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The Medical/Legal/Human Disconnect in Cure Cases: A Proposal for Reform

Thomas C. Galligan, Jr.¹

Abstract

The obligation of a vessel owner to provide a seaman with cure or medical treatment for injuries or conditions which were either caused by the seaman's service of the ship or which manifested themselves during that service is of ancient origin. The obligation lasts until the seaman attains what the courts call maximum medical improvement, a medical decision, even if further treatment would ease the seaman's pain or prevent relapse or degeneration of the seaman's condition. Under the traditional rules, if medicine could not fix the seaman's problem, then the obligation to provide cure ceased. These old rules are out of step with modern reality in several respects; they are relics of our past and while history can be a reliable guide in legal interpretation, it should not shackle legal evolution where significant change has occurred in society, science, or culture. How are the rules concerning cure out of step with the world today? First, the rule that the seaman can recover cure for a condition which manifests itself during the seaman's service of the ship, but which was not caused by the seaman's service of the ship, places a risk on the vessel owner which is not fairly attributable to its enterprise. Modern worker's compensation schemes require a worker's injury or illness to arise out of the employment, i.e., to be a risk fairly attributed to the employer. Moreover, with first-party medical insurance so much more available today than it was in the days when courts first defined the vessel owner's obligation to provide cure, it is unlikely a seaman will go without treatment.

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Additionally, the rule that medical treatment that eases pain or prevents relapse or degeneration does not count as “cure” is inconsistent with developments in medicine, including developments in pain management and medicine’s increased emphasis on maintaining the quality of a patient’s life, not just eradicating a condition (or not). Thus, I propose limiting cure where a seaman’s medical condition is not caused by the seaman’s service of the ship. In that case, the vessel owner’s obligation to provide cure would cease upon a determination that the condition was not caused by the service of the ship. Additionally, I argue that if the seaman’s condition was caused by the service of the ship, the right to cure should include the right to recover for pain relief and anti-regression treatment. As a necessary by-product of my proposals, the law of admiralty should jettison the concept of maximum medical improvement.

I. Introduction

The past is always with us, whether we consciously face it or not. Studies of the past include archaeology, on the physical side of things, and psychotherapy, on the individual or personal side of things. By digging up artifacts we learn about the people who lived where the artifacts are found. By digging at what lurks in our own past, we know ourselves better and maybe rid our lives of the past’s adverse effects on our present.

Of course, most commonly, we call the study of the past: history. One definition provides that history is the “discipline that studies the chronological record of events, usually attempting, on the basis of the critical examination of source materials, to explain events.”² The definition is straightforward enough until the last three words: “to explain events.” The fast reader will no doubt conclude the words mean to explain *past* events.

² <https://www.britannica.com/topic/history>

But there is another way to read the phrase “to explain events.” That reading, while accepting that history can explain past events might also conclude that history can explain current events. Knowing what our forebears did and why may help explain why we do what we do, even if we don’t know why. In this regard the historian functions, in part, as a social psychotherapist. Understanding the past helps us know ourselves better and understand ourselves as a society. Knowing about the past, we can choose whether to change direction or to let history repeat itself, to borrow a cliché.

One might conclude that to the extent the historical explanation of what we do today makes sense and the circumstances that demanded the historical answer still apply, there should be little or no need to alter our course of historically influenced action. We might call such continued behavior tradition—something we did in the past that still works today. Alternatively, if what we did in the past no longer makes sense either because it was informed by outdated beliefs or because things other than our belief structures have changed, then the logical thing to do would be to abandon the past practice or change the rule to make sense under present circumstances.

History has always been important in legal analysis. Studying the history of a rule or body of rules can help explain it. Historical legal analysis lets us know where the rule came from and hopefully it tells us why our legal ancestors adopted the particular rule or sculpted a body of rules.³ In addition, understanding the historical basis of a rule can serve as a limit on judicial discretion. A judge who uses history in their analysis of a legal problem may feel intellectually fettered by the past out of which the rule under consideration arose. Understanding the historical

³ Of course, “historical evidence will often fail to provide clear answers to difficult questions.” *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2180 (2023) (Breyer, J., dissenting).

origins of a rule and its why-fore may cause a judge on the verge of overruling a prior decision or changing an old rule to pause before acting or to act more cautiously than they otherwise might have acted.

But, at the same time, a judge who always limits the scope of a rule to its historical basis is shackled by that rule, not merely prudentially constrained by it. What if, as Karl Llewellyn famously wondered: the reason for the rule no longer applied?⁴ What if circumstances had changed? What if the rule were based on an understanding of history, proper governance, science, social structure, etc. that no longer prevailed? Should the rule really still apply as it was articulated in the past? Or should the court reconsider the rule? I am a post-realist realist.⁵ Like, Llewellyn, I think that the rule should stop where the reason for the rule stops—or where other changes in how we live our lives have occurred.

