegedly suffered as a result of an accident while he was performing (*describe task*).

The plaintiff's claim arises under the Jones Act. Only a seaman can bring a claim under the Jones Act. The plaintiff claims that his employment with the defendant was of such a nature that under the law he was a seaman and is entitled to bring this claim. The defendant denies that the plaintiff was a seaman and takes the position that the plaintiff is not entitled to bring this claim. You first must determine whether, at the time of the accident, the plaintiff was a seaman as the law defines that term. [*May be modified to reflect unseaworthiness claim.*]

As I instruct you about the test for seaman status, I also may use the term "member of a crew." Seaman and member of a crew mean the same thing.

The plaintiff is a seaman if he proves by a preponderance of the evidence that he performs the work of the vessel.[1] He performs the work of the vessel if and only if:

1. he was assigned permanently to a vessel or performed a substantial part of his work on a vessel; and

2. the capacity in which he was employed or the duties that he performed contributed to the function of a vessel or to the accomplishment of the vessel's mission or to the operation or maintenance of the vessel during its movement or while at anchor for the vessel's future trips. A person need not aid in the navigation of a vessel in order to qualify as a seaman.

The plaintiff must satisfy both the first and second parts of this test. If he satisfies both, then you must find that he was a seaman. In applying the first part of the test, you must determine whether, from a preponderance of the evidence, the plaintiff was either assigned permanently to the _____, the vessel, or whether he performed a substantial part of his work on it. The plaintiff need only to prove one of these to satisfy the first part of the test.

Plaintiff was permanently assigned to the _____ if he had more than a temporary or occasional connection with the vessel, the _____. The plaintiff must prove that he had an actual regular connection with the _____.

Even if you find that the plaintiff was not permanently assigned to the vessel as I have just defined it, he nevertheless can satisfy the first part of the test for seaman status if he performed a substantial part of his work on the vessel or if he performed a significant part of his work on the vessel with at least some degree of regularity and continuity and his duties on the vessel were more

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[1]Where the claimant's connection is with a "fleet" of vessels, the term "fleet of vessels" should be substituted for the word "vessel." In addition, the jury should be charged in the following manner:

"A fleet of vessels is an identifiable group of vessels acting together or under one control." Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir.1986).

than merely fortuitous and incidental. (For example, a person who comes aboard to perform an isolated piece of work is not a seaman.) When a person performs some of his duties on land—[or in this case a platform]—and other of his duties on the vessel, you must consider the portion of his duties that he performed in each location in connection with your determination as to whether or not he performed a substantial or significant part of his work on the vessel, as compared to what he did on land [on the platform]. In other words, in determining whether or not the plaintiff was a seaman at the time of the accident, you must look at the nature and location of his work for the defendant taken as a whole. If the plaintiff's regularly assigned duties required him to divide his work time between vessel and land (or platform), you must determine his status as a seaman in the context of his entire employment with his employer, _____, not just his duties at the time he was injured.

(*If plaintiff had a change in work assignment only.*)

If, however, you find that the plaintiff's employment with _____ was changed before the accident, then you must determine whether the plaintiff was a seaman on the basis of his activities in his new assignment. Under the law, a person may change his employment with the same employer if his work duties or his work location are changed permanently.

If you find that the plaintiff was assigned permanently to the _____ or that he performed a substantial part of his work on the _____, you must then determine whether the plaintiff's duties were such that he meets the second part of the test. The plaintiff meets the second part of the test if he proves by a preponderance of the evidence that the job or duties he performed contributed to the function of the vessel, the _____, or to the accomplishment of its mission or to its operation or maintenance during its voyages or during its anchorage for its future trips. A person may contribute to the function of the vessel or the accomplishment of its mission although he is not engaged in actual navigation of the vessel.

Note

McDermott International, Inc. v. Wilander, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991). See Southwest Marine, Inc. v. Byron Gizoni, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991).

Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir.1986).

Offshore Co. v. Robison, 266 F.2d 769 (5th Cir.1959).

4.2

VESSELS

You must determine whether the _____ (name, or describe structure) was a vessel. A vessel is a structure designed or used in navigation for the transportation of passengers, cargo, or equipment across navigable waters. In determining whether [the _____ (the structure)] is a vessel, you may but need not consider whether it had the following features:

(1) Navigational aids;

(2) A racked bow;

(3) Lifeboats or other lifesaving equipment;

(4) Bilge pumps;

(5) Crew quarters; or

(6) Coast Guard registration.

