PATTERN JURY INSTRUCTIONS (Civil Cases)

Prepared by the

Committee on Pattern

Jury Instructions

District Judges Association

Fifth Circuit

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NOTE: This document has been abbreviated to only sections regarding maritime law for your convenience.

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PATTERN JURY INSTRUCTIONS

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ADMIRALTY

4.1 Seaman Status

Plaintiff [name] is seeking damages from Defendant [name] for injuries that [he/she] allegedly suffered as a result of an accident while [he/she] was performing [specify work/task].

Plaintiff [name]'s claim arises under a federal law known as the Jones Act. Only a seaman may bring a claim under the Jones Act. Plaintiff [name] claims that because of the nature of [his/her] employment with Defendant [name], [he/she] was a seaman and is entitled to bring this claim. Defendant [name] denies that Plaintiff [name] was a seaman and contends that [he/she] has no such right. You must first determine whether, when the accident happened, Plaintiff [name] was a seaman as the law defines that term.[1]

A two-part test is used to make this determination. For Plaintiff [name] to be considered a seaman:

1. [his/her] duties must contribute to the function of the vessel or the accomplishment of the vessel's mission; and

2. [he/she] must have a connection to [a vessel] [an identifiable group of vessels subject to common ownership or control][2] that is substantial in both duration and nature.

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[1]This instruction may be modified to include an unseaworthiness claim if appropriate for the facts of the case.

[2]*Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 557 (1997).

For the first part of the test, you must determine whether Plaintiff [name] has proved by a preponderance of the evidence that [his/her] duties: (1) contributed to the function of a vessel or the accomplishment of its mission or to the operation of the vessel; or (2) contributed to the 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. Plaintiff [name] must show only that [he/she] did the ship's work.[3]

If you do not find this first part of the test satisfied, then your deliberations on seaman status are over and Plaintiff [name] cannot recover under the Jones Act.

If you do find this first part of the test satisfied, you then must consider the second part of the test. You must decide whether Plaintiff [name] has proved by a preponderance of the evidence that [he/she] has a connection to [a vessel] [an identifiable group of vessels under common ownership or control] that is substantial in terms of both duration and nature.[4] In determining whether Plaintiff [name] has proved that [he/she] had a connection to [a vessel] [an identifiable group of vessels under common ownership or control] that is both substantial in duration and nature, you must consider the totality of the circumstances of [his/her] employment. The ultimate inquiry is whether [his/her] fundamental employment was substantially connected to the function or mission of the vessel or whether [he/

[3] *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995).

[4] *Chandris, Inc.*, 515 U.S. at 366 (citing with approval the Fifth Circuit's definition of an "identifiable fleet"of vessels as a "finite group of vessels under common ownership or control."); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1074 (5th Cir. 1986) ("By fleet we mean an identifiable group of vessels acting together or under one control"); *Bertrand v. Int'l Mooring & Marine, Inc.*, 700 F.2d 240, 244–45 (5th Cir. 1983) ("[O]ne can be a member of a crew of numerous vessels which have common ownership or control.").

she] was simply a land-based employee who happened to be working aboard the vessel at a given time.[5]

For example, if a land-based employee is given a change of assignment to a vessel for a permanent or indefinite period and [his/her] land-based duties are eliminated, [he/she] is a seaman even if [he/she] is injured on the first day of assignment on the vessel. In other words, if a seaman is reassigned to new job responsibilities, the seaman status determination should be made in light of that reassignment.

On the other hand, if an employee does [land-based work] [fixed-platform-based work] as well as work on a vessel that contributes to the function or mission of the vessel, you must determine whether [his/her] temporal connection to the vessel is substantial in nature and duration and not simply work aboard the vessel that is sporadic and for an insignificant period.

In determining whether Plaintiff [name] was a seaman when the accident occurred, you must look at the nature and location of [his/her] work for Defendant [name] as a whole. If Plaintiff [name]'s regularly assigned duties required [him/her] to divide work time between vessel and [land] [a fixed platform], you must determine [his/her] status as a seaman in the context of [his/her] entire employment with [his/her] employer, [name], not just [his/her] duties when [he/she] was injured.