This piece is about some old rules and changing circumstances in a field I study and write about: Admiralty. Maritime law is among the world's oldest bodies of law.⁶ Its history is, in many ways, a key part of the history of all law.⁷ And, among Admiralty's oldest rules is the vessel owner's⁸ obligation to provide cure to a seaman⁹ who is injured or becomes ill while in

⁴ Karl Llewellyn, *The Bramble Bush* 158 (7th printing 1981). Following history merely because it is what we did is reminiscent of Alexander Pope's statement in his poem, *An Essay on Man*: "Whatever is, is RIGHT." See, Sarah Bakewell, *Humanly Possible*, 165 (2023).

⁵ See, e.g., Brian Leiter, *Legal Realism and Legal Doctrine*, 163 *U. Pa. L. Rev.* 1975 (2015) ("What the Legal Realists taught us is that too often the doctrine that courts invoke is not really the normative standard upon which they *really* rely, and it was central to Legal Realism to reform the law to make the actual doctrine cited by courts and treatise writers correspond to the *actual* normative standards upon which judges rely.").

⁶ See, e.g., George S. Potter, *The Sources, Growth and Development of the Law Maritime*, 11 *Yale L. J.* 143 (1902) ("To the admiralty lawyer a knowledge of the sources of the Law Maritime is of the utmost importance. Its present condition being the outgrowth of more than three thousand years of commercial intercourse among the nations engaged in the navigation of the seas, it is essential to a proper appreciation and understanding of its nature, scope and character at the present day that those who practice it should familiarize themselves with its history and be able to recall the various steps of its growth and progress.")

⁷ *Id.*

⁸ Commonly, the vessel owner is also the seaman's employer.

⁹ See, Kenneth G. Engerrand, *Primer on Maintenance and Cure*, 18 *U. San Fran. Mar. L. J.* 41-44 (2006). Of course, if we started all over, today we might refer to worker's who have an employment connection to a vessel which is

the service of the ship. That point is important: the obligation to provide cure applies both to injuries that merely occur or arise in the service of the ship and those that are caused by that service. That means the obligation to provide cure goes beyond injuries which are caused by the service of the ship; the duty to provide cure extends to injuries or diseases which arise during the course of the seaman's service of the ship even though not caused by it.¹⁰

How long does the obligation to provide cure last? The vessel owner's obligation to provide the injured seaman with cure ceases when the seaman reaches what the law calls "maximum medical improvement."¹¹ That is, the vessel owner's obligation to provide cure stops when medical science can do no more for the seaman, even though the seaman is still receiving medical treatment to ease their pain or maintain their albeit injured or ill condition.¹² Put differently, the seaman's condition may be incurable, and further medical treatment of a

substantial in duration and nature seafarer's, rather than seamen. It would be nice to take the gender out of it. But to avoid confusion and to be consistent with what the courts continue to do, I will use the terms seaman and seamen.¹⁰ "The inquiry is not one of causation, but of timing; did the illness for which the seaman seeks maintenance and cure begin or become aggravated while he was 'serving the ship?'" *Ramirez v. Carolina Dream, inc.*, 760 F. 3d 119, 124-25 (1st Cir. 2014), *citing*, *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001).¹¹ *Costa Crociere, S. p. A. v. Rose*, 939 F. Supp. 1538 (S.D. Fla. 1996). Court will also use the phrase maximum medical recovery, *Whitman v. Miles*, 387 F. 3d 68 (1st Cir. 2004), or maximum medical cure. *Johnson v. Marlin Drilling Co.*, 893 F. 77, (5th Cir. 1990). All the phrases mean the same thing: medicine can do no more to make the seaman better even if it can relieve pain or prevent relapse or degeneration.

¹² On a related issue, the

cut-off date for both maintenance and cure is not the point at which the seaman recovers sufficiently to return to work. Rather, it is the date of maximum medical cure. *Brown v. Aggie & Millie, Inc.*, 485 F.2d 1293, 1296, 1973 A.M.C. 2465, 2467 (5th Cir.1973). Maximum cure is achieved when it is probable that further treatment will result in no betterment of the seaman's condition. *Calmar*, 303 U.S. at 530, 58 S.Ct. at 654, 82 L.Ed. at 998, 1938 A.M.C. at 345; *Farrell v. United States*, 336 U.S. 511, 515, 69 S.Ct. 707, 709, 93 L.Ed. 850, 854, 1949 A.M.C. 613, 619 (1949); *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 404, 1981 A.M.C. 1047, 1051 (5th Cir.1979) (where it appears that the condition is incurable or that further treatment will merely relieve pain and suffering and not otherwise improve the physical condition, it is proper to declare the point of maximum cure); *see also*, *Cox v. Dravo Corp.*, 517 F.2d 620 (3^d Cir.) (en banc), *cert. denied*, 423 U.S. 1020, 96 S.Ct. 457, 46 L.Ed.2d 392 (1975).