You may also consider the size of the [_____ (the structure)], its ability to float, the permanence of its attachment to the shore or the water bottom, and the fact of its movement, if any, across navigable waters. However, the fact that the (structure) had any one of these features is not conclusive. They are merely factors that you might wish to consider in determining whether the [_____ (structure)] was a vessel.[1]

4.3

JONES ACT—UNSEAWORTHINESS—MAINTENANCE AND CURE—LOSS OF SOCIETY (SEAMAN STATUS NOT CONTESTED)

The plaintiff, _____ [a seaman], is asserting three separate claims against the defendant in this case.

The plaintiff's first claim, under a federal law known as the Jones Act, is that his employer, _____, was negligent, and that _____'s negligence was a cause of his injuries. The plaintiff's second claim is that unseaworthiness of a vessel caused his injury. The plaintiff's third claim is for Maintenance and Cure.

You must consider each of these claims separately. The plaintiff is not required to prove all of these claims. He may recover if he proves any one of them. However, he may only recover those damages or benefits that the law provides for the claims that he proves; he may not recover the same damages or benefits more than once.

The plaintiff _____ seeks damages for the loss of society with her husband, plaintiff

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[1]See Southwest Marine, Inc. v. Byron Gizoni, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991). The structures at issue, regarding vessel status, were movable work platforms used in a ship repair yard. The Supreme Court held that whether such structures were vessels was a material fact issue in the summary judgment context. The structures were moved about within the repair yard by tugboats. They had no power themselves, means of steering, navigation lights, navigation aids, or living facilities.

_____.[1]

4.4

JONES ACT—NEGLIGENCE

Under the Jones Act, the plaintiff _____ must prove that his employer was negligent. Negligence is the doing of an act that a reasonably prudent person would not do, or the failure to do something that a reasonably prudent person would do, under the same or similar circumstances. The occurrence of an accident, standing alone, does not mean anyone's negligence caused the accident.

In a Jones Act claim, the word "negligence" is given a liberal interpretation. It includes any breach of duty that an employer owes to his employees who are seamen, including the duty of providing for the safety of the crew.

Under the Jones Act, if the employer's negligent act caused the plaintiff's injury[1], in whole

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[1]The spouse of an injured seaman probably cannot recover damages for loss of consortium, either under the Jones Act or for the unseaworthiness of the vessel. See Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); Anglada v. Tidewater, Inc., 752 F.Supp. 722 (E.D.La.1990). But see Rayborn v. Zapata Offshore Co., ___ F.Supp. ___, No. 90-0467, slip op. (W.D.La. May 2, 1991); Verdin v. L & M Bo-Truc Rental, Inc., 1991 WL 87930 (E.D.La.1991). The Fifth Circuit has resolved the conflict among the district courts and held that the spouse of an injured seaman cannot recover for loss of consortium. Murray v. Anthony J. Bertucci Constr. Co., Inc., 958 F.2d 127 (5th Cir.1992); Michel v. Total Transp., Inc., 957 F.2d 186 (5th Cir.1992).

[1]The Supreme Court, in Consolidated Rail Corporation v. Gottshall, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), held that a railroad, as part of its duty to provide its employees with a safe place to work under FELA, has a duty to avoid subjecting its workers to negligently inflicted emotional injury. The Court ruled that "injury" as used in that statute may encompass both physical and emotional injury. The Court further announced that a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, but a worker outside the zone of danger will not. Because FELA standards have been carried into the Jones Act, this zone of danger standard applies to Jones Act claims as well as FELA claims. Therefore, in Jones Act cases in which plaintiff sues for purely emotional injury, without physical impact but within the zone of danger which causes a fear of physical impact, it is recommended by the Committee that the jury be instructed in a manner consistent herewith. Whether a reasonable person under the

or in part, then you must find that the employer is liable under the Jones Act.

Negligence under the Jones Act may consist of a failure to comply with a duty required by law. Employers of seamen have a duty to provide their employees with a reasonably safe place to work. If you find that the plaintiff was injured because the defendant failed to furnish him with a reasonably safe place to work, and that the plaintiff's working conditions could have been made safe through the exercise of reasonable care, then you must find that the defendant was negligent.