If you find that Plaintiff [name] has satisfied both parts of this test, then you must find that [he/she] is a seaman for purposes of the Jones Act.

(If the plaintiff is a seaman and is injured on land):

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[5]*Chandris*, 515 U.S. at 370 (quoting *Wallace v. Oceaneering Int'l*, 727 F.2d 427, 432 (5th Cir. 1984)); *Chambers v. Wilco Indus. Serv., L.L.C.*, 2010 WL 3070392 at *6–7 (E.D. La. Aug. 3, 2010).

A maritime worker who has attained seaman status does not lose that protection automatically when on shore. A maritime worker may recover under the Jones Act whenever [he/she] is injured in the service of a vessel, whether the injury occurs on or off the ship.[6] The right to recover under the Jones Act is given to the seaman and does not depend on the place where the injury occurs. Instead, the right depends on the nature of the service and its relationship to the operation of the vessel. If you find that Plaintiff [name] has proved by a preponderance of the evidence that [he/she] meets the criteria and [his/her] injury occurred in the service of the vessel, then [he/she] is entitled to seek recovery under the Jones Act regardless of whether the injury occurred on land.

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[6] *Chandris*, 515 U.S. at 360 (citing *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943)).

4.2 Vessels

You must determine whether the [specify structure by name or description] was a "vessel." A vessel is any water craft practically capable of maritime transportation, regardless of its primary purpose or state of movement at a particular moment.[1] A water craft need not be in motion to qualify as a vessel. You must consider whether a reasonable observer looking at the physical characteristics and activities of the [specify structure by name or description] would consider it designed to a practical degree for carrying people or things over water. If so, then it is a vessel.[2] A water craft that has been permanently moored or otherwise made practically incapable of transportation or movement is not a vessel.[3]

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[1] *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 494–95 (2005).

[2] *Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 741 (2013) (discussing in depth various factors to consider in determining whether a structure is a vessel).

[3] *Stewart*, 543 U.S. at 494 ("[A] water craft is not 'capable of being used' for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement."); see *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295 (5th Cir. 2008) (explaining that *Stewart* does not require the Fifth Circuit to modify its precedent that an incomplete water craft is not a vessel in navigation).

4.3 Jones Act—Unseaworthiness—Maintenance and Cure (Seaman Status Not Contested)

Plaintiff [name], [a seaman], is asserting three separate claims against Defendant [name].

Plaintiff [name]'s first claim, under the federal law known as the Jones Act, is that [his/her] employer, Defendant [name], was negligent, and that this negligence was a cause of [his/her] injuries. Plaintiff [name]'s second claim is that unseaworthiness of a vessel caused [his/her] injuries. Plaintiff [name]'s third claim is for what is called maintenance and cure.

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

4.4 Jones Act—Negligence

Under the Jones Act, Plaintiff [name] must prove that [his/her] employer was negligent. Negligence is doing an act that a reasonably prudent person would not do, or failing 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 that anyone was negligent or that anyone's negligence caused the accident.

In a Jones Act claim, the word "negligence" is liberally interpreted. It includes any breach of duty that an employer owes to its 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 was the cause, in whole or in part, of injury to a seaman employee, then you must find that the employer is liable under the Jones Act.[1] In other words, under the Jones Act, Defendant [name] bears the responsibility for any negligence that played a part, however slight, in causing Plaintiff [name]'s injury.[2]

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

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[1] In *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), the Supreme Court held that a railroad's duty under FELA to provide its employees with a safe place to work includes 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 also stated 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. In Jones Act cases in which a plaintiff sues for purely emotional injury, without physical impact but within the zone of danger, the jury should be instructed accordingly. Whether a reasonable person under the circumstances would have had a fear of physical impact is a question for the jury.

[2] *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2633 (2011).

with a reasonably safe place to work. If you find that Plaintiff [name] was injured because Defendant [name] failed to furnish [him/her] with a reasonably safe place to work, and that Plaintiff [name]'s working conditions could have been made safe through the exercise of reasonable care, then you must find that Defendant [name] was negligent.