Springborn v. American Commercial Barge Lines, Inc., 767 F. 2d 89 (5th Cir. 1985).

palliative nature, or to prevent degeneration, may be desirable or needed but the vessel owner does not have to pay for it.¹³

Courts state that the decision whether the seaman has reached maximum medical improvement is a medical question.¹⁴ But the notion of maximum medical improvement is, in many ways, a historical relic. It reflects an outmoded medical view. Perhaps at one time, doctors viewed cure as making someone better, restoring them to their previous condition, or doing what the doctor could and then resolving that they could do no more to help—to cure, in the vernacular sense. The vessel owner’s obligation to provide cure stopped at that point—when the seaman was restored or when medicine could do no more. Treatment designed to relieve pain or suffering but which did not entail improvement in the seaman’s medical condition was not a part of the vessel owner’s obligation to provide cure. Nor, apparently, was treatment meant to prevent relapse or regeneration. But today, doctors do not merely focus on making someone better; they have developed expertise in managing pain to allow people to live fuller lives and they have developed other types of therapeutic treatment that allow someone to maintain a desirable quality of life even though those therapies may not cure or improve the underlying condition. Doctors

¹³ *Alario v. Offshore Service Vessels, L.L.C.*, 447 Fed. Appx. 185 (E.D. La. 2012). The law is not quite as clear as the above quite would seem. The U.S. Supreme Court, as discussed below, has never expressly said that the right to recover cure does not extend to palliative care, *Vella v. For Motor Co., Inc.*, 421 U.S. 1 (1975), but it has clearly stated that no further cure is due to some workers whose condition will not improve and who will continue to receive periodic treatments. *See. e.g., Farrell v. United States*, 336 U.S. 511 (1979). Under the traditional rules, it is up to the jury to decide whether treatment is curative or palliative based upon the medical evidence. *Andrews v. Dravo Corp.*, 288 F. Supp. 142, 147 (W.D. Pa. 1968).

¹⁴ *Breese v. AWI, Inc.*, 823 F. 2d 100, 104 (5th Cir. 1987) (“Finally, maximum medical improvement ‘is a medical question, not a legal one,’ and any ‘ambiguities or doubts in the application of the law of maintenance and cure are resolved in favor of the seaman.’ ”. *Accord: Durbin v. Marquette Transportation Company, L.L.C.*, 528 F. Supp. 3d 700, 7-06) ((W.D. Ky. 2021), *citing and quoting, Breese and Giroir v. Cenac Marine Services, LLC*, 2019 WL 2233763, *3 (E.D. La. 2019)

have expanded their notions of treatment to include treatments that allow someone to more meaningfully live their life with a medical condition.

How should the law treat the seaman who has developed a disease or illness who will not clearly improve with further treatment, but who will definitely and seriously regress without treatment or whose life will be more miserable without treatment because of pain? Must the vessel owner provide anti-regression treatment or life-bettering treatment that will not improve the underlying condition *per se*? Must the vessel owner provide indefinite pain relief? Courts have not been consistent in answering these questions and thus the definition of maximum medical improvement has become rather accordion-like. The law of cure, by adhering to the idea of maximum medical improvement, has not adapted to changes in medical theory even though courts continue to say that whether a seaman has reached maximum medical improvement is a medical question.¹⁵

Given what medicine can do today, I am convinced that the concept of maximum medical improvement should not be the standard for determining when the vessel owner's obligation to provide cure ceases. The line where the seaman reaches maximum medical improvement is a wavering and uncertain one, grounded in outmoded medical theory. And as medicine develops, that rule and its application become more uncertain. Adhering to the maximum medical improvement test is blind obeisance to history. It is time for a change.

At the same time, today, one may justifiably question whether a vessel owner should be liable for injury or disease that arises during but is not caused by the seaman's service of the

¹⁵ Breese v. AWI, Inc., 823 F. 2d 100 (5th Cir. 1987).

ship. A condition that is not caused by the service of the ship but merely manifests itself during the seaman's service is not a risk fairly attributable to the vessel owner or the vessel owner's enterprise. It is a background risk—a part of life. Public or private health insurance, rather than the employer or the employer's liability insurer, should be responsible for post-causation determination medical treatment where the seaman's medical condition was not caused by the service to the ship. Because it may not be immediately known what the cause of the seaman's illness or condition is and because it is essential to get an injured or ill seaman diagnosed and treated as soon as possible the vessel owner should have an obligation to provide the injured or ill seaman cure until a determination is made that the condition was not caused by the seaman's service of the ship.¹⁶ If it turns out that the condition was not one caused by the seaman's service of the ship, then the obligation to provide cure should cease even if the seaman has not reached maximum medical improvement and/or would benefit from palliative treatment or anti-regression treatment. On this point, I am arguing for some narrowing of the historic obligation to pay cure. I would add that the right to cure should extend beyond the causation determination if that determination is made in a foreign port to the time when the seaman returns home.