The fact that the defendant conducted its operations in a manner similar to that of other companies is not conclusive as to whether the defendant was negligent or not.

You must determine if the operation in question was reasonably safe under the circumstances. The fact that a certain practice has been continued for a long period of time does not necessarily mean that it is reasonably safe under all circumstances. A long accepted practice may be an unsafe practice. However, a practice is not necessarily unsafe or unreasonable merely because it injures someone.

A seaman's employer is legally responsible for the negligence of one of his employees while that employee is acting within the course and scope of his job [employment].

If you find from a preponderance of the evidence that the defendant assigned the plaintiff to perform a task that the plaintiff was not adequately trained to perform, you must find that the defendant was negligent.

4.5

UNSEAWORTHINESS

The plaintiff seeks damages for personal injury that he claims was caused by the unseaworthiness of the defendant's vessel, the _____.

A shipowner owes to every member of the crew employed on its vessel the absolute duty to keep and maintain the ship, and all decks and passageways, appliances, gear, tools, parts and equipment of the vessel in a seaworthy condition at all times.

A seaworthy vessel is one that is reasonably fit for its intended use. The duty to provide a seaworthy vessel is absolute because the owner may not delegate that duty to anyone. Liability for an unseaworthy condition does not in any way depend upon negligence or fault or blame. If an owner does not provide a seaworthy vessel—a vessel that is reasonably fit for its intended use—no amount of care or prudence excuses the owner.

The duty to provide a seaworthy vessel includes a duty to supply an adequate and competent crew. A vessel may be unseaworthy even though it has a numerically adequate crew, if too few

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circumstances would have had a fear of physical impact is a question for the jury.

persons are assigned to a given task.

However, the owner of a vessel is not required to furnish an accident free ship. He need only furnish a vessel and its appurtenances that are reasonably fit for their intended use and a crew that is reasonably adequate for their assigned tasks.

The shipowner is not required to provide the best appliances and equipment, or the finest of crews, on his vessel. He is only required to provide gear that is reasonably proper and suitable for its intended use, and a crew that is reasonably adequate.

In summary, if you find that the owner of the vessel did not provide an adequate crew of sufficient manpower to perform the tasks required, or if you find that the vessel was in any manner unfit in accordance with the law as I have just explained it to you and that this was a proximate cause of the injury, a term I will explain to you, then you may find that the vessel was unseaworthy and the shipowner liable, without considering any negligence on the part of the defendant or any of its employees.

However, if you find that the owner had a capable crew and appliances and gear that were safe and suitable for their intended use, then the vessel was not unseaworthy and the defendant is not liable to the plaintiff on the claim of unseaworthiness.

4.6

CAUSATION

Not every injury[1] that follows an accident necessarily results from it. The accident must be the cause of the injury.

In determining causation, a different rule applies to the Jones Act claim and to the unseaworthiness claim.

Under the Jones Act, for both the employer's negligence and the plaintiff's contributory negligence[2] an injury or damage is considered caused by an act or failure to act if the act or omission brought about or actually caused the injury or damage, in whole or in part.

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[1]See Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), regarding claims for purely emotional injuries within the zone of danger of physical impact. If a claim for purely emotional injuries is made, without physical impact but within the zone of danger which causes a fear of physical impact, then an instruction should be given consistent with *Gottshall.* See also Pattern Instruction 4.4.

[2]Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir.1997) (en banc).

In an unseaworthiness claim, the plaintiff must show, not merely that the unseaworthy condition was a cause of the injury, but that such condition was a proximate cause of it. This means that the plaintiff must show that the condition in question played a substantial part [was a substantial factor] in bringing about or actually causing his injury, and that the injury was either a direct result or a reasonably probable consequence of the condition.

4.7

CONTRIBUTORY NEGLIGENCE

The defendant contends that the plaintiff was negligent, and that the plaintiff's negligence caused or contributed to causing his injury. This is the defense of contributory negligence. The defendant has the burden of proving that the plaintiff was contributorily negligent. If the plaintiff was guilty of contributory negligence that contributed to his injury, he nevertheless may recover. However, the amount of his recovery will be reduced by the extent of his contributory negligence.

