

**MARITIME MALADIES AND MORTALITIES:
A SURVEY OF RECENT PERSONAL INJURY AND DEATH CASES
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A significant portion of reported maritime cases involve personal injuries and death. While there have been no major developments in recent years, the cases discussed below provide useful, and at times, colorful examples of the current application of traditional maritime principles.

We examine jurisdictional issues, what constitutes a vessel, choice of law questions (federal maritime law versus state law) and a potpourri of “course and scope of employment,” primary duty rule, adequacy of a damage award and finally, whether the West Nile virus is covered under the maintenance and cure doctrine.

1. Establishing jurisdiction in maritime and admiralty cases

A. In *Gruver v. Lesman Fisheries Inc.*, 489 F.3d 978, 2007 A.M.C. 1559 (9th Cir. 2007), a case arising out of the district court in the Western District of Washington the issue concerned whether a fight aboard a ship between a seaman and his former maritime employer over unpaid wages can give rise to federal admiralty jurisdiction. Jeff Gruver worked as a deckhand for Lesman Fisheries, Inc. aboard the shrimp and crab boat F/V SUNSET CHARGE for the owner and captain of the vessel, Robert Lesman. Gruver quit his job, although still owed some wages, and began working on a different fishing vessel, the F/V ADVENTUROUS.

Soon after he began working for the ADVENTUROUS Gruver angrily confronted Lesman at the dock, demanding his unpaid wages, and left threatening phone messages on Lesman’s voicemail in which Gruver demanded the money and warned that he would

hurt Lesman and damage his vessel unless he was paid. On June 11, 2004, plaintiff telephoned Mr. Lesman at his home and left the following message on the answering machine:

Yeah Lesman, this is Jeff Gruver. You want to try me, ok. I've been waiting all week for my check and it never showed up at my house. I'm not playing games, ok. My girls just got an eviction notice and I'm fucking pissed off at you. Ok, you want to try me, I'll get the Marshal to tie up your fucking boat. You don't want to fuck with me ok. You don't know me but nobody's not paid me in twenty-five years. I'm fucking crazy ok. You got a lot of nice shit. You want me to fuck your shit up? You best be giving me my money and don't give me that get on the dock fight shit because I will fight you and I will hurt you because I am not scared of you a bit. You best have my fucking paycheck. I am not fucking around any more. If you don't give me my fucking paycheck before I leave this fucking town I'll fuck you over 24/7 buddy. I want my fucking check now. I will see you when you get into town.

Gruver v. Lesman Fisheries, Inc., Not Reported in F.Supp.2d, 2005 WL 2090666 (W.D. Wash. 2005). The next day a check for \$203.44 was delivered to Gruver after which he left another voice mail on Mr. Lesman's answering machine stating:

Yeah Lesman, I got your check. I'm playin at the Lucky Eagle here. I got that statement here and you told me that I was getting 10% off the top with no fuel off the top. You only paid me 9% and charged me \$10 a day for living on the boat. You clipped me a hundred bucks here. I don't think you want to make an enemy for a few hundred bucks. It's not worth it. You don't know what I am capable of. So I think you best get me the rest of my money to me or we will part on fucking bad terms, alright. I will be looking forward to getting what you owe, alright. So pay up. Bye.

Id.

Within days of that second phone call, while Gruver was lying in his bunk on the ADVENTUROUS, Lesman boarded the dockside vessel looking for him. The parties gave divergent renditions of what happened next. According to Lesman, he was attempting to give Gruver a check for the remainder of his wages and that Gruver attacked him, resulting in a fight. Conversely, Gruver claimed that Lesman found him

asleep in his bunk and, with the help of Lesman's 380-pound nephew, beat Gruver severely, attempting to break his legs and vowing to kill him for leaving the threatening messages. Somehow Gruver escaped to a neighbor's house, and an ambulance was called. As a result of the fight, Gruver sustained broken ribs and a punctured lung. He was hospitalized for several days and later reported the incident to the police, leading to Lesman's arrest.

Gruver filed a complaint raising claims pursuant to admiralty and maritime law. In response, Lesman filed a motion to dismiss the case pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. The district court granted the motion dismissing Gruver's claim because he had failed to establish federal admiralty jurisdiction.

In deciding that it had subject matter jurisdiction, the court first recognized that, historically, admiralty jurisdiction turned solely on the question of whether the tort occurred on navigable waters. That test, however, has been "refined" over time so that today, a party seeking to invoke federal maritime jurisdiction over a tort claim must satisfy both a location test and a connection test. The former focusing on "whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." While the latter is comprised of two prongs: (1) an assessment of the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce; and (2) an examination of "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity."

In *Gruver* neither the location test nor the first prong of the connection test was at issue; the jurisdictional dispute focused on the second prong: "whether the general

character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.” The court explained that to warrant jurisdiction, the tortfeasor’s activity must be “so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply.” The court rejected the possibility that the assault could be the relevant activity for the purposes of the connection test’s second prong. Instead, the court framed the relevant activity giving rise to the assault in this case as the failure to pay wages for maritime services performed aboard a commercial vessel pointing out that “[i]t is clear that paying seamen for their work at sea has a substantial relationship to traditional maritime activities.” The court continued: “[t]he obligation of vessel owners and operators to pay workers for the services that enable such commerce is inextricably bound up in the ‘fundamental interest giving rise to maritime jurisdiction.’” Therefore, the court found both the location and connection tests were met and the court had subject matter jurisdiction.