The fact that Defendant [name] conducted its operations in a manner similar to that of other companies is not conclusive as to whether Defendant [name] was negligent or not.

You must determine if the operation in question was reasonably safe under the circumstances. The fact that a certain practice had 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. A practice is not necessarily unsafe or unreasonable, however, merely because it injures someone.

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

If you find from a preponderance of the evidence that Defendant [name] assigned Plaintiff [name] to perform a task that the Plaintiff [name] was not adequately trained to perform, you must find that Defendant [name] was negligent.

4.5 Unseaworthiness

Plaintiff [name] seeks damages for personal injury that [he/she] claims was caused by the unseaworthiness of Defendant [name]'s vessel, the [name].

A shipowner owes every member of the crew employed on its vessel the absolute duty to keep and maintain the vessel and all its decks and passageways, appliances, gear, tools, parts and equipment 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 on 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 the duty to supply an adequate and competent crew. A vessel may be unseaworthy even though it has a numerically adequate crew, if too few persons are assigned to a given task.

However, the vessel owner is not required to furnish an accident-free ship. [He/she/it] need only furnish a vessel and appurtenances that are reasonably fit for the intended use and a crew that is reasonably adequate for the assigned tasks.

The vessel owner is not required to provide the best appliances and equipment, or the finest crews, on [his/her/its] vessel. [He/she/it] is required to provide only 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 vessel owner did

not provide an adequate crew of sufficient number to perform the tasks required, or if you find that the vessel was in any manner unfit under the law as I have 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 vessel owner liable, without considering any negligence on the part of the vessel owner or any of [his/her/its] employees.

However, if you find that the owner had a capable crew, and had appliances and gear that were safe and suitable for their intended use, then the vessel was not unseaworthy and Defendant [name] is not liable to Plaintiff [name] 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, different rules apply to the Jones Act claim and to the unseaworthiness claim.

Under the Jones Act, for both the employer's negligence and the seaman'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. In other words, under the Jones Act, a defendant and a plaintiff each bear the responsibility for any negligence that played a part, however slight, in causing the plaintiff's injury.[3]

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

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[1] *See Consol. Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), discussing 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 that 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).

[3] *CSX Transp., Inc. v. Robert McBride*, 131 S. Ct. 2630 (2011).

4.7 Contributory Negligence

Defendant [name] contends that Plaintiff [name] was negligent and that Plaintiff [name]'s negligence caused or contributed to causing [his/her] injury. This is the defense of contributory negligence. Plaintiff [name]'s negligence will be considered a cause of the injury if it played a part—no matter how slight—in bringing about [his/her] injury.[1] Defendant [name] has the burden of proving that Plaintiff [name] was contributorily negligent. If Plaintiff [name]'s negligence contributed to [his/her] injury, [he/she] may still recover damages, but the amount of [his/her] 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/her] reliance on [his/her] employer to provide a safe work environment, but also [his/her] own experience, training and education. Under the Jones Act, a seaman has the duty to exercise that degree of care for [his/her] own safety that a reasonable seaman would exercise in like circumstances.[2]

(If the case involves concealment of material information in hiring:)

You may find Plaintiff [name] was contributorily negligent if you find that [he/she] concealed material information about a preexisting injury or physical condition from [his/her] employer; exposed [his/her] body to a risk of reinjuring or aggravating a preexisting

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[1] *Norfolk S. R.R. v. Sorrell*, 549 U.S. 158 (2007).

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

injury or condition; and then suffered reinjury or aggravation of that injury or condition.[3]

If you find that [Defendant [name] was negligent] [the vessel was unseaworthy], and that the [negligence] [unseaworthiness] was a proximate [legal] cause of Plaintiff [name]'s injury, but you also find that the accident was due partly to Plaintiff [name]'s contributory negligence, then you must determine the percentage Plaintiff [name]'s negligence contributed to the accident. You will provide this information by filling in the appropriate blanks in the jury questions. Do not make any reduction in the amount of damages that you award to Plaintiff [name]. It is my job to reduce any damages that you award by any percentage of contributory negligence that you assign to Plaintiff [name].