A seaman is obligated under the Jones Act to act with ordinary prudence under the circumstances. The circumstances of a seaman's employment include not only his reliance on his employer to provide a safe work environment, but also his own experience, training and education. In other words, under the Jones Act a seaman has the duty to exercise that degree of care for his own safety that a reasonable seaman would exercise in like circumstances.[1]

If you find that the defendant was negligent (the vessel was unseaworthy), and that the (negligence) (unseaworthiness) was a proximate (legal) cause of the plaintiff's injury, but you also find that the accident was due partly to the contributory negligence of the plaintiff, then you must determine the percentage the plaintiff's contributory negligence contributed to the accident. You will provide this information by filling in the appropriate blanks in the special interrogatories. Do not make any reduction in the amount of damages that you award to the plaintiff. I will reduce the damages that you award by the percentage of contributory negligence that you assign to the plaintiff.

4.8

DAMAGES

If you find that the defendant is liable, you must award the amount you find by a preponderance of the evidence as full and just compensation for all of the plaintiff's damages. [*If there is no issue of punitive damages for the jury, continue with this instruction. If there is, however, then this instruction should be prefaced with: You also will be asked to determine if the Defendant is liable for punitive damages, and, if so, you will be asked to fix the amount of those damages. Because the method of determining punitive damages and compensatory damages differ, I will instruct you separately on punitive damages. The instructions I now give you apply only to your award, if any, of compensatory damages.*] Compensatory damages are not allowed as a punishment against a party. Such damages cannot be based on speculation, for it is only actual damages—what

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[1]Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir.1997) (en banc).

the law calls compensatory damages—that are recoverable. However, compensatory damages are not restricted to actual loss of time or money; they include both the mental and physical aspects of injury, tangible and intangible. They are an attempt to make the plaintiff whole, or to restore him to the position he would have been in if the accident had not happened.

You should consider the following elements of damages, to the extent you find that the plaintiff has established such damages by a preponderance of the evidence: physical pain and suffering including physical disability, impairment, and inconvenience, and the effect of the plaintiff's injuries and inconvenience on the normal pursuits and pleasures of life; mental anguish and feelings of economic insecurity caused by disability; income loss in the past; impairment of earning capacity or ability in the future, including impairment in the normal progress in the plaintiff's earning capacity due to his physical condition; postmedical expenses; the reasonable value, not exceeding actual cost to the plaintiff, of medical care that you find from the evidence will be reasonably certain to be required in the future as a proximate result of the injury in question.

Some of these damages, such as mental or physical pain and suffering, are intangible things about which no evidence of value is required. In awarding these damages, you are not determining value, but you should award an amount that will fairly compensate the plaintiff for his injuries.

Any award you make to the plaintiff is not subject to income tax; neither the state nor the federal government will tax it. Therefore, you should determine the amount that plaintiff is entitled to receive without considering the effect of taxes upon it.

4.9

LOSS OF SOCIETY

In addition to the damages that the plaintiff _____ demands, plaintiff _____ seeks damages for loss of society with her husband, _____, which she claims she has suffered as a result of his accident.

The spouse of an injured person may recover damages for loss of society if she proves by a preponderance of the evidence that she has suffered loss of society with her husband and that that loss of society was caused by injuries to her husband that are attributable to the fault of the defendant.[1]

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[1]The spouse of an injured seaman probably cannot recover damages for loss of consortium, either under the Jones Act or for the unseaworthiness of the vessel. See Miles v. Apex Marine Corp., 498 U.S. 19, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990); Anglada v. Tidewater, Inc., 752 F.Supp. 722 (E.D.La.1990). But see Rayborn v. Zapata Offshore Co., ___ F.Supp. ___, No. 90-0467, slip op. (W.D.La. May 2, 1991); Verdin v. L & M Bo-Truc Rental, Inc., 1991 WL 87930 (E.D.La.1991). The Fifth Circuit has resolved the conflict among the district courts and held that the spouse of an injured seaman cannot recover for loss of consortium. Murray v. Anthony J. Bertucci Constr. Co., Inc., 958 F.2d 127 (5th Cir.1992); Michel v. Total Transp., Inc., 957 F.2d 186 (5th Cir.1992).