B. The court similarly found admiralty jurisdiction in *Roane v. Greenwich Swim Committee*, 330 F. Supp. 2d 306, 2005 A.M.C. 45 (S.D.N.Y. 2004). Plaintiff Stephen Roane participated in the Greenwich Point One Mile Swim, organized and operated by defendant Greenwich Swim Committee (“GSC”), and held in the Long Island Sound, near Greenwich, Connecticut. Roane swam for approximately one-eighth of a mile when he began swallowing seawater and became severely distressed. Realizing that he could not continue in the race, he swam to a nearby buoy and signaled to a lifeguard in a kayak for help. The lifeguard paddled in Roane’s direction and directed

him to straddle the front of the kayak with his arms and legs. Roane was then transported to a support boat operated by defendant Walter McDermott.

McDermott was the owner of a 27 foot, twin engine Tiara 2700 Continental model motor vessel named the SEA BREEZE. The boat was powered by two Mercury inboard/outboard engines or sterndrives. Prior to the race, McDermott was having trouble with his vessel's engines which caused him to shut down the impaired port engine and use the starboard engine only.

As Roane approached the SEA BREEZE (straddling the bow of the rescue kayak) he was thrown a rope and instructed to board the boat by throwing his leg up on to the platform as the starboard engine continued to run. After several failed attempts to pull himself onto the boat, Roane was suddenly drawn beneath the vessel and struck by parts of the boat in his lower abdomen and testicles. It was subsequently discovered that Roane's loose fitting swimming trunks had become entangled in the port propeller.

In resolving the threshold issue of jurisdiction, the court determined first that Long Island Sound was, "unquestionably" a navigable waterway. Moving to the "connection" portion of the test, the court concluded that the attempted life salvage and the sale of pleasure boats to the public bore a "sufficiently substantial" relationship to traditional maritime activity to satisfy the second prong of the connection test. With regard to the "effect on maritime commerce" the court noted that "[n]ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction." After giving this lip service to limited jurisdiction, the court proceeded to reason that Long Island Sound is traversed by commercial vessels of various sizes and purposes, and those on board a boat in the Sound giving their full attention to the saving

of the life of a swimmer in difficulty might well be distracted from hazards posed by the approach of other boats unaware of the rescue in progress, or coming at speed in an effort to assist. Therefore, the court concluded that the case was within the Court's admiralty jurisdiction, and that the general maritime law applied.

2. "Resolving" the issue regarding what is, and is not, a "vessel"

A. The Supreme Court's decision in *Stewart v. Dutra Const. Co.*, **543 U.S. 481, 2005 A.M.C. 609 (2005)**, attempted to provide some clarity to the definition of a "vessel." In that case, Dutra Construction Company was employed by the Commonwealth of Massachusetts to work on Boston's Central Artery/Tunnel Project. At the time, Dutra owned the world's largest dredge, "the Super Scoop." The Super Scoop had certain characteristics common to seagoing vessels (*e.g.*, a captain and crew, navigational lights, ballast tanks, and a crew dining area) but it lacked others (*e.g.*, it had only limited means of self-propulsion). It was moved long distances by tugboat and navigated short distances by manipulating its anchors and cables.

Dutra hired Willard Stewart, a marine engineer, to maintain the mechanical systems on the Super Scoop during its dredging of the harbor. At the time of Stewart's accident, the Super Scoop lay idle because one of its scows, Scow No. 4, had suffered an engine malfunction and the other was at sea. Stewart was on board Scow No. 4, feeding wires through an open hatch located about 10 feet above the engine area. While Stewart was perched beside the hatch, the Super Scoop used its bucket to move the scow. In the process, the scow collided with the Super Scoop, causing a jolt that plunged Stewart headfirst through the hatch to the deck below causing serious injury.

Stewart, *inter alia*, filed a claim against Dutra under Section 5(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) (LHWCA), which authorizes covered employees to sue a "vessel" owner as a third party for an injury caused by the owner's negligence. The Supreme Court granted certiorari to clarify whether a watercraft is a "vessel" for purposes of the LHWCA (a determination which has subsequently been held applicable to Jones Act cases as well. *See Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441, 2006 A.M.C. 182 (5th Cir. 2006)).

The Supreme Court concluded that although Congress did not define "vessel" in the LHWCA or the Jones Act, that term was defined in 1 U.S.C. § 3 as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The court noted that § 3 codified the meaning that the term "vessel" had acquired in general maritime law, and the Court noted the historic case law prior to the Jones Act and the LHWCA where courts had often used § 3's definition to conclude that dredges were vessels.

Relying on § 3, the Court thus held that a vessel "is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." Because the SUPER SCOOP was not only capable of transporting men and equipment but had actually done so, the Court found that the dredge was a vessel for purposes of the LHWCA.

B. In *Lee v. Great Lakes Dredge & Dock Co.*, 2008 A.M.C. 1 (S.D.N.Y. 2007) plaintiff brought suit under the Jones Act and under general maritime law to recover damages for personal injuries he suffered while working on a Coastal Research Amphibious Buggy ("CRAB"). The CRAB was a three-wheeled, amphibious vehicle

with an operator's platform perched upon three tall legs and an inflatable rubber tire attached to the bottom of each leg which moved by the rotation of its rubber tires on the sea bottom or on land. Defendant sought to dismiss the claim on the basis that the CRAB was not a vessel.