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[3]*Johnson v. Cenac Towing, Inc.*, 544 F.3d 296 (5th Cir. 2008); Ramirez v. Am. Pollution Control Corp., 364 F. App'x. 856 (5th Cir. 2010).

4.8 Damages

If you find that Defendant [name] is liable, you must award the amount you find by a preponderance of the evidence is full and just compensation for all of Plaintiff [name]'s damages.[1] **(If punitive damages are an issue:)** [You also will be asked to determine if Defendant [name] is liable for punitive damages. Because the methods of determining punitive damages and compensatory damages differ, I will instruct you separately on punitive damages. The instructions I give you now apply only to your consideration of compensatory damages.]

Compensatory damages are not allowed as a punishment against a party. Such damages cannot be based on speculation, because compensatory damages must be actual damages to be recoverable. But compensatory damages are not restricted to out-of-pocket losses of money or lost time. Instead, compensatory damages may include mental and physical aspects of injury, tangible and intangible. Compensatory damages are intended to make Plaintiff [name] whole, or to restore [him/her] to the position [he/she] would have been in if the accident had not happened.

In determining compensatory damages, you should consider only the following elements, to the extent you find that Plaintiff [name] has established them by a preponderance of the evidence: past and future physical pain and suffering, including physical disability, impairment, and inconvenience, and the effect of Plaintiff [name]'s injuries and inconvenience on the normal pursuits and pleasures of life; past and future mental anguish and feelings of economic insecurity

[1]If there is no issue about punitive damages, the bracketed sentences that follow can be deleted and the instructions on compensatory damages can continue. If the pleadings and evidence raise issues about punitive damages, include the bracketed language.

caused by disability; income loss in the past; impairment of earning capacity or ability in the future, including impairment of Plaintiff [name]'s earning capacity due to [his/her] physical condition; past medical expenses [unless medical expenses have been paid as cure]; and the reasonable value, not exceeding actual cost to Plaintiff [name], 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.

If you find that Plaintiff [name] is entitled to an award of damages for loss of past or 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 [name] 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 [name] only [his/her] 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 that you award on this basis.

Second, an amount to cover a future loss of earnings is more valuable to Plaintiff [name] if [he/she] received the amount today than if [he/she] received the same amount in the future. If you decide to award Plaintiff [name] an amount for lost future earnings, you must discount that amount to present value by considering what return would be realized on a relatively risk free investment and deducting that amount from the gross future earning award.

However, 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, instead determining what amount that will fairly

compensate Plaintiff [name] for [his/her] injuries.

4.9 Punitive Damages[1]

You may, but are not required to, award punitive damages against a defendant if that defendant has acted willfully and wantonly. The purpose of an award of punitive damages is to punish the defendant and to deter [him/her/it] and others from acting as [he/she/it] did.[2]

A defendant's action is willful or wanton if it is 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/she/it] proceeds in disregard of a high and excessive degree of danger that is known to [him/her/it] or was apparent to a reasonable person in [his/her/its] position.[3]

[Note: Previous versions of this instruction included a charge regarding recovery of punitive damages from a Jones Act employer under the general maritime law for gross

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[1]Punitive damages are presently available under the Jones Act only if the employer allegedly willfully and wantonly disregarded its maintenance and cure obligation. *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009) (*abrogating* Guervara v. Mar. Overseas Corp., 59 F.3d 1496 (5th Cir. 1995)); see Instruction No. 4.11. At least one court has questioned whether *Townsend* opens the possibility of punitive damages under the Jones Act. In *Townsend*, the Supreme Court stated that it was not addressing the dissent's argument that the Jones Act prohibits punitive damages by virtue of its incorporation of the Federal Employers' Liability Act, 46 U.S.C. § 30104(a). *See Wagner v. Kona Blue Water Farms, LLC*, 2010 WL 3566730 (D. Haw. Sept. 13, 2010); *see also* David Robertson, Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend, 70 La. L. Rev. 463 (2010). It should also be noted that the Supreme Court did not address whether the size of punitive damages awards in maintenance and cure cases requires a recovery cap such as that imposed in *Exxon Shipping Co. v. Baker*, 554 U.S 471, 514 (imposing a punitive/ compensatory ratio of 1:1). *Townsend*, 557 U.S. at 424 n.11.