Contrariwise, where the seaman's injury or illness is caused by the service to the ship, then the risk is attributable to the vessel owner's enterprise and the vessel owner should be responsible for cure beyond the causation determination. And, as I have said, the vessel owner should be responsible for palliative care and any anti-regression and/or life bettering treatment because that is consistent with modern medical views of care. Here, I am arguing for an expansion of how most courts have treated the obligation to provide cure.

¹⁶ The obligation should include getting the seaman home if the injury or illness arises in a foreign port or on a voyage on the high seas.

In the next section, I shall discuss the legal background of cure, the development of worker's compensation and first party insurance, and what I call the conundrum of care. I will also outline developments in medical science and theory that emphasize the treatment of pain, the quality of the patient's life, and facilitating one's living with a condition, rather than either making it better (curing it) or simply admitting there is nothing else medicine can do. In Section III, I shall discuss some of the leading American cases dealing with cure and when the obligation ceases and critique them in light of my proposal. In Section IV, I shall discuss in detail several district court decisions that prompted this paper and the rather different approaches they take to determining when a seaman reached maximum medical improvement. The length of the opinions, the arguably inconsistent conclusions they reach, and the very different approaches they took to the concept of maximum medical improvement help to show the vulnerability of that concept as an effective test to determine when the obligation to provide cure ceases. In Section V, I will discuss the impact my proposal would have on the seaman's recovery under the Jones Act for negligence and the right to recover for a breach of the warranty of seaworthiness. And in Section VI, I will recap and conclude.

II. The History and Hornbook Law of Cure, Worker's Compensation, First-Party Insurance, and the Conundrum of Cure

A. The Hornbook Law of Cure¹⁷

¹⁷ For additional discussion of the jurisprudence and issues discussed and from which I have benefited in my research and thinking, *see*, Kenneth G. Engerrand, Primer on Maintenance and Cure, 18 U. San Fran. Mar. L. J. 41-44 (2006) and Robert Force and Martin J. Norris, The Law of Seamen § 26:37. Duration of the obligation to provide maintenance and cure (5th ed. 2003-2022).

As noted, the vessel owner has had, since time immemorial,¹⁸ an obligation to provide a seaman who is injured or who becomes ill¹⁹ in the service of the ship with medical treatment or cure.²⁰ The obligation to provide cure goes along with the vessel owner's obligation to provide maintenance, a set amount designed to sustain the injured or ill seaman in port—to provide an amount more or less equal to the cost of food and lodging in the relevant port.²¹ Both those obligations cease when the seaman has reached maximum medical improvement, the point where medicine can do no more to improve the seaman's condition.²² While the obligation to pay maintenance goes hand-in-hand with the obligation to provide cure, in this piece, I will generally only discuss the duty to provide cure, rather than the obligation to provide maintenance and cure because both essentially turn on when the seaman achieves maximum medical improvement²³ and that is the primary focus of this piece. It also saves words.

¹⁸ See, e.g., *The Osceola*, 189 U.S. 158, 169-71 (1903). See also, B. Shields, *Seaman's Rights to recover Maintenance and Cure Benefits*, 55 Tul. L. Rev. 1046 (1981) (stating that the right to recover cure was included in the 1338 Black Book of Admiralty).

¹⁹ Technically, the key is whether the injury or illness becomes ill during the service of the ship, not merely when the condition manifests itself although I have used that word or some variation of it in other places in this piece. For instance, in *Messier v. Bouchard Transportation*, 688 F. 78 (2d Cir. 2012), a seaman developed lymphoma while in the service of the defendant's ship even though the disease did not present or manifest any symptoms until after the seaman's service had ended. There, the court refused to adopt a manifestation rule but instead held that the proper inquiry was whether the disease occurred during the service of the ship even if it did not manifest itself until afterwards.

²⁰ The obligation to provide cure may extend beyond the determination that a seaman is fit to return to duty if "there remains a reasonable possibility that further treatment will aid in restoring him to his pre-accident condition." *Brown v. Aggie & Miller, Inc.*, 485 F. 2d 1293 (5th Cir. 1293) (headaches).

²¹ *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582 (La. 5th Cir. 2001).

²² See, e.g., *Pelotto v. L & N Towing Co.*, 604 F. 2d 396, 400 (5th Cir. 1979) (Maintenance is a Per diem living allowance, paid so long as the seaman is outside the hospital and has not reached the point of "maximum cure." Cure involves the payment of therapeutic, medical, and hospital expenses not otherwise furnished to the seaman, again, until the point of "maximum cure.").

²³ *Haney v. Miller's Launch, Inc.*, 773 F. Supp. 2d 280, 290 (E.D. N.Y. 2010) ("But, while its [maintenance's] amount may have shrunk in relative value, its duration remains the period when medical treatment is called for.").