In opposition, plaintiff argued the CRAB was capable of transporting people and equipment on water and, therefore was a "vessel." Defendants', however, argued that passengers and equipment on the CRAB were not transported "on water," but rather "above the water" as the CRAB was designed not to float, but rather to remain constantly in contact with the seabed. The court ultimately determined the CRAB was a "vessel" and based its opinion on "the broad definition that courts, generally, have given to the term vessel" as well as the "purpose of the Act" being to provide "heightened legal protections" to seamen "because of their exposure to the 'perils of the sea.'"

C. In *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, 2008 A.M.C. 831 (5th Cir. 2008), the court reached a different conclusion. In *Cain*, a "toolpusher" bumped his head while aboard a "semi-submersible mobile offshore drilling rig" which was still under construction at the time of the injury. Although capable of self-propulsion, but lacking equipment to make it fully operational, it was not considered a vessel in navigation. Plaintiff, therefore, could not recover as a Jones Act seaman.

3. Does Maritime or State Law Apply

A. In *Matheny v. Tennessee Valley Authority*, 503 F. Supp. 2d 917, 2008 A.M.C. 769 (M.D. Tenn. 2007), the widow of the decedent, Ronald Matheny, brought suit following the drowning death of her husband. At the time of his death, Mr. Matheny was with his uncle, Mr. Lawrence, in a small boat traveling upstream to fish near an

island. As the boat started up-river, it encountered a tug boat, The PATRICIA H., which the fishermen first noticed when it was only 50 yards away. Both vessels continued toward each other. As the boats came closer, Mr. Lawrence heard the sound of the tug engine and surmised that the engine was running wide open, in a high gear. Mr. Lawrence noticed a wake three feet high, created by the movement of the front of the tug through the water and knew that his boat could not survive this wake.

Accordingly, Mr. Lawrence attempted to turn his boat downstream, to the left, to outrun the PATRICIA H., but as he turned water crashed over the bow, and the small boat filled with water and was submerged in the river causing Mr. Matheny and Mr. Lawrence to go into “the drink.” Initially Mr. Matheny held onto a life jacket, and Mr. Lawrence held onto a floating cooler. The PATRICIA H. continued on toward its destination, apparently unaware of the capsized fishing boat, and only when it reached its destination, approximately 650 feet from the site of the accident, did the tug’s pilot hear Mr. Matheny screaming.

The PATRICIA H. then returned to attempt a rescue. At that point, Mr. Matheny was still conscious and trying to stay above water. The deckhands did not offer Mr. Matheny the 15-foot pike pole, but instead threw him a life ring. Mr. Matheny attempted to grab the life ring, putting his hand on it three times, but did not succeed. Instead, he sank about a foot and a half under water and stopped moving.

Mr. Matheny was now within arm’s reach of the deckhands. One of them used the pike pole to hook Mr. Matheny and pulled him into the boat. Mr. Matheny did not regain consciousness and, despite attempts at resuscitation, he was pronounced dead upon arrival at the local hospital. Mr. Lawrence survived.

Defendant moved for summary judgment arguing that under the Tennessee Recreational Use Statute, which provided in part that an “occupant, or any person in control of land or premises . . . owes no duty of care to keep such land or premises safe for entry or use by others for such recreational activities as . . . fishing” After determining that admiralty jurisdiction was proper the court recognized that “with admiralty jurisdiction ‘comes the application of substantive admiralty law.’” Nonetheless, the exercise of admiralty jurisdiction “does not result in automatic displacement of state law”; however, admiralty law does require displacement of state law in a great many contexts. Generally, “state law will be applied where it “fills gaps” or provides relief that otherwise would not be available under admiralty law; but, where state law would supersede or limit clearly defined maritime causes of action, it cannot be applied.” Recognizing that the general maritime law recognized a cause of action for death of a non-seaman in state territorial waters resulting from negligence the court determined that the case was one in which the federal law applied and which the state statute, if applied, would bar. The state statute was, therefore, held inapplicable.

B. The court reached the opposite conclusion in *Christiansen v. Christiansen*, 152 P.3d 1144, 2007 A.M.C. 379, cert. den. 127 S.Ct. 2982 (Alaska 2007). In that case, Wesley Christiansen arrived at the city dock in Old Harbor, Kodiak, Alaska, boarded his cousin Kenny’s fishing boat, which was tied to the dock, and began drinking beer with Kenny and his friends. Wesley may have been intoxicated when he arrived at the boat; however, some of the alcohol Wesley consumed may have been supplied by Kenny. After drinking for awhile, Wesley announced that he had to urinate at which point it was suggested that he urinate off the end of the dock. Wesley

disembarked from the fish boat and was not seen again until his body was discovered floating in the water near the boat's starboard side. State troopers later concluded that Wesley had fallen from the end of the dock.

Almeria Christiansen, Wesley's widow, filed a wrongful death suit against Kenny, alleging in part that Kenny had violated duties owed to Wesley imposed by virtue of Kenny's status as owner and captain of the boat. Kenny moved for summary judgment on the ground that, as a social host, he owed no legal duty to Wesley under Alaska law. In opposition, the widow argued that federal maritime law applied and it imposed a general duty of "reasonable care" on Kenny. The court granted partial summary judgment for Kenny, ruling that Alaska law governed the case and that, under Alaska's dram shop act, Kenny had no duty to control Wesley's drinking. On appeal, plaintiff argued that the superior court committed reversible error by "erroneously appl[ying] a state law limitation on a federal maritime cause of action."