[2]On the general subject of punitive damages and the guidelines to be considered in fashioning jury instructions, *see Exxon Shipping Co. v. Baker*, 554 U.S. 471.

[3]W. Page Keeton et al., *Prosser and Keeton on Torts*, § 34, at 213 (West, 5th ed. 1984).

unseaworthiness.[4]*]*

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[4]At the time of the inital printing, *McBride v. Estis Well Services, L.L.C*, 731 F.3d 505 (5th Cir. 2013) reversing a district court ruling that punitive damages were unavailable for unseaworthiness under the general maritime law, had been argued *en banc* and that decision had yet to be rendered. However, a result of the *en banc* decision in *McBride v. Estis Well Serv. L.L.C.*, 768 F.3d 382, 385 (Cir. 2014) *cert. denied*, ___ U.S. ____, 135 S.Ct. 2310 (2015), there is no longer a right to recover punitive damages from a Jones Act employer under the general maritime law for gross unseaworthiness.

4.10 Maintenance and Cure Claims and Their Relationship to Jones Act and Unseaworthiness Claims—Punitive Damages for Willful Withholding of Maintenance and Cure

Plaintiff [name]'s third claim is that, as a seaman, [he/she] 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 [name]. You must decide this claim separately from your determination of [his/her] Jones Act and unseaworthiness claims.

Maintenance and cure provides a seaman who is disabled by injury or illness while in the ship's service with medical care and treatment and the means of maintaining [him/her]self while [he/she] is recuperating.

Maintenance and cure is a seaman's remedy. [If you determine that Plaintiff [name] was a seaman, you then must determine if [he/she] is entitled to maintenance and cure.] [Plaintiff [name] is a seaman; therefore, you must determine whether [he/she] is entitled to maintenance and cure.] When there are ambiguities or doubts about a seaman's right to maintenance and cure, you should resolve those ambiguities or doubts in the seaman's favor.[1]

A seaman is entitled to maintenance and cure even though [he/she] was not injured as a result of any negligence on the part of his employer or any unsea-

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[1]*Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962) ("When there are ambiguities or doubts [regarding maintenance and cure], they are resolved in favor of the seaman."); *Johnson v. Marlin Drilling Co.*, 893 F.2d 77, 79–80 (5th Cir. 1990) (applying "ambiguities or doubts" rule to find that a treating physician's opinion that contradicted the opinion of the doctor performing the independent medical examination "would require a finding in favor" of the seaman).

worthy condition of the vessel. To recover maintenance and cure, Plaintiff [name] need only show that [he/she] suffered injury or illness while in the service of the vessel on which [he/she] was employed as a seaman, without willful misbehavior on [his/her] part. The injury or illness need not be work-related; it need only occur while the seaman is in the ship's service. Maintenance and cure may not be reduced because of any negligence on the seaman's part.

The "cure" to which a seaman may be entitled includes the costs of medical attention, including the services of physicians and nurses as well as hospitalization, medicines and medical apparatus. However, the employer has no duty to provide cure for any period during which a seaman is hospitalized at the employer's expense.

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

A seaman is entitled to receive maintenance and cure from the date [he/she] leaves the vessel until [he/she] reaches what is called "maximum cure." Maximum cure is the point at which no further improvement in the seaman's medical condition is reasonably expected. If it appears that a seaman's condition is incurable, or that the treatment will not improve a seaman's physical condition but will only relieve pain, [he/she] 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 Plaintiff [name] 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 when the seaman resumed [his/her] employment, if [he/she] did so. If, however, the evidence supports a finding that economic necessity forced the seaman to return to work before reaching maximum cure, you may take that finding into consideration in determining when the period for maintenance and cure ends.