To reiterate, the courts hold that the decision whether a seaman has reached maximum medical improvement is a medical decision.²⁴ Do the doctors think they can do more for the seaman? Naturally if they disagree there would be a question of credibility for the factfinder, but resolution should depend upon which medical opinion about maximum medical improvement to accept. The decision is not legal or purely factual; it is based on medical opinion. And courts have said that the decision to terminate a seaman's right to maintenance and cure must be unequivocal.²⁵ As long as there is meaningful improvement the obligation to provide cure should continue.²⁶

The vessel owner's obligation to provide cure arises out of the relationship between the vessel owner and the seaman.²⁷ One might say it is an aspect of their contract,²⁸ but it is perhaps more apt to say that the obligation inheres in the relationship. The vessel owner has an obligation to protect the seaman, who traditionally might have been injured or fallen ill far from home on a vessel on the high seas on which the seaman lived or in a foreign port. In fact, the courts have said and continue to say that seaman are deserving of special solicitude or are wards of admiralty,²⁹ although Justice Alito has questioned the continuing viability of that concept.³⁰

²⁴ *Breese v. AWI, Inc.*, 823 F. 2d 100 (5th Cir. 1987).

²⁵ *Johnson v. Marlin Drilling Co.*, 893 F. 2d 77 (5th Cir. 1990).

²⁶ *Morewitz v. S.S. Matador*, 306 F. 2d 144 (4th Cir. 1962) (heart ailment).

²⁷ *Messier v. Bouchard Transportation*, 688 F. 78, 81 (2d Cir. 2012) (the duty arises out of the contract between the seaman and the vessel owner).

²⁸ *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724 (1943).

²⁹ *Air and Liquid Systems Corp. v. DeVries*, 139 S. Ct. 986, 998 (2019) ("special solicitude"); *Vaughan v. Atkinson*, 369 U.S. 527, 531-32 (1962) (wards). In *Garay v. Carnival Cruise Line, Inc.*, 904 F. 2d 1537, 2530 (11th Cir. 1990) the court called the vessel owner's duty to the crew "almost paternalistic".

³⁰ *The Dutra Group v. Batterton*, 139 S. Ct. 2275, 2287 (2019). There, Justice Alito wrote:(

Against this, *Batterton* points to the maritime doctrine that encourages special solicitude for the welfare of seamen. But that doctrine has its roots in the paternalistic approach taken toward mariners by 19th century courts. See, e.g., *Harden*, 11 F.Cas. at 485; *Brown*, 4 F.Cas. at 409. The doctrine has never been a commandment that maritime law must favor seamen whenever possible. Indeed, the doctrine's apex

In addition to the protectionist rationale for cure, there are policy justifications. The ability to recover maintenance and cure provides a quick remedy for the injured or ill seaman.³¹ Since the obligation to provide the relevant benefits does not traditionally depend upon whether the injury or illness is caused by the service of the ship, the hope was that there would be little litigation over maintenance and cure and that what litigation there was would be resolved quickly.³² Moreover, the right to recover maintenance and cure might extend beyond the end of the voyage on which the seaman was injured or became ill if the seaman had not achieved maximum medical improvement by the end of the voyage.³³

Courts stated that the combination of justifications for maintenance and cure helped assure the continued viability of the merchant workforce. A person who knows about the right to recover maintenance and cure presumably would be reassured when deciding whether to enter or remain in the merchant service.³⁴ Of course, there is some irony afoot with the traditional rationales. A seaman injured in the service of the ship could recover maintenance and cure and knowing that was supposedly reassuring to the seaman. However, the obligation to provide cure only lasted until the seaman reached maximum medical improvement. If at that point the seaman could not return to active duty the obligation stopped and the seaman was then a former seaman with no continuing maintenance or cure, like an asset at the end of its useful life. That reality

coincided with many of the harsh common-law limitations on recovery that were not set aside until the passage of the Jones Act. And, while sailors today face hardships not encountered by those who work on land, neither are they as isolated nor as dependent on the master as their predecessors from the age of sail. In light of these changes and of the roles now played by the Judiciary and the political branches in protecting sailors, the special solicitude to sailors has only a small role to play in contemporary maritime law. It is not sufficient to overcome the weight of authority indicating that punitive damages are unavailable.

³¹ *Farrell v. United States*, 336 U.S. 511, 516 (1949).

³² *Id.*

³³ *Calmar S.S. Corporation v. Taylor*, 303 U.S. 525, 528-29 (1938).

³⁴ *Id.* at 528-29 (1938).

could not have been particularly comforting to seamen. And the courts did not bother to compare the discomfort caused by the maximum medical improvement rule with the reassurance provided by the right to maintenance and cure up to that point of maximum medical improvement. It is not clear that the balance would positively incentivize workers to become seamen. In some ways it points out the silliness of the whole idea that the availability of maintenance and cure played any role whatsoever in the recruitment of merchant seamen.