The Alaska law at issue, provided that "only persons who are licensed to sell alcohol may be held civilly liable for injuries resulting from a recipient's intoxication" thereby absolving "social hosts" of civil liability for harm resulting from the intoxication of their guests. Studying maritime law precedent, the court found no "controlling federal rule" imposing liability on an unlicensed social host and properly concluded that, "[i]n the absence of a controlling federal rule [there was no showing] that a characteristic feature of maritime law would be materially prejudiced by applying [state law]." Similarly, the court found application of state law would not interfere with the "proper harmony and uniformity of maritime law" in light of the fact that the maritime cause of

action for wrongful death advances the federal interest in affording decedents' representatives an avenue for recovery.

C. *Szollosoy v. Hyatt Corp.*, 396 F. Supp. 2d 147, 2005 A.M.C. 2501 (D. Conn. 2005). The Szollosoy family was vacationing at Hyatt's Grand Cayman Resort and Villas in the Cayman Islands and took a day trip to the nearby Rum Point recreation area. While at Rum Point, Charles Szollosoy waded in the water with his son, then-four-year-old Dean, to a concession stand which rented sailboats, paddleboats, windsurfers, wave runners and other equipment. Charles sat on one wave runner with little Dean before placing his son on a second wave runner. Shortly thereafter, the second wave runner's engine started and the watercraft began to move with only four-year-old Dean aboard. The wave runner carried Dean across the Rum Point harbor and crashed directly into a stone jetty. Dean was thrown over the handlebars of the wave runner as a result of the crash and suffered serious injuries including a coma and brain hemorrhage.

Dean's mother brought a lawsuit against defendants who in turn brought a third-party complaint against the father, Charles, for negligent failure to adequately supervise the four year old. Charles moved for summary judgment on the third-party complaint arguing that Connecticut's "parental immunity doctrine" shielded him from the third-party plaintiffs' claims because he was precluded from liability by Connecticut's parental immunity doctrine.

The court recognized that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law" and that state law may be used, when necessary, as a "gap filler." Further pointing out that a state rule will be pre-empted if its application would disrupt the "harmonious system" of uniform federal maritime law.

Interestingly, in analyzing the issue of uniformity the court looked to “trends across the United States” with regard to parental immunity and found the immunity was treated differently across the country and even within the state of Connecticut. That analysis led the court to conclude that “importing state law rules on parental immunity to federal admiralty actions would detract from the uniformity of admiralty law, undermine the simplicity of the admiralty system, and too greatly impair admiralty’s rule of contribution among joint tortfeasors.” On that basis, the court would not apply Connecticut’s parental immunity and Charles’ motion for summary judgment was denied.

D. *Voillat v. Red and White Fleet, 2006 A.M.C. 66 (N.D. Cal. 2004)*, raised the question of whether the court should recognize a general maritime dram shop rule or apply California’s anti-dram shop provision. Lionel Voillat purchased a ticket and attended a cruise aboard the ROYAL PRINCE on San Francisco Bay. During the cruise, a fellow passenger (William Monaghan) allegedly threw Voillat overboard into the bay. Voillat was pronounced dead almost three weeks later when his body was discovered floating between Angel Island and Alcatraz. Decedent’s parents brought this wrongful death and survival action alleging, *inter alia*, defendants were negligent in serving alcohol to an obviously intoxicated passenger.

With regard to the issue of dram shop liability, the court had to determine whether to recognize a general maritime dram shop rule, as urged by plaintiffs, or, conversely to apply California’s anti-dram shop provision, as defendants argued. After noting that the Ninth Circuit has not adopted a general maritime dram shop rule, the court declined to declare its own rule “because doing so would require the court to engage in the difficult task of choosing among various competing state regulatory approaches” a power the

court believed better left to the states. Applying the California law, the court concluded that plaintiffs failed to state a claim for improper service of alcohol because that law provides statutory immunity to those who serve alcohol to an individual who later injures someone else because of intoxication.

4. **A myriad of issues arising in Jones Act and Unseaworthiness claims**

A. *Bilozur v. Royal Daiquiri's Inc.*, 2007 A.M.C. 685 (E.D. La. 2006), *aff'd* 262 F. App'x 669 (5th Cir. 2008) involved a plaintiff employed by defendant Edison Chouest Offshore, LLC (ECO) aboard the M/V SEACOR RELIANT. Upon disembarking from the vessel he was free to pursue whatever he wished. While in Larose, Louisiana, plaintiff stayed in a dormitory where ECO employees can stay for free and he participated in a free training program to complete a class which was a condition of his employment.

After the class ended, plaintiff went to Royal Daiquiri's, allegedly to have dinner and plan a fishing trip with a friend. Plaintiff arrived at Royal Daiquiri's around 5:30 p.m. and consumed about four beers and one-half a shot of liquor in the next few hours. Plaintiff claimed that around 11:00 p.m. he felt there was a "hostile environment" at Royal Daiquiri's and decided to leave. According to witnesses, however, plaintiff had been harassing other bar patrons all night and was asked to leave.