If you find that Plaintiff [name] is entitled to an award of damages under either the Jones Act or unseaworthiness claims, and if you award [him/her] either lost wages or medical expenses, then you may not award [him/her] maintenance and cure for the same period. That is because Plaintiff [name] may not recover twice for the same loss of wages or medical expenses. However, Plaintiff [name] may also be entitled to an award of damages if Defendant [name] failed to pay maintenance and cure when it was due.[2]

A shipowner who has received a claim for maintenance and cure is entitled to investigate the claim. If, after investigating the claim, the shipowner unreasonably rejects it, [he/she] is liable for both the maintenance and cure payments [he/she] should have made, and for any compensatory damages caused by [his/her] unreasonable failure to pay. Compensatory damages may include any aggravation of Plaintiff [name]'s condi-

[2]The existence and extent of a double-recovery problem will vary from case to case. Avoiding double recovery requires careful screening of the evidence and a jury charge tailored to fit the evidence presented. For example, if the value of the food 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. If a jury awards loss of earnings from the date of injury to some date after the end of the voyage, then those same earnings cannot again be awarded as part of maintenance recovery under the ship owner's obligation to provide wages until the end of the voyage. *See Colburn v. Bunge Towing, Inc.*, 883 F.2d 372 (5th Cir. 1989).

tion because of the failure to provide maintenance and cure.

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. Plaintiff [name] was entitled to maintenance and cure;

2. it was not provided;

3. Defendant [name] acted unreasonably in failing to provide maintenance and cure; and

4. the failure to provide the maintenance and cure resulted in some injury to Plaintiff [name].[3]

(If punitive damages for maintenance and cure are at issue:)

If you also find that the vessel owner's failure to pay maintenance and cure was not only unreasonable, but was also willful and wanton, that is, with the deliberate intent to do so, you may also award Plaintiff [name] punitive damages and attorney's fees. You may not award these damages unless the vessel owner acted callously or willfully in disregard of the seaman's claim for maintenance and cure. The purpose of an award of punitive damages is to punish a defendant and to deter the defendant and others from such conduct in the future.

A plaintiff may not recover attorney's fees for prosecuting Jones Act or unseaworthiness claims. Instead,

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[3]*See Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987) (abrogated on other grounds); *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995) (abrogated with respect to punitive damages award for wrongful failure to pay maintenance and cure obligation); *Atl. Sounding, Inc. v. Townsend*, 557 U.S. 404.

fees may be recovered only for prosecuting claims that the vessel owner not only failed to pay maintenance and cure, but did so in willful and wanton disregard of the obligation to do so. You may award such attorney's fees only if you find that the vessel owner acted willfully and wantonly in disregarding the vessel owner's obligation to pay maintenance and cure.[4]

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[4] *Atl. Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009) (abrogating *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995)). It should be noted that at least one court has questioned whether *Atlantic Sounding* opens the possibility of punitive damages under the Jones Act by virtue of the Supreme Court's express statement that it did not address the dissent's argument that the Jones Act prohibits the recovery of punitive damages by virtue of its incorporation of the Federal Employers' Liability Act, 46 U.S.C. § 30104(a). *See Wagner v. Kona Blue Water Farms, LLC*, 2010 WL 3566730 (D. Haw. Sept. 13, 2010); *see also* David Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 La. L. Rev. 463 (2010).

4.11 Section 905(b) Longshore and Harbor Workers' Compensation Act Claim

A. Committee Note

A maritime worker who is a seaman has a Jones Act claim and remedy against his or her employer, and an unseaworthiness claim and remedy against the operator of the vessel as to which he or she is a seaman, whether the operator is his or her employer or not. A maritime worker who is not a seaman may claim LHWCA benefits from his or her employer, and may bring a negligence action under 33 U.S.C. § 905(b) against the operator of the vessel on which he or she is working (and, in some cases, against the employer, if the employer is operating the vessel). The standards for liability under the Jones Act and unseaworthiness differ from those for liability under § 905(b). The categories of maritime worker—seaman and nonseaman—are mutually exclusive[1] and require independent determinations. A maritime worker is limited to LHWCA remedies only if there is no genuine factual dispute about whether the worker was a seaman under the Jones Act.[2]

B. Charge

1. LHWCA STATUS

A worker is covered by the LHWCA if [he/she] is (1) engaged in maritime employment and (2) is injured at a place within the coverage of the act. These are two separate requirements.

