INTRODUCTORY COMMENT

These instructions were prepared for use in an action brought under maritime common law and the Jones Act, 46 U.S.C. § 688, by a "seaman" against his or her employer. The instructions focus on the issues of negligence, contributory negligence, unseaworthiness, and maintenance and cure. They assume that the plaintiff was injured while in the course of employment as a crew member of a vessel.

Definitional sections for "crew member," "vessel," "in the course of employment," and "in the service of the vessel" have not been included because of the infinite variety of situations that arise. For assistance in dealing with these terms, it is preferable to refer to cases with fact patterns similar to the case under consideration. *See, e.g., Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (discussing "crew member," and "vessel"); *Kathriner v. UNISEA, Inc.*, 975 F.2d 657 (9th Cir.1992) (discussing "vessel in navigation").

In order to recover under the Jones Act, or under the doctrine of unseaworthiness, the plaintiff must be a "seaman." A new instruction on seaman status has been included. *See* Instruction 9.1 (Seaman Status).

9.1 SEAMAN STATUS

The plaintiff seeks recovery against the defendant under the Jones Act [and the doctrine of unseaworthiness]. Only a "seaman" can bring these claims. The parties dispute whether or not the plaintiff was a seaman at the time of his injury.

The plaintiff must prove that the plaintiff was a "seaman" in order to recover. To prove seaman status, the plaintiff must prove both of the following elements by a preponderance of the evidence:

1. the vessel on which the plaintiff was employed was in navigation and the capacity in which the plaintiff was employed contributed to the vessel's mission or to the operation or maintenance of the vessel under way or while at anchor or tied up in preparation for future trips. A person need not aid in the navigation of a vessel in order to qualify as a seaman; and

2. the plaintiff had a more or less permanent connection with the vessel which was substantial in terms of time and work, rather than sporadic, temporary, or incidental.

Comment

See Harbor Tug & Barge Company v. Papai, 520 U.S. 548, 554 (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 355 (1995); *Gizoni v. Southwest Marine Inc.*, 56 F.3d 1138, 1141 (9th Cir.1995) (two elements of test discussed). The seaman inquiry is a mixed question of law and fact, and when necessary, should be submitted to the jury. *Delange v. Dutra Construction Co.*, 183 F.3d 916, 919 (9th Cir.1999).

A plaintiff may be entitled to an instruction on the fleet seaman doctrine if it has some foundation in the evidence. *Gizoni*, 56 F.3d at 1141 ("Under the fleet doctrine, one can acquire 'seaman status' through permanent assignment to a group of vessels under common ownership or control.").

The Longshore and Harbor Workers' Compensation Act (LHWCA) excludes from its coverage "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). Masters and crew members are entitled to sue under the Jones Act and the doctrine of unseaworthiness. A non-"seaman" is limited to the remedies of the LHWCA.

9.2 JONES ACT—NEGLIGENCE CLAIM— ELEMENTS AND BURDEN OF PROOF (46 APP. U.S.C. § 688)

On the plaintiff's Jones Act claim, the plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the defendant was negligent as claimed; and

2. the defendant's negligence was a cause of the injury to the plaintiff.

If you find that both of the elements on which the plaintiff has the burden of proof have been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove either of these elements, your verdict should be for the defendant.

Comment

For a discussion of the elements of a Jones Act negligence claim, see *In re Hechinger*, 890 F.2d 202, 208 (9th Cir.1989) ("To recover under a Jones Act claim, a plaintiff has the burden of establishing by a preponderance of the evidence, negligence on the part of his employer ... [and] that the act of negligence was a cause, however slight, of his injuries." (quotations and citation omitted)), *cert. denied*, 498 U.S. 848 (1990). *Cf. Mohn v. Marla Marie, Inc.*, 625 F.2d 900 (9th Cir.1980).

9.3 JONES ACT—NEGLIGENCE DEFINED

Negligence is the failure to use reasonable care. Reasonable care is the degree of care that reasonably prudent persons would use under like circumstances to avoid injury to themselves or others. Negligence is the doing of something that a reasonably prudent person would not do, or the failure to do something that a reasonably prudent person would do, under like circumstances.