In his attempt to leave, plaintiff backed into another car in the parking lot. Plaintiff went back into the bar to find the owner the other vehicle who turned out to be Lorell Danos, a woman with whom plaintiff had trouble earlier in the evening. Despite the night he was having, plaintiff did not choose to leave the bar.

At some point later in the evening, plaintiff was allegedly hit from behind in the neck. He claims that when he awoke his neck was severely twisted. Plaintiff also claimed that Danos then put her shoe in his face and threatened him. The next day he was transported to the hospital where doctors discovered that his neck was actually broken. He is now a quadriplegic.

Plaintiff filed a lawsuit against ECO, as well as several other defendants, seeking maintenance and cure as well as a recovery under the Jones Act based on the fact that there were two other ECO employees at the bar when he was injured. He claimed that if they were also in the course and scope of their employment and caused his injuries, that ECO was vicariously liable. ECO filed a motion for summary judgment arguing that it was not liable to plaintiff because he was not in the course and scope of his employment at the time of the incident.

Plaintiff argued he was in the course and scope of his employment because ECO benefited from his presence in South Louisiana. He also argued that the fact that ECO paid travel expenses meant that he was in the course and scope of his employment at the time of his injuries. Furthermore, he argued that the other ECO employees at the bar may have been in the course and scope of their employment and contributed to his injuries so as to render ECO liable for Jones Act negligence. The court found those arguments unpersuasive and determined that during his wild night at Royal Daiquiri's plaintiff was neither "within the course and scope" of his employment as required under the Jones Act nor was he in "service of the ship" that would have entitled him to maintenance and cure.

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B. In *Nelson v. Stellar Seafoods, Inc.*, 2007 A.M.C. 433 (W.D. Wash. 2006), plaintiff filed a lawsuit raising claims under the Jones Act and general maritime law based on injuries he sustained while a cook aboard the M/V STELLAR SEA, a fish processing vessel. Plaintiff, who had worked aboard the vessel as a cook in the past, was responsible for menu planning, cooking, maintaining supplies, and supervising galley helpers while he was on shift. On the day of his injury, plaintiff was notified that heavy weather was expected and that he should “secure the galley” which required plaintiff to, among other things, secure 50 pound bags of dry goods on a metal rack with an “industrial bungee cord.” The bungee cords were made of a flat piece of heavy black elastic, with a metal “S” hook attached at each end. The bungee cord was fastened to the metal rail of the rack upon which the dry goods were placed, pulled over the sacks of dry goods, and attached at the other end to a metal shelf above. The bungee cords had been used in the vessel’s galley for years and, upon joining the crew, plaintiff was given instructions on the proper use of the cords to secure the dry stores.

Plaintiff was in the process of hooking the bungee cord to a metal shelf when the “S” hook came free and struck him in the testicles. As a result of the accident, plaintiff had to undergo surgical procedures and the injury affected Mr. Nelson’s relation with his wife.

Plaintiff filed a lawsuit raising claims for Jones Act negligence and unseaworthiness. With regard to the Jones Act claim, the court took notice of the “slight” burden placed on Jones Act plaintiffs to establish causation but pointed out that plaintiff still must prove the element by a preponderance of the evidence. In this case, the defendants’ duty to provide plaintiff a safe place to work was satisfied because there was

no evidence that the conditions at the time of the injury were “unreasonable dangerous under the circumstances.” Nor were defendants negligent for “failing to warn” plaintiff of the dangers inherent in a bungee cord and failing to train him in its use because, as the court pointed out “[t]he law does not impose a duty to warn of an obvious danger.”

In his claim for unseaworthiness, plaintiff claimed the vessel was unseaworthy because the bungee cord was unfit for its intended purpose. The court noted that a vessel owner has a duty to provide a seaworthy vessel, but went on to explain that “the vessel owner is not an insurer of a seaman’s safety and need not provide an accident-proof ship; the mere fact that an injury or illness has been sustained on board ship does not, standing alone, establish liability on the part of the shipowner. . . .” In sum, the court held that plaintiff failed to establish that the bungee cord was not reasonably fit for its intended purpose and, therefore, the unseaworthiness claim (like the Jones Act claim) was dismissed.

C. In *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 2006 A.M.C. 956 (6th Cir. 2006), plaintiff brought a lawsuit for personal injuries she sustained aboard defendants’ ship, the MARIE HENDRICK, where she was employed as a cook. Plaintiff was cleaning the kitchen after having served the crew breakfast and, as she was instructed, poured grease from a skillet into a coffee can. Plaintiff then picked up the coffee can by its rim. Apparently, the can itself was greasy and it slipped out of plaintiff’s hand hitting the counter and falling onto the floor. The grease, which was not hot, landed on the counter, plaintiff, and the smooth, solid floor mat on which Plaintiff was standing. Plaintiff took one step backwards and slipped in the grease on the floor causing her to sustain back injuries from the incident.

Plaintiff argued that she would not have dropped the grease can if she had been allowed to place it in a container with handles, and she would not have slipped if the mat had contained holes to re-direct the grease. Defendants brought a motion for summary judgment arguing, *inter alia*, that plaintiff's own negligence caused her injury rendering the "primary duty" rule a bar to her lawsuit. The court disagreed. First, it noted that maritime law espouses a system of comparative negligence, in which a plaintiff's negligence does not preclude recovery. The only exception is the primary duty doctrine, which was inapplicable.