B. Relationship and Comparison of Cure to Worker's Compensation

Critically, the vessel owner's obligation to provide cure predates worker's compensation schemes³⁵ and is different from it.³⁶ For one thing, the traditional right to recover cure, as noted, arises whenever the injury or illness manifests itself during the seaman's service of the ship. Worker's compensation is normally limited to work related injuries or illnesses, i.e., those caused by the employment.³⁷ I will rely on this distinction in my proposal to argue that extended cure should be limited to injuries or illnesses that are caused by the service of the ship, i.e., those medical conditions caused by and related to the employment. Modern concepts of risk allocation in the workplace require that the injury or illness be one that arose out of and in the course and scope of employment. That is, the worker's condition must be employment rooted; it must be a risk attributable to the employer's enterprise. While worker's compensation schemes are creatures of statute, including the necessity that the injury arise out of the employment, and the

³⁵ The modern birth of worker's compensation is notably Otto Von Bismarck's implementation of the Sickness and Accident Laws in 1871 in Prussia. America's first worker's compensation statute was passed in Wisconsin in 1911. <https://www.thehartford.com/workers-compensation/history>, citing The Iowa Orthopedic Journal's "A Brief History of Worker's Compensation."

³⁶ *Messier v. Bouchard Transportation*, 688 F. 78, 81 (2d Cir. 2012) (calling the right to cure a kind of nonstatutory worker's compensation" and citing *Weiss v. Cent. R.R. Co. of N.J.*, 235 F.2d 309, 311 (2d Cir.1956), but also noting that cure is different from worker's compensation because it is a more expansive remedy, expanding beyond medical conditions caused by the service of the ship).

³⁷ H. Alston Johnson, III, *Louisiana Civil Law Treatise Series—Worker's Compensation*, §§ 142 and 143, discussing the "in the course and scope of employment" and the "arising out of the employment" requirements.

right to cure is jurisprudential, the risk attribution concept transcends the statutory scheme.³⁸ It is also inherent in all causation requirements. There must be some connection between the claimed wrong and the injury.

The right to recover maintenance and cure also differs from worker's compensation in that the obligation to provide maintenance and cure ceases when the seaman reaches maximum medical improvement even if the seaman's medical condition is permanent. Contrariwise, worker's compensation may be available for an extended period, depending upon the severity of the worker's condition.³⁹ And permanent disability may mean benefits for life.⁴⁰ I point to this modern reality about workplace benefits to argue that the vessel owner's obligation to provide cure should extend beyond what the law currently calls maximum medical improvement where the injured seaman's condition is caused by the seaman's service of the ship and where the condition requires palliative care or anti-regression treatment.

C. First-Party Insurance

There have been other changes in the world besides worker's compensation since the creation of the vessel owner's obligation to provide cure. First-party medical insurance and public health insurance schemes were unknown when maritime law first imposed, articulated, and honed the law relating to maintenance and cure.⁴¹ Now, many people have health insurance

³⁸ See, e.g., Guido Calabresi, *The Costs of Accidents* (1970).

³⁹ See, e.g., LHWCA § 908(a) (dealing with permanent total disability). See also, H. Alston Johnson, III, *Louisiana Civil Law Treatise Series—Worker's Compensation*, § 272, discussing permanent total disability which may be paid for the duration of the disability.

⁴⁰ LHWCA § 908(a); H. Alston Johnson, III, *Louisiana Civil Law Treatise Series—Worker's Compensation*, § 272, discussing permanent total disability which may be paid for the duration of the disability.

⁴¹ The first health and medical policies in the United States were introduced in the 1920s with Blue Cross forming in 1930. HIAA Insurance Education (1997). *Fundamentals of Health Insurance Part A*, Washington, D.C.: Health Insurance Association of America. ISBN 978-1-879143-36-4.

available through work, or because they have purchased it.⁴² Other Americans have access to first-party health insurance through governmental programs, like Medicaid⁴³ or Medicare.⁴⁴ Indeed, in days of yore a vessel owner could satisfy its obligation to provide cure by sending a seaman to one of the federally maintained seaman's hospitals.⁴⁵ Today a vessel owner might be able to rely upon the availability of Medicaid to satisfy its obligation to provide cure.⁴⁶ The improved availability of first-party medical insurance is one of the reasons why I propose limiting the right to recover cure where the seaman's condition was not caused by the seaman's service of the ship. A seaman will rarely, if ever, be left without any treatment at all. It is a question of who (or whose insurer) pays.