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[1] *Sw. Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991).

[2] *Gizoni*, 502 U.S. at 89. This inquiry is a mixed question of fact and law.

A worker is engaged in maritime employment if:[3]

1. [he/she] is injured on actual navigable waters in the course of [his/her] employment on those waters;[4] or

2. [he/she] is injured while engaged in an essential part of the loading or unloading process of a vessel.[5]

2. Place Within the Coverage of the Act[6]

A place is within the coverage of the Act if the place is 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 a vessel.[7]

3. Section 905(b) Negligence Charge

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[3]A special charge may be appropriate if reasonable minds could conclude that the plaintiff was engaged in the activities described in 33 U.S.C. § 902(3)(A)-(H). 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.

[4]*Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.*, 459 U.S. 297 (1983); Great S. Oil & Gas Co. v. Dir., Office of Workers' Comp. Programs, 401 F. App'x. 964 (5th Cir. 2010).

[5]*Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40 (1989), and cases cited therein; *Coastal Prod. Servs. v. Hudson*, 555 F.3d 426, 439 (5th Cir. 2009).

[6]A special charge may be appropriate if reasonable minds could conclude that the plaintiff's employment fits within 33 U.S.C. § 903(d). This section excludes from coverage certain employees injured while working in certain areas of a facility engaged exclusively in building, repairing, and dismantling certain small vessels, unless the facility receives federal maritime subsidies or the employee is not covered by a state worker-compensation law.

[7]33 U.S.C. § 903; *Coastal Prod. Serv. Inc. v. Hudson*, 555 F.3d 426, 431 (5th Cir. 2009).

If you find that Plaintiff [name] was covered by the LHWCA at the time of [his/her] injury, then you must determine whether Plaintiff [name]'s injury was caused by the negligence of Defendant [name], the operator of the vessel [name]. Defendant [name] does not owe Plaintiff [name] the duty to provide a seaworthy vessel. Defendant [name] is liable only if [he/she] was guilty of negligence that was the legal cause of Plaintiff [name]'s injury. [The shipowner owes three duties to longshoremen: (1) a turnover duty, (2) a duty to exercise reasonable care in the areas of the ship under the active control of the vessel owner, and (3) a duty to intervene.[8]]

4. The Turnover Duty

Negligence is the failure to exercise reasonable care under the circumstances. A vessel operator such as Defendant [name] must exercise reasonable care before Plaintiff [name]'s employer, a [specify type of maritime employment in which employer was engaged in the vessel, such as stevedore], began its operations on the vessel. Defendant [name] must use reasonable care to have the vessel and its equipment in such condition that an expert and experienced [specify type of maritime employment in which employer is 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 Defendant [name] must warn Plaintiff [name]'s employer of a hazard on the ship, or a hazard with respect to the vessel's equipment, if:

1. Defendant [name] knew about the hazard or should have discovered it in the exercise of reasonable care, and

[8]A proper charge must be crafted in light of the plaintiff's factual allegations. *Kirksey v. Tonghai Mar.*, 535 F.3d 388 (5th Cir. 2008) (citing *Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156 (1981); *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994)).

2. the hazard was one likely to be encountered by Plaintiff [name]'s employer in the course of its operations in connection with Defendant [name]'s vessel, and

3. the hazard was not known to Plaintiff [name]'s employer and would not be obvious to or anticipated by a reasonably competent [specify type of maritime employment in which employer is engaged on the vessel, such as stevedore or other designated maritime employer] in the performance of the work. Even if the hazard was one that Plaintiff [name]'s employer knew about or that would be obvious to or anticipated by a reasonably competent [specify stevedore or other type of maritime employment in which the employer was engaged on the vessel], Defendant [name] must exercise reasonable care to avoid the harm to Plaintiff [name] if Defendant [name] knew or should have known Plaintiff [name]'s employer would not or could not correct the hazard and Plaintiff [name] could not or would not avoid it.[9]

The standard of care a vessel operator owes to Plaintiff [name] after [his/her] employer began its operations on the vessel is different than the standard

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[9]This sentence does not appear in the *Scindia* decision (see footnote 33) but appears warranted from a number of later 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 stevedore's negligence. *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 shipowner 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.*, 512 U.S. 92 (1994), *remanded to* 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.

of care governing the vessel operator's actions before the employer began its vessel operations.