Loss of society covers only the loss of love, affection, care, attention, comfort, protection and sexual relations the spouse has experienced. It does not include loss of support or loss of income that the spouse sustains. And it does not include grief or mental anguish.

Therefore, if you find by a preponderance of the evidence that plaintiff _____ suffered loss of society with her husband, _____ as a result of injuries caused by the fault of the defendant, you may award her damages for loss of society. If, on the other hand, you find from a preponderance of the evidence that plaintiff _____ did not sustain loss of society with her husband _____ as a result of injuries attributable to the fault of the defendant, then you may not award her damages for loss of society.

You may not award damages for any injury or condition from which the plaintiffs may have suffered, or may now be suffering, unless it has been proved by a preponderance of the evidence that the accident proximately or directly caused such injury or condition.

4.10

PUNITIVE DAMAGES

1. Under General Maritime Law

You may but are not required to award punitive damages against a defendant who has acted willfully and wantonly. The purpose of an award of punitive damages is to punish the defendant and to deter him and others from acting as he did.[1]

A person acts willfully or wantonly if he acts in reckless or callous disregard of, or with indifference to, the rights of the plaintiff. An actor is indifferent to the rights of another, regardless of the actor's state of mind, when he proceeds in disregard of a high and excessive degree of danger that is known to him or was apparent to a reasonable person in his position.[2]

2. Unseaworthiness

You may, but are not required to, award punitive damages if you find that the shipowner, _____, wantonly or willfully failed to provide the plaintiff with a seaworthy vessel, and that failure was a proximate cause of the plaintiff's injuries.

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[1]On the general subject of punitive damages and the guidelines to be considered in fashioning jury charges, see Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

[2]Prosser and Keeton on Torts, Fifth Edition, Sec. 34, p. 213, West Publishing Company, 1984.

4.11

MAINTENANCE AND CURE (APPENDED TO JONES ACT—UNSEAWORTHINESS CLAIMS)

The plaintiff's third claim is that, as a seaman, he is entitled to recover Maintenance and Cure. This claim is separate and independent from both the Jones Act and the unseaworthiness claims of the plaintiff. You must decide this claim separately from your determination of his Jones Act and unseaworthiness claims.

Maintenance and Cure is a seaman's remedy. [If you determine that plaintiff was a seaman, you then must determine if he is entitled to maintenance and cure.] [Plaintiff is a seaman; thus you must determine whether he is entitled to maintenance and cure.]

Maintenance and cure provides 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 himself, while recuperating.

A seaman is entitled to maintenance and cure even though he was not injured as a result of any negligence on the part of his employer or any unseaworthy condition of the vessel. To recover maintenance and cure, the plaintiff need only show that he suffered injury or illness while in the service of the vessel on which he was employed as a seaman, without willful misbehavior on his part. The injury or illness need not be work related, it need only occur while the seaman is in the service of the ship. And maintenance and cure may not be reduced because of any negligence on the part of the seaman.

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 for any period of time during which a seaman is hospitalized at the employer's expense.

Maintenance is the cost of food and lodging, and transportation to and from a medical facility. A seaman is not entitled to maintenance for that period of time that he is an inpatient in any hospital, because the cure provided by the employer through hospitalization includes the food and lodging of the seaman.

A seaman is entitled to receive maintenance and cure from the date he leaves the vessel until he reaches the point of what is called "maximum cure." Maximum cure is the point at which no further improvement in the seaman's medical condition is reasonably expected. Thus, if it appears that a seaman's condition is incurable, or that the treatment will only relieve pain but will not improve a seaman's physical condition, he has reached maximum cure. The obligation to provide maintenance and cure usually ends when qualified medical opinion is to the effect that maximum possible cure has been accomplished.

If you decide that the plaintiff is entitled to maintenance and cure, you must determine when the employer's obligation to pay maintenance began, and when it ends. One factor you may consider in determining when the period ends is the date when the seaman resumed his employment, if he did so. However, if the evidence supports a finding that economic necessity forced the seaman to return

to work prior to reaching maximum cure, you may take that finding into consideration in determining when the period for maintenance and cure ends.