D. *Conundrums*

In addition to the development of worker's compensation and the increased availability of first-party medical insurance, medicine has evolved since the day when courts initially imposed the obligation to provide cure. The treatment of pain has become a specialty in and of itself and doctors, in addition to seeking to cure conditions, have studied and improved ways to allow a

⁴² In 2021, 64.5% of the American population had health insurance through work or directly purchased private health insurance coverage. <https://www.census.gov/content/dam/Census/library/visualizations/2022/demo/p60-278/figure1.pdf>

⁴³ In 2021, 35.7% of Americans had some public health insurance plan. 18.9% had Medicaid coverage. <https://www.census.gov/content/dam/Census/library/visualizations/2022/demo/p60-278/figure1.pdf>

⁴⁴ In 2021, 18.4% of Americans had Medicare coverage. <https://www.census.gov/content/dam/Census/library/visualizations/2022/demo/p60-278/figure1.pdf>

⁴⁵ Frank L. Maraist, Thomas C. Galligan, Jr., Dean A. Sutherland, Sara B. Kuebel, *Admiralty in a Nutshell* 243 (8th ed. 2022).

⁴⁶ *Moran Towing & Transp. Co. v. Lombas*, 58 F. 3d 24 (2^d Cir. 1995).

person to more meaningfully live with a condition.⁴⁷ That is, cure in the “all better” sense may be impossible but medical treatment can make the condition more bearable than it otherwise would be, resulting in a more productive and enjoyable life. In some cases, the failure to continue the treatment that allows a person with a certain condition to live a fuller life will result in regression. And here, it is appropriate to consider a practical and logical conundrum.

Imagine a seaman who incurs an acute infection while in the service of the ship which is caused by the employment, a bacteria encountered on the ship from another seaman. Further imagine that the infection finds its way to the seaman’s leg and amputation is necessary to stop the spread of the infection. Under the traditional rules, the vessel owner’s right to provide cure should include the amputation. But what about the provision of a prosthesis, an artificial leg? And what about training for the injured seaman in how to use the prosthesis? Certainly, the artificial leg and knowledge of how to use it will improve the seaman’s life and I would certainly hope a court would say that the prosthesis is part of the seaman’s cure. But the lack of a leg itself is not going to get any better after the amputation than it was before. The leg will not grow back.⁴⁸

“Doctor,” a hypothetical lawyer may have asked, “can you make the seaman’s leg any better after cutting it off?”

⁴⁷ In *Sefcik v. Ocean Pride Alaska, Inc.*, 844 F. Supp. 1372 (D. Alaska 1993), a seaman injured his wrist and developed psychological issues—*anxiety*—secondary to the wrist injury. The court held that biofeedback treatment was part of the vessel owner’s obligation to provide cure. And, in *Dorsey v. J. Ray McDermott, Inc.*, 886 So. 2d 482, 490 (La. App. 1st Cir. 2004), the court held that a seaman who injured his back had not reached maximum medical improvement if the seaman would benefit from further mental health treatment.

⁴⁸ As one court said, in reference to the loss of a limb and maximum medical improvement: “[A]ccidental amputation of a limb is readily declared permanent, perhaps even before the bleeding stops.” *Norfolk Dredging Co. v. Wiley*, 450 F. Supp. 2d 620 (E.D. Va. 2006).

“That is a ridiculous question counsellor; the leg is gone,” said the doctor crossing her arms in a huff.

“Doctor,” asked the lawyer more sheepishly, “can you make the seaman’s life better in any way after the amputation?”

“Certainly,” said the doctor, uncrossing her arms and leaning forward, “I can refer the seaman to a specialist who will fit the seaman for a prosthesis and then order therapy to teach the seaman to use the artificial leg for maximum possible mobility under the circumstances.”

The issue: is the prosthesis cure or is it a post-cure way to make the seaman’s life better without in any way fixing the amputated leg itself? It seems incorrect to say that the provision of the prosthesis has cured the condition of having one leg. The seaman still has only one natural leg after obtaining a prosthesis. That condition endures. The logician may mince words and argue that the prosthesis cures the condition of being immobile (or largely so) due to the amputation. But is that a medical condition? And while rephrasing the condition that way may be a clever way to extend cure, is it not more honest to say that the right to cure extends not merely to the amputation but to the provision of the prosthesis? I prefer the latter solution, at least where the injury is caused by the service of the ship.

Now, let me slightly vary the conundrum. Suppose the infection does not affect the seaman’s leg but the seaman’s liver, necessitating a liver transplant.⁴⁹ Again, assume that the infection is caused by the seaman’s service of the ship. After the transplant, the seaman must take anti-rejection medication for the rest of their life. Not taking the medication will result in

⁴⁹ See, *American Seafood Company LLC v. Naufahu*, 2014 WL 12539363 (W.D. Wa. 2014) (denying employer’s motion for summary judgment regarding whether maximum medical improvement had been reached for seaman’s pulmonary condition because a lung transplant might improve seaman’s condition).

rejection of the transplant and either a second transplant or death. Does the vessel owner's obligation to provide cure extend to the anti-rejection medication, which is necessary to prevent regression, or is the seaman at maximum medical cure after the transplant and initial post-operative treatment? I will consider a case below that is substantially similar to this hypothetical.⁵⁰