9.4 JONES ACT—NEGLIGENCE CLAIM—CAUSATION

Negligence is a cause of an injury or damage if it played any part, no matter how small, in bringing about the injury or damage. Therefore, even if the negligence operated in combination with the acts of another, or in combination with some other cause, the negligence was a cause of the injury or damage if it played any part, no matter how small, in bringing about the injury or damage.

Comment

See Ribitzki v. Canmar Reading & Bates, Ltd. Partnership, 111 F.3d 658, 662 (9th Cir.1997) ("even the slightest negligence" is sufficient to support a Jones Act finding of negligence) (citing *Havens v. F/T Polar Mist*, 996 F.2d 215, 218 (9th Cir.1993)). This test is often described as a "featherweight causation standard" and allows a seaman to survive summary judgment by presenting even the slightest proof of causation. *Ribitzki*, 111 F.3d at 664.

The requirement of cause for the plaintiff's negligence claim is different from that for the unseaworthiness claim.

Where negligence and unseaworthiness are both claimed, it may be advisable to compare the causal requirements for each. *See Lies v. Farrell Lines*, 641 F.2d 765, 769 n.7 (9th Cir.1981).

9.5 JONES ACT—PLAINTIFF'S COMPLIANCE WITH DEFENDANT'S REQUEST OR DIRECTIONS

The plaintiff is not negligent simply because the plaintiff, upon the request or direction of the defendant, worked at a dangerous job, or in a dangerous place, or under dangerous conditions.

Comment

Use this instruction only where the plaintiff's compliance with an employer's request or direction is an issue. Under the "primary duty" doctrine, "a seaman-employee may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employment." *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836 (9th Cir.1989).

The primary duty rule is not applicable "where a seaman is injured by a dangerous condition that he did not create and, in the proper exercise of his employment duties, could not have controlled or eliminated." *See Bernard v. Maersk Lines, Ltd.*, 22 F.3d 903, 907 (9th Cir.1994).

A seaman who follows a supervisor's urgent call to the crew for help cannot be found contributorily negligent. *Simenoff v. Hiner*, 249 F.3d 883, 890–91 (9th Cir.2001).

9.6 UNSEAWORTHINESS CLAIM—ELEMENTS AND BURDEN OF PROOF

On the plaintiff's unseaworthiness claim, the plaintiff has the burden of proving both of the following elements by a preponderance of the evidence:

1. the [*name of vessel*] was unseaworthy; and

2. the unseaworthy condition was a cause of an injury to the plaintiff.

If you find that both of the elements on which the plaintiff has the burden of proof have been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove either of these elements, your verdict should be for the defendant.

Comment

"A shipowner has an absolute duty to furnish a seaworthy ship." *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960). A seaworthy ship is one reasonably fit for its intended use. *Ribitzki v. Canmar Reading & Bates, Ltd. Partnership*, 111 F.3d 658 (9th Cir.1997).

See also Comment to Instruction 9.7 (Unseaworthiness Defined).

9.7 UNSEAWORTHINESS DEFINED

A vessel owner has a duty to provide and maintain a seaworthy vessel. [That duty cannot be turned over to anyone else.]

A vessel is seaworthy if the vessel and all of its parts and equipment are reasonably fit for their intended purpose [and it is operated by a crew reasonably adequate and competent for the work assigned].

A vessel is unseaworthy if the vessel, or any of its parts or equipment, is not reasonably fit for its intended purpose [or if its crew is not reasonably adequate or competent to perform the work assigned].

A vessel owner has a duty to provide adequate safety equipment for the vessel. However, the owner of the vessel is not required to furnish an accident-free ship. A vessel owner is not called on to have the best parts and equipment, or the finest of crews, but is required to have what is reasonably proper and suitable for its intended use, and a crew that is reasonably competent and adequate.

Comment

For a definition of a seaworthy vessel, see *Ribitzki v. Canmar Reading & Bates, Ltd.* Partnership, 111 F.3d 658, 664 (9th Cir.1997) and *Havens v. F/T Polar Mist*, 996 F.2d 215, 217–8 (9th Cir.1993).