The primary duty rule, which gives ship owners a complete defense against Jones Act and unseaworthiness claims, provides that "a ship's officer may not recover against his employer for negligence or unseaworthiness when there is no other cause of the officer's injuries other than the officer's breach of his consciously assumed duty to maintain safe conditions aboard the vessel." In *Churchwell*, the primary duty rule did not apply because there was no evidence that plaintiff, a cook, had assumed the duty to maintain safe conditions.

D. In *Napier v. F/V DEESIE, Inc.*, 454 F.3d 61, 2006 A.M.C. 2636 (1st Cir. 2006), plaintiff was employed as a crewman aboard the F/V DEESIE. While fishing, plaintiff was attaching baited hooks to the line feeding out of the vessel's stern when a rusty, six-inch hook stabbed him in the abdomen. Using bolt cutters and a razor, the captain and plaintiff cut out the hook. Plaintiff quickly doused the wound with peroxide, applied a bandage, and returned to work. The ship's first aid kit contained aspirin and Motrin, which plaintiff took, to treat the pain. Eight days after the accident, plaintiff experienced sudden pain and loss of breath.

Upon arrival at port, plaintiff was sent to a doctor who diagnosed him with an infection and prescribed antibiotics. Two days later, plaintiff developed severe stomach pains, began vomiting blood, and was taken by ambulance to the hospital. He was admitted with gastrointestinal bleeding, and physicians discovered that he had suffered a perforated duodenal ulcer, which required two surgeries and resulted in a one-month hospital stay. It was noted in the medical record that plaintiff had taken cocaine and heroin on the day prior to his admission.

Plaintiff's lawsuit brought claims under the Jones Act, for unseaworthiness and a claim for maintenance and cure. Defendant moved for summary judgment and both sides filed affidavits from their medical experts discussing whether the fishhook accident caused plaintiff's perforated ulcer. Defendant's expert surmised that the perforated ulcer was not caused by direct contact with the hook but was more likely caused by plaintiff's reported cocaine use. Conversely, plaintiff's medical expert believed there was a causal relationship between the injury and the perforated ulcer based on the fact that plaintiff "appeared" to have been treated with aspirin and Motrin aboard the vessel. The trial court granted summary judgment on the Jones Act and unseaworthiness claims because they found insufficient evidence in the record that taking aspirin could cause an ulcer.

In evaluating whether plaintiff had met his "featherweight" burden to prove causation under the Jones Act, the court noted that plaintiff need only demonstrate that the vessel's "negligence played any part, even the slightest, in producing the injuries for which the plaintiff seeks damages." The appellate court, taking the record in a light most favorable to plaintiff, found that because plaintiff presented evidence that aspirin was available, and that he took aspirin to treat the pain, and that aspirin alone can cause

ulcers, plaintiff sufficiently carried his burden on causation to defeat defendant's summary judgment motion.

E. In *Falconer v. Penn Maritime, Inc.*, 421 F. Supp. 2d 190, 2006 A.M.C. 1430 (D. Me. 2006), plaintiff was working aboard defendant's tug VALIANT in drydock. While working aboard the tug, plaintiff somehow fell down an open hatch and suffered severe personal injuries resulting in his being permanently confined to a wheelchair. He required extensive surgery, faced the on-going possibility of future surgery and experienced a multitude of additional problems including scoliosis, renal failure, significant bladder and bowel problems, arthritis, shoulder symptoms, and a shortened life expectancy. Following a jury trial, plaintiff was awarded damages totaling \$5,062,060, before reduction for comparative negligence, broken down as follows:

- (1) net past lost wages: \$255,497;
- (2) past pain and suffering: \$25,000;
- (3) future lost earning capacity: \$2,115,668;
- (4) future medical costs: \$2,590,895; and,
- (5) future pain and suffering: \$75,000.

On a motion for a new trial, plaintiff argued that that the \$100,000 total award for pain and suffering was "miserly", "shocking to the conscience", and "inconsistent with... [the] award of \$4,706,563.00 for future medical costs and future lost earning capacity." Plaintiff contended this award "was clearly against the weight of evidence" and was "unconscionable and a 'manifest injustice' that is far 'outside the universe of possible awards.'" Noting the understandable hesitancy to play "Monday morning quarterback" the court explained that, in some cases, an inadequate damages award may constitute a

sufficient basis for a new trial, such as “when the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a clear miscarriage of justice.” Although the court found the \$100,000 award of pain and suffering to be “conservative almost to a fault” it denied plaintiff’s motion for the following reasons. First, plaintiff relied solely on the inadequacy of the jury’s award and did not claim that “there is some evidence of an improper verdict based on factors other than the amount of the damage award,” which “constrained” the Court’s discretion in overturning the verdict. Second, plaintiff attacked the area in which juries are granted the greatest deference, *i.e.*, the translation of intangible, non-economic losses into money damages. Third, looked at as a whole the verdict was generous regarding special damages. Indeed, the jury awarded more than plaintiff sought for special damages. In sum, plaintiff bore “an extremely high burden” to convince the court to overturn a jury verdict, a burden which was not met in this case.