If you find that the plaintiff is entitled to an award of damages under either the Jones Act or unseaworthiness claims, and if you award him either lost wages or medical expenses, then you may not award him maintenance and cure for the same period of time. That is because the plaintiff may not recover twice for the same loss of wages or medical expenses. However, the plaintiff may also be entitled to an award of damages for failure to pay maintenance and cure when it was due.[1]

A shipowner who has received a claim for maintenance and cure is entitled to investigate the claim. However, if after investigating the claim, the shipowner unreasonably rejects the claim for maintenance and cure, he is liable for both the maintenance and cure payments he should have made, and any compensatory damages caused by his unreasonable failure to pay. Compensatory damages may include any aggravation of the plaintiff's condition because of the failure to provide maintenance and cure.

Thus, you may award compensatory damages because the shipowner failed to provide maintenance and cure if you find by a preponderance of the evidence that:

1. The plaintiff was entitled to maintenance and cure;

2. It was not provided;

3. The defendant acted unreasonably in failing to provide maintenance and cure; and

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[1]The existence and extent of the double recovery problem will vary from case to case. Avoidance of double recovery will require careful screening of the evidence and a jury charge tailored in each case to fit the evidence presented.

For example, if the value of the food and/or lodging supplied to the seaman by the vessel owner is included in the wage base from which loss of earnings is calculated, then those items must not again be awarded as maintenance.

Likewise, if a jury awards loss of earnings from date of injury to some date which is subsequent to the end of the voyage, then those same earnings can't again be awarded as part of maintenance recovery pursuant to the ship owner's obligation to provide wages till the end of the voyage.

See Colburn v. Bunge Towing, Inc., et al., 883 F.2d 372 (5th Cir.1989).

4. The failure to provide the maintenance and cure resulted in some injury to the plaintiff.[2]

If you also find that the shipowner's failure to pay maintenance and cure was not only unreasonable, but was willful, that is, with the deliberate intent to do so, you may also award the plaintiff attorney's fees. However, you should not award attorney's fees unless the shipowner acted willfully in disregard of the seaman's claim for maintenance and cure. The plaintiff may not recover attorney's fees for the prosecution of the Jones Act or unseaworthiness claims. Thus, you may award only those attorney's fees plaintiff incurred in pursuing the maintenance and cure claim and only if you find that the shipowner acted willfully in failing to pay maintenance and cure.[3]

The plaintiff may not recover attorney's fees for the prosecution of the Jones Act or unseaworthiness claims. You may award attorney's fees only if you find that the shipowner acted arbitrarily or with callous disregard, in failing to pay maintenance and cure.

4.12

LOSS OF FUTURE EARNINGS (REPLACEMENT FOR CULVER II)[1]

If you find that the plaintiff is entitled to an award of damages for loss of future earnings, there are two particular factors you must consider. First, you should consider loss after income taxes; that is, you should determine the actual or net income that plaintiff has lost or will lose, taking into consideration that any past or future earnings would be subject to income taxes. You must award the plaintiff only his net earnings after tax. This is so because any award you may make here is not subject to income tax. The federal or state government will not tax any amount which you award on this basis.

Second, an amount to cover a future loss of earnings is more valuable to the plaintiff if he received the amount today than if he received the same amount in the future. Therefore, if you decide to award plaintiff an amount for lost future earnings, you must discount it to present value by considering what return would be realized on a relatively risk free investment.

4.13

SECTION 905(B) LONGSHORE AND HARBOR WORKER'S COMPENSATION ACT CLAIM

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[2]Morales v. Garijak, Inc., 829 F.2d 1355 (5th Cir.1987).

[3]Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995), held punitive damages are not awardable even for willful failure to pay maintenance and cure.

[1]See Monessen Southwestern Railway Co. v. Morgan, 486 U.S. 330, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988).