A shipowner has the duty to a seaman employed on the ship to furnish a vessel and appurtenances which are reasonably fit for their use. This includes maintaining a ship's equipment in proper operating condition. The failure of a piece of equipment under proper and expected use is sufficient to establish unseaworthiness. *Lee v. Pacific Far E. Line*, 566 F.2d 65, 67 (9th Cir.1977). *But see Mitchell v. Trawler Racer*, 362 U.S. 539, 550 (1960) (no obligation to furnish accident-free ship).

A vessel may be unseaworthy because of "defective" crew members. *Pashby v. Universal Dredging Corp.*, 608 F.2d 1312, 1313–14 (9th Cir.1979) (violent or assaultive crew members may make vessel unseaworthy).

9.8 UNSEAWORTHINESS—CAUSATION

[The requirement of cause for the plaintiff's unseaworthiness claim is different from that for the negligence claim.]

Unseaworthiness is a cause of injury or damage if it played a substantial part in bringing about injury or damage.

Comment

A different test for causation applies to an unseaworthiness claim as compared to a Jones Act claim. *See Ribitzki v. Canmar Reading & Bates, Ltd. Partnership*, 111 F.3d 658, 665 (9th Cir.1997) (causation is established by showing the condition was a "substantial factor" in causing the injury). Where both Jones Act and unseaworthiness claims exist, the court should instruct on the causal requirements of each. *See Lies v. Farrell Lines*, 641 F.2d 765, 769 n. 7 (9th Cir.1981).

9.9 NEGLIGENCE OR UNSEAWORTHINESS—DAMAGES—PROOF

Comment

See Instruction 7.1 (Damages—Proof).

Punitive damages are not available. *See Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1505 (9th Cir.1995), *cert. denied*, 516 U.S. 1046 (1996).

The collateral source rule applies in cases brought under the Jones Act. *See Folkestad v. Burlington N., Inc.*, 813 F.2d 1377, 1380 n. 3 (9th Cir.1987) (citing *Gypsum Carrier, Inc. v. Handelsman*, 307 F.2d 525 (9th Cir.1962)).

"Maintenance" damages are unique to the Jones Act. These damages include the cost of obtaining room and board on land, equivalent to that provided at sea, for those periods that the plaintiff would have worked aboard ship but for this injury. *See* Instruction 9.11 (Jones Act—Maintenance and Cure).

9.10 NEGLIGENCE OR UNSEAWORTHINESS—PLAINTIFF'S NEGLIGENCE—REDUCTION OF DAMAGES

If you decide that the plaintiff has established by a preponderance of the evidence that the plaintiff is entitled to recover under [the Jones Act claim] [and/or] [the unseaworthiness claim], then you must determine whether the plaintiff's own negligence was also a cause of the plaintiff's injury. The defendant has the burden of proving by a preponderance of the evidence that the plaintiff was negligent and that the plaintiff's negligence was also a cause of the plaintiff's injury.

The plaintiff has a duty to use the care which a reasonably careful person would use under similar circumstances. The defendant must prove by a preponderance of the evidence that the plaintiff's failure to use due care contributed in some way to bringing about the plaintiff's injury.

If you decide that the plaintiff was negligent and that the plaintiff's negligence was a cause of the plaintiff's injury, you must then decide how much of the injury was caused by the plaintiff's negligence. This should be fixed as a percentage—for example, 10%, 50%, 90%. The percentage of the plaintiff's negligence, if any, is for you to decide. You must then write that percentage on the appropriate place on the verdict form. 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 negligence that you assign to the plaintiff.

Comment

See 46 App. U.S.C. § 688(a) (common-law rights or remedies in cases of personal injury to railway employees applies to a seaman injured in the course of employment); 45 U.S.C. § 53 (contributory negligence will not bar a railroad employee from suing the employer for tort damages).

Section 53 of the Federal Employers' Liability Act, 45 U.S.C. § 53, which provides for a reduction in the plaintiff's damages as a result of the plaintiff's comparative negligence, is applicable to actions under both the Jones Act and general maritime law. *See Kopczynski v. The Jacqueline*, 742 F.2d 555, 557–58 (9th Cir.1984), *cert. denied*, 471 U.S. 1136 (1985). *See also Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408–09 (1953) ("admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires"); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir.1995).