5. After the Employer Begins Vessel Operations-Duty of Vessel Owner With Active Control of Vessel

If, after Plaintiff [name]'s employer [name] began operations on the vessel, Defendant [name] actively involved itself in those operations, it is liable if it failed to exercise reasonable care in doing so, and if such failure was the cause of Plaintiff [name]'s injuries.

If, after Plaintiff [name]'s employer began operations on the vessel, Defendant [name] maintained control over equipment or over an area of the vessel on which Plaintiff [name] could reasonably have been expected to go in performing [his/her] duties, Defendant [name] must use reasonable care to avoid exposing Plaintiff [name] to harm from the hazards [he/she] reasonably could have been expected to encounter from such equipment or in such area.

6. Duty to Intervene

If, after Plaintiff [name]'s employer [name] began its operations on the vessel, Defendant [name] learned that an apparently dangerous condition existed (including a condition that existed before Plaintiff [name]'s employer began its operations) or has developed in the course of those operations, Defendant [name] vessel owner must use reasonable care to intervene to protect Plaintiff [name] against injury from that condition only if Plaintiff [name]'s employer's judgment in continuing to work in the face of such a condition was so obviously improvident that Defendant [name] should have known that the condition created an unreasonable risk of harm to Plaintiff [name]. In determining whether Plaintiff [name]'s employer's judgment is "so obviously improvident" that Defendant [name] should have intervened,

you may consider that Plaintiff [name]'s employer has the primary duty to provide a safe place to work for Plaintiff [name] and its other employees, and that Defendant [name] ordinarily must justifiably rely on the Plaintiff [name]'s employer to provide its employees with a reasonably safe place to work. In determining whether Defendant [name] justifiably relied on the decision of Plaintiff [name]'s employer to continue the work despite the condition, you should consider the expertise of Plaintiff [name]'s employer, the expertise of Defendant [name], and any other factors that would tend to establish whether Defendant [name] was negligent in failing to intervene into the operations of Plaintiff [name]'s employer.[10]

7. Damages—Loss of Society[11]—Only Available in United States Territorial Waters in a § 905(b) Claim

In addition to the damages that Plaintiff [name] demands, [he/she] seeks damages for the loss of society with [his/her] [wife/husband], [name], which [he/she] claims [he/she] has suffered as a result of [his/her] accident.

The spouse of an injured person may recover damages for loss of society if [he/she] proves by a preponderance of the evidence that [he/she] has suffered the loss of society with [his/her] [wife/husband] and that the loss of society was caused by injuries to [his/her] wife/husband that are attributable to Defendant [name]'s fault.

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[10]*Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156 (1981); *Randolph v. Laeisz*, 896 F.2d 964 (5th Cir. 1990).

[11]*Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Murray v. Anthony J. Bertucci Constr. Co.*, 958 F.2d. 127 (5th Cir. 1992); *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992) (a claim for loss of society is only available in a 905(b) claim arising in territorial waters); *Moore v. M/V Angela*, 353 F.3d 376, 383 (5th Cir. 2003); *Sinegal v. Merit Energy Co.*, 2010 WL 1335151 (W.D. La. March 29, 2010); *Nunez v. Forest Oil Corp.*, 2008 WL 2522121 (E.D. La. June 20, 2008).

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.

If you find by a preponderance of the evidence that Plaintiff [name] suffered the loss of society with [his/her] [wife/husband], [name] as a result of injuries caused by Defendant [name]'s fault, you may award [him/her] damages for loss of society. If, on the other hand, you find from a preponderance of the evidence that Plaintiff [name] did not sustain loss of society with [his/her] [wife/husband] [name] as a result of injuries attributable to Defendant [name]'s fault, then you may not award [him/her] damages for loss of society.

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