Introduction

Note: A maritime worker who is a seaman has the Jones Act remedy against his employer, and an unseaworthiness claim against the operator of the vessel as to which he is a seaman, whether the vessel operator is his employer or not. A maritime worker who is not a seaman may claim LHWCA benefits from his employer, and may bring a negligence action [33 U.S.C. Sec. 905(b)] against the operator of the vessel on which he is working (and, in some cases, against his employer, if his employer is operating the vessel). The standards for liability under the Jones Act and unseaworthiness differ from those for liability under Section 905(b). The United States Supreme Court has said that the categories of maritime worker—seaman and non-seaman—are mutually exclusive,[1] and the U.S. Fifth Circuit Court of Appeals has ruled that if a worker is covered by the LHWCA, he cannot qualify for seaman status.[2] The U.S. Ninth Circuit Court of Appeals has reached the opposite conclusion, holding that the initial inquiry is whether the worker is a seaman, and the U.S. Supreme Court granted writs in the Ninth Circuit case. The Supreme Court affirmed the Ninth Circuit and, in doing so, impliedly overruled the Fifth Circuit ruling, which is now of doubtful value. Seaman status and LHWCA status are mutually exclusive, requiring independent determinations, as the facts of the case may require. A maritime worker is limited to LHWCA remedies only if no genuine issue of fact exists as to whether the worker was a seaman under the Jones Act.[3]

LHWCA STATUS

A worker is covered by the LHWCA if he is engaged in maritime employment and is injured at a place within the coverage of the act. These are two separate requirements.

A worker is engaged in maritime employment if:

(1) he is injured on actual navigable waters in the course of his employment on those waters,[4] or

(2) he is injured while engaged in an essential part of the loading or unloading process of a

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[1]McDermott International, Inc. v. Wilander, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991).

[2]Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir.1987).

[3]Southwest Marine, Inc. v. Byron Gizoni, 502 U.S. 81, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991); See Gizoni v. Southwest Marine, Inc., 909 F.2d 385 (9th Cir.1990).

[4]Director v. Perini North River Associates, 459 U.S. 297, 103 S.Ct. 634, 74 L.Ed.2d 465 (1983).

vessel.[5]

Note: A special charge may be appropriate if reasonable minds could conclude that the plaintiff was engaged in the activities described in 33 USC Sec. 902(3)(A)–(H).[6]

A place is within the coverage of the act if it is either actual navigable waters, an area adjoining actual navigable waters, or an area adjoining an area adjoining actual navigable waters and customarily used by an employer in loading, unloading, building or repairing of a vessel.[7]

Note: A special charge may be appropriate if reasonable minds could conclude that the plaintiff's employment fit within 33 USC Sec. 903(d).[8]

SECTION 905(b) NEGLIGENCE CHARGE

If you find that the plaintiff, _____, was covered by the LHWCA at the time of his injury, then you must determine whether plaintiff's injury was caused by the negligence of the defendant, the operator of the vessel _____. The defendant does not owe plaintiff the duty to provide a seaworthy vessel; the defendant is liable only if he was guilty of negligence which was the legal cause of the plaintiff's injury.

Negligence is the failure to exercise reasonable care under the circumstances. A vessel operator such as defendant must exercise reasonable care before the plaintiff's employer, a (here, insert "stevedore," or the other type of maritime employment in which the plaintiff's employer was engaged on the vessel) began its operations on the vessel. This means that the defendant must use reasonable care to have the vessel and its equipment in such condition that an expert and experienced

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[5]Chesapeake and Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989), and cases cited therein.

[6]These subsections exclude from the definition of maritime workers certain clerical, recreational, marina and aquaculture workers, employees of suppliers or vendors, suppliers or transporters temporarily doing business on a covered premise and not engaged in work normally performed by the employer, masters or members of the crew of a vessel, and certain persons employed to build, load, unload or repair certain vessels.

[7]33 U.S.C. § 903.

[8]The cited section excludes from coverage certain employees injured while working in certain areas of a facility engaged exclusively in building, repairing or dismantling certain small vessels, unless the facility receives Federal maritime subsidies or the employee is not covered by a state worker compensation law.

(here, insert "stevedore," or the other type of maritime employment in which the plaintiff's employer was engaged on the vessel) would be able, by the exercise of reasonable care, to carry on its work on the vessel with reasonable safety to persons and property. This means that the defendant must warn the plaintiff's employer of a hazard on the ship, or a hazard with respect to the ship's equipment, if:

> The defendant knew about the hazard, or should have discovered it in the exercise of reasonable care, and
>
> The hazard was one which was likely to be encountered by the plaintiff's employer in the course of his operations in connection with the defendant's vessel, and
>
> The hazard was one which the plaintiff's employer did not know about, and which would not be obvious to or anticipated by a reasonably competent (stevedore, or other designated maritime employer) in the performance of his work. Even if the hazard was one about which the plaintiff's employer knew, or which would be obvious or anticipated by a reasonably competent (here, insert "stevedore" or the other type of maritime employment in which the plaintiff's employer was engaged on the vessel), the defendant must exercise reasonable care to avoid the harm to plaintiff if the hazard was one which defendant knew or should have known the plaintiff's employer would not or could not correct and the plaintiff could not or would not avoid.[9]

The standard of care which a vessel operator owes to the plaintiff after the plaintiff's employer began its operations on the vessel is different.