F. *Sobieski v. Ispat Island, Inc.*, 413 F.3d 628, 2005 A.M.C. 1735 (7th Cir. 2005) involved a crewman who brought a Jones Act claim against his employer for injuries he sustained when a fellow crewmember performed unexpected neck “tractioning” on him.

Plaintiff was a crewman aboard the M/V JOSEPH L. BLOCK and was aboard the vessel as it was underway across Lake Michigan from South Chicago to Muskegon, Michigan. Prior to the incident, plaintiff was in the vessel’s recreation room drinking a cup of coffee and was relaxing in a chair and watching television. Unbeknownst to plaintiff, a fellow crewman crept up behind him silently as he watched TV. Suddenly, before plaintiff could react, the crewmate seized plaintiff’s head between his hands and

made an “adjustment.” According to plaintiff’s complaint the crewmate “snuck up behind his co-employee, [plaintiff], placed his hands on each side of [plaintiff’s] head, and forcefully slammed it to the side against [plaintiff’s] own right shoulder causing his neck to be injured.”

Plaintiff claimed that, as a result of the unrequested and unexpected neck “tractioning,” he suffered intense pain, immediately falling “onto one knee in front of his chair, with his eyes watering and a burning sensation in his neck.” After a few seconds in which to recover, plaintiff demanded to know why the crewmate had done what he did. The crewmate replied, “Look, I do it to myself all the time,” and he proved it by “maneuvering” his own head in the same manner.

For days after this incident, plaintiff suffered various after-effects of the neck-cracking, including numbness and tingling in his neck, left leg, arm, and side. His physical problems worsened and for several months, plaintiff sought and received treatment from medical specialists. Within months, plaintiff’s condition took a turn for the worse when he experienced a “lock up pinch” in his neck and fell down his basement stairs, breaking his neck in three places and requiring multiple surgeries.

Plaintiff and his wife subsequently filed a lawsuit advancing various negligence claims under maritime law, including unseaworthiness, maintenance and cure and Jones Act negligence. The appeal challenged the district court’s grant of summary judgment on plaintiff’s Jones Act claim in favor of the defendant employer. The Jones Act claim, brought under the doctrine of respondeat superior, sought to hold plaintiff’s employer liable for the actions of the crewmate on the basis that the crewmate’s negligence (or

intentional tort) was committed within the course or scope of his employment, *i.e.*, while furthering the ship's business.

In affirming the grant of summary judgment against plaintiffs' Jones Act claim, the court first analyzed whether the crewmate's neck-cracking was within the scope of his employment. To support their argument that the crewmate was acting within the scope of his employment, plaintiffs pointed to the deposition testimony in which the crewman testified that he had "cracked the necks of several crewman over the years to help them feel better." The court, however, rejected the crewmate's subjective belief regarding the benefits of his neck-cracking activity.

Plaintiffs also argued that defendant was negligent because certain of the ship's officers knew of the crewmate's "proclivities" yet did nothing to put a stop to them. Specifically, in his deposition, the crewmate answered "yes" when asked if any officers had seen him crack necks. In addition, he testified to his belief that he had a "reputation" among some crewman as a masseur or neck cracker. According to plaintiffs, this "admission" showed that the crewmate's acts were "common and continuous and that [he] had a reputation as a masseuse [sic] and neck cracker," such that the defendant was negligent for letting those acts continue.

Again the court disagreed. To the contrary, it found that while the crewmate's "actions with these individuals may say much about his off-duty indulgences, they say nothing about whether [the crewmate] had any sort of reputation of which the defendant should have been aware, such that the defendant should have taken steps to stop [his] "sneak attack" on [plaintiff]. No evidence in the record suggests the contrary." The appellate court, therefore, affirmed the grant of summary judgment in favor of defendant.

5. **When is an employer obligated to pay maintenance and cure**

A. *Price v. Connolly-Pacific Co.*, 162 Cal. App. 4th 1210, 2008 A.M.C.

1331 (2008) helps establish when an employee is “in service of the ship.” In that case, plaintiff was a crewman aboard the derrick barge LONG BEACH which was owned and operated by defendant. Plaintiff was a “commuter seaman,” *i.e.*, he did not live aboard the LONG BEACH. Plaintiff worked for defendant at the Port of Los Angeles on a pier reconstruction project; however, because plaintiff resided in La Mesa, in San Diego County plaintiff requested defendant’s permission to park his camper truck in defendant’s parking lot near the job site so he could live there during the work week. Defendant gave plaintiff permission and plaintiff would stay in the parking lot during the week and only return home on the weekends.

During one of his weekends at home plaintiff started feeling ill. Plaintiff’s symptoms worsened over the weekend. He saw his family physician the following Monday and was hospitalized the next day when he was diagnosed with West Nile Virus. He never returned to work for defendant.

West Nile Virus has a three to fourteen day incubation period, and in that time preceding his hospitalization plaintiff suffered multiple mosquito bites. Plaintiff admitted that no one could say for certain when or where he was bitten by mosquitoes that infected him with the virus. In addition, stipulated scientific evidence presented to the trial court indicated that plaintiff was far more likely to have been infected with the disease at night while he was camping out in the parking lot, than during the day while working on the vessel.