Comparative negligence is not applicable if a seaman is injured as a result of a violation of Coast Guard regulations. *See Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514, 517 (9th Cir.1996).

A seaman who follows a supervisor's urgent call to the crew for help cannot be found contributorily negligent. *Simenoff v. Hiner*, 249 F.3d 883, 890–91 (9th Cir.2001).

9.11 JONES ACT—MAINTENANCE AND CURE

On the plaintiff's maintenance and cure claim, the plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. the plaintiff was injured or became ill while in the service of the vessel;

2. maintenance and cure was not provided; and

3. the amount of maintenance and cure to which the plaintiff was entitled.

Maintenance is the cost of food and lodging, and transportation to and from a medical facility. The plaintiff is not entitled to maintenance while hospitalized because hospitalization includes food and lodging.

Cure is the cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines and medical apparatus.

The injury or illness need not be work-related so long as it occurs while in the service of the vessel. Neither maintenance nor cure may be reduced because of any negligence on the part of the plaintiff.

The plaintiff is entitled to receive 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. The plaintiff is entitled to recover maintenance and cure from the date of departure from the ship to the time of maximum cure under the circumstances. Maximum cure is the point at which no further improvement in the plaintiff's medical condition may be reasonably expected.

There can be no double recovery for the plaintiff. If you find that the plaintiff is entitled to an award of damages under the negligence claim or under the unseaworthiness claim, and if you include either loss of wages or medical expenses in the damage award relating to either of these claims, then maintenance or cure cannot be awarded for the same period.

If you find that each of the elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff. If, on the other hand, the plaintiff has failed to prove each of these element, your verdict should be for the defendant.

Comment

See Lipscomb v. Foss Maritime Co., 83 F.3d 1106, 1108 (9th Cir.1996); *Gardiner v. Sea–Land Serv.*, 786 F.2d 943, 945–46 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986); *Kopczynski v. The Jacqueline*, 742 F.2d 555, 557–58 (9th Cir.1984), *cert. denied*, 471 U.S. 1136 (1985).

The shipowner's duty to provide maintenance and cure arises irrespective of whether the illness or injury is suffered in the course of the seaman's employment, and negligence on the seaman's part will not relieve the shipowner of responsibility. *Vella v. Ford Motor Co.*, 421 U.S.

1, 4–5 (1975). A plaintiff may not recover for maintenance and cure where the injury or illness results from the plaintiff's own willful misbehavior. *See Omar v. Sea–Land Serv.*, 813 F.2d 986, 989–90 (9th Cir.1987).

Punitive damages are not available where payment for maintenance and cure is wrongfully denied. *See Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir.1995), *cert. denied,* 516 U.S. 1046 (1996).

If there is an issue as to willful or arbitrary failure to pay, see Instruction 9.12 (Jones Act—Willful or Arbitrary Failure to Pay Maintenance and Cure).

9.12 JONES ACT—WILLFUL OR ARBITRARY FAILURE TO PAY—MAINTENANCE AND CURE

The plaintiff also claims the defendant willfully or arbitrarily failed to pay [maintenance] [[and][or]] [cure] when it was due. On this claim, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the plaintiff was entitled to [maintenance] [[and][or]] [cure];

2. the defendant willfully or arbitrarily failed to provide [maintenance] [[and][or]] [cure]; and

3. the defendant's failure to provide [maintenance] [[and][or]] [cure] resulted in injury to the plaintiff.

Where the defendant's wilful or arbitrary failure to provide [maintenance] [[and][or]] [cure] worsens the plaintiff's injury, the plaintiff may recover resulting damages and expenses, including pain and suffering, and additional medical expenses.

If you find that each of these elements on which the plaintiff has the burden of proof has been proved, your verdict should be for the plaintiff on this claim. If, on the other hand, the plaintiff has failed to prove each of these elements, your verdict should be for the defendant on this claim.

Comment

See Comment following Instruction 9.11 (Jones Act—Maintenance and Cure).

If the claim is for only maintenance or cure, this instruction should be modified accordingly.

If the jury finds that the defendant wilfully or arbitrarily failed to pay maintenance or cure, the plaintiff will be entitled to reasonable attorneys' fees as determined by the court. A special interrogatory may be required.