If, after the plaintiff's employer began operations on the vessel, the defendant actively involved itself in those operations, it is liable if it failed to exercise reasonable care in doing so, and

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[9]This sentence does not appear in the Scindia decision (see footnote 10, post) but appears warranted from a number of subsequent lower court decisions. See, e.g., Pluyer v. Mitsui O.S.K. Lines, Ltd., 664 F.2d 1243 (5th Cir.1982); Griffith v. Wheeling-Pittsburgh Steel Corp., 657 F.2d 25 (3d Cir.1981); Harris v. Reederei, 657 F.2d 53 (4th Cir.1981); Moore v. M.P. Howlett, Inc., 704 F.2d 39 (2d Cir.1983). The language selected should not conflict with the rule that the shipowner has no duty to anticipate the negligence of the stevedore. See, e.g., Polizzi v. M/V Zephyros II Monrovia, 860 F.2d 147 (5th Cir.1988). The Supreme Court has held, for example, that the exercise of reasonable care does not require the ship-owner to supervise the ongoing operations of the loading stevedore (or other stevedores who handle the cargo before its arrival in port) or to inspect the completed stow. Howlett v. Birkdale Shipping Co., S.A., 512 U.S. 92, 114 S.Ct. 2057, 129 L.Ed.2d 78 (1994), on remand, 1995 WL 27104 (E.D.Pa.1995). In *Howlett,* the Supreme Court dealt with the turnover duty to warn of latent defects in the cargo stow and cargo area, and held that the duty is a narrow one.

such failure was the cause of plaintiff's injuries.

If, after the plaintiff's employer began operations on the vessel, the defendant maintained control over equipment or over an area of the vessel on which the plaintiff could reasonably have been expected to go in the performance of his duties, the defendant must use reasonable care to avoid exposing the plaintiff to harm from the hazards the plaintiff reasonably could have been expected to encounter from such equipment or in such area.

If, after the plaintiff's employer began its operations on the vessel, the defendant learned that an apparently dangerous condition existed (including a condition which existed before the plaintiff's employer began its operations) or has developed in the course of those operations, the defendant vessel owner must use reasonable care to intervene to protect the plaintiff against injury from that condition only if the plaintiff's employer's judgment in continuing to work in the face of such a condition was so obviously improvident that the defendant should have known that the condition created an unreasonable risk of harm to the plaintiff. In determining whether the plaintiff's employer's judgment is "so obviously improvident" that the defendant should have intervened, you may consider that the plaintiff's employer has the primary duty to provide a safe place to work for plaintiff and its other employees, and that the defendant ordinarily must justifiably rely upon the plaintiff's employer to provide his employees with a reasonably safe place to work. In determining whether the defendant justifiably relied upon the decision of the plaintiff's employer to continue the work despite the condition, you should consider the expertise of the plaintiff's employer, the expertise of the defendant, and any other factors which would tend to establish whether the defendant was negligent in failing to intervene into the operations of the plaintiff's employer.[10]

PATTERN JURY INSTRUCTIONS

RAILROAD EMPLOYEES

5. RAILROAD EMPLOYEES

5.1

FEDERAL EMPLOYERS LIABILITY ACT (45 U.S.C. SECTION 51 ET SEQ.)

The plaintiff is making a claim under the Federal Employers Liability Act. To win, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. That at the time of the plaintiff's injury[1], he (she) was an employee of the defendant

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[10]Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981); Randolph et al. v. Laeisz, 896 F.2d 964 (5th Cir.1990).

[1]The Supreme Court, in Consolidated Rail Corporation v. Gottshall, 512 U.S. 532, 114 S.Ct. 2396, 129 L.Ed.2d 427 (1994), held that a railroad, as part of its duty to provide its employees with a safe place to work under FELA, has a duty to avoid