Under the circumstances, plaintiff essentially conceded that he could not establish that his West Nile virus illness was caused by his service to the ship or that he contracted the virus or manifested symptoms while in the service of the ship, a concession defendant seized upon to argue that plaintiff was not entitled to maintenance and cure. In response, plaintiff raised two arguments. First, relying on language in the Shipowner's Liability Convention of 1936 (SLC), he argued that a seaman need not prove an illness was incurred, aggravated or manifested itself while in the service of the vessel, but only that the illness was incurred, aggravated or manifested itself during the period of the seaman's employment. The court rejected the argument on the basis that plaintiff misinterpreted the SLC and that under maritime law an illness contracted other than in the service of the vessel is compensable only if the symptoms manifest themselves while the seaman is in the service of the vessel. Because plaintiff experienced the symptoms while at home he was not entitled to maintenance and cure.

Second, plaintiff argued that even if a seaman is not on call or otherwise engaged in an activity generally considered to be in the service of the vessel, maintenance and cure is required if an illness is contracted while the seaman is participating in an on-shore activity that benefits the employer. Plaintiff contended that his camping in defendant's parking lot was such activity. Once again, the court disagreed distinguishing this case from cases in which seamen were found to be "in the service of the vessel" while traveling to work on company time or in a company car. The court simply could not find an entitlement to maintenance and cure based only on defendant's "generosity in allowing [plaintiff] to use his RV-camper in an otherwise empty parking lot."

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B. In some cases where you file makes a big difference if your client denies maintenance and cure

Recent case law has demonstrated a split in the circuit courts on whether punitive damages are allowed in cases in which an employer denied maintenance and cure in the wake of the Supreme Court's decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), setting forth the uniformity principle.

On the one hand, both the Ninth and the Fifth Circuits have held that punitive damages are not allowed in maintenance and cure cases. In *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1995 A.M.C. 2022 (9th Cir. 1995), the court held that punitive damages were not available, although attorney's fees are, to a seaman where the shipowner has been willful and persistent in its failure to investigate a seaman's claim for maintenance and cure or to pay maintenance. The court, examining the *Miles* decision noted that "[b]ecause *Miles* did not consider the availability of punitive damages, and was not faced with a claim for maintenance and cure that has no statutory analog, it does not directly control the question of whether punitive damages are available for the willful failure to pay maintenance." In arriving at its holding on the issue, however, the court found the determination to be "consistent" with the *Miles* decision.

In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1995 A.M.C. 2409 (5th Cir. 1995), the Fifth Circuit considered whether, following *Miles*, its pre-*Miles* precedent allowing punitive damages remained valid. Initially, the court affirmed the district court's award of punitive damages for the failure to timely pay maintenance and cure; however, on rehearing *en banc* the court held that, despite its pre-*Miles* precedent, punitive damages are not allowed for willful nonpayment of maintenance and cure. The court reasoned that *Miles* created a "weakened foundation" in that circuit's precedent, so

much so that the court overruled the precedent and held that “punitive damages should no longer be available in cases of willful nonpayment of maintenance and cure under the general maritime law.”

Most recently, in *Atlantic Sounding Co., Inc. v. Townsend*, 496 F.3d 1282, 2007 A.M.C. 2009 (11th Cir. 2007), the Eleventh Circuit adhered to its pre-*Miles* precedent allowing punitive damages in claims for maintenance and cure when it held that such damages may be awarded upon a showing of willful and arbitrary refusal to pay. In arriving at that conclusion, the court recognized the Ninth and Fifth Circuits’ holding but distanced itself from the reasoning applied in those decisions.

In *Atlantic Sounding*, the employer of a seaman injured while working on the employer’s vessel sought declaratory judgment regarding their obligations with respect to maintenance and cure. In response, the seaman brought several maritime claims including willful failure to pay maintenance and cure seeking punitive damages. Employer argued that “[t]he *Miles* uniformity principle dictates that all subsequent courts determining the availability of damages in a maritime case must provide for uniform results in similar factual settings, regardless of whether the action is brought pursuant to the Jones Act, DOHSA, or general maritime law.” Under that principle, employer reasoned, the seaman could not recover punitive damages for a general maritime maintenance and cure cause of action because he would not be able to recover punitive damages-which are non-pecuniary in nature-under the Jones Act.

As a first step in addressing employer’s argument the court explained it “prior panel precedent rule” which provides that “a later panel may depart from an earlier panel’s decision only when the intervening Supreme Court decision is ‘clearly on point.’”

The court went on to emphasize the difference between the holding in a case and the reasoning that supports that holding concluding that when “the reasoning of an intervening high court decision is at odds with that of our prior decision [there is] no basis for a panel to depart from our prior decision. As we have stated, ‘[o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing.’”

The continued by noting that, given the parameters of the *Miles* decision, employer’s “argument can only be based on the reasoning of the *Miles* opinion, not on the *Miles* decision: its holding. Miles says and-more important-decides nothing about maintenance and cure actions or punitive damages.” The court referenced the decisions in *Guevara* and *Glynn* but moved passed those holdings on the basis that in both cases the courts recognized that their holdings could not “rest upon the specific holdings in *Miles*” because that case “did not involve maintenance and cure or punitive damages.” Based on that distinction, the court side-stepped *Miles* stating that “the Miles decision provides no basis for this panel to depart from [its precedent] under our prior panel precedent rule.” On the basis of its “prior panel precedent rule” the court held the district court properly followed the circuit’s pre-*Miles* precedent in denying employer’s motion to strike seaman’s request for punitive damages.