If the obligation to provide cure does not extend to the anti-regression medication and the seaman cannot otherwise afford the drugs and does not take them and begins to regress, then, arguably, the seaman is no longer at maximum medical improvement. Does that mean that the vessel owner's obligation is triggered again, and it must pay for the anti-regression drugs until the seaman once again reaches maximum improvement? Or do we say that once the seaman reaches maximum medical improvement that is it and any backsliding or recurrence is a risk attributable to the seaman? Interestingly, the jurisprudence provides that if a seaman reaches maximum medical improvement and the obligation to provide cure ceases and then, a new treatment becomes available which can improve the seaman's condition, the vessel owner's obligation to provide cure kicks in again and requires provision of the new, additional treatment ("cure").⁵¹ The answer is not so clear with regression or relapse, absent new, available treatments.

⁵⁰ *Stemmler v. Interlake Steamship Co.*, 2022 WL 3155137 (E.D.N.Y. 2022).

⁵¹ *Ramirez v. Carolina Dream, Inc.*, 760 F. 3d 119, 126 (1st Cir. 2014) (even after achieving maximum medical improvement, a seaman may reinstitute a demand for maintenance and cure when subsequent new curative treatments become available); *Messier v. Bouchard Transp.*, 688 F. 3d 78 (2d Cir. 2012) (development of subsequent new curative treatments may require additional provision of cure); *Adams v. Liberty Marine Corporation*, 407 F. Supp. 3d 196, 204-05 (E.D. N.Y. 2019) (However, where a seaman has reached the point of maximum medical improvement and maintenance and cure payments have been discontinued, the seaman may nonetheless reinstitute a demand for maintenance and cure where subsequent new curative medical treatments become available.); *Semien v. Parker Offshore USA LLC*, 179 F. Supp. 687 (W.D. La. 2016) (additional diagnostic which reveals need for additional curative treatment might trigger an obligation to provide additional cure).

Clearly, in our hypothetical liver transplant hypothetical, paying for the transplant itself would be a tremendous financial obligation for the vessel owner. And lifelong provision of anti-regression drugs would also be a significant obligation. Should that influence the decision as to the scope of cure? I do not think cost *per se* should matter, but what should matter is whether the condition was caused by the service of the ship or merely manifested itself while the seaman was in the service of the ship, but not caused by that service.

Before considering developments in medical theory and treatment theory, it bears emphasizing that while the obligation to provide cure rests on the vessel owner and the seaman is the beneficiary of that duty, an insurer will probably ultimately foot the bill. If the obligation to provide cure covers a certain treatment, then the vessel owner's liability insurer will pay for the treatment. If the obligation to provide cure does not cover the treatment, then the seaman's first party-insurer, whether private or public, will ultimately pay. Determining who pays—vessel owner and its insurer or seaman and their insurer—is an allocation of risk. To whom does it make the most sense to allocate the particular risk? Again, I believe that where the seaman's condition is caused by the service of the ship the vessel owner should bear the risk, including the risk of extended or anti-regression care. If the seaman's condition is not caused by the seaman's service of the ship, then after making that determination, the right to cure from the vessel owner should cease and the risk of future treatment should fall on the seaman. When the condition is not caused by the service of the ship, its manifestation during the service of the ship is a random event. Most basically, I am arguing that because of developments in medicine, courts should move beyond the notion of maximum medical improvement as the stopping point for the vessel owner's obligation to provide cure and instead focus on the cause of the condition—was it the service of the ship or not?

I wonder whether the fact that traditional the vessel owner's obligation to provide cure included illnesses that arose during the service of the ship whether caused by it or not influenced the development of the maximum medical improvement rule. If cure includes a risk that is not fairly attributable to the employer's enterprise (not caused by the service of the ship), then it seems wrong somehow for that obligation to continue indefinitely to include palliation and anti-regression treatment. Thus, the law cut off the obligation at maximum cure. But the equities add up differently when the condition is caused by the service of the ship. Then, the risk is attributable to the employer's enterprise and cutting it off without requiring payment of palliative or anti-regression treatment does not seem right or consistent with risk allocation principles.

E. *Advances in Medical Treatment and Treatment Theory*

As noted, the vessel owner's obligation to provide cure stops when the seaman achieves maximum medical improvement; when the seaman is cured or the condition is declared permanent and there will not be any significant betterment. Palliative treatment to relieve pain is not deemed part of the vessel owner's obligation to provide cure, even though the United States expressly left the question open in *Vella v. Ford Motor Co.*⁵² And, as I have noted, attaining maximum medical improvement is supposedly a medical decision. In this section I will consider the words the law uses when describing the extent of the vessel owner's obligation to provide cure ("cure," "palliative," and "maximum medical improvement") and show that they are not consistent with modern medical practice or theory.

⁵² 421 U.S. 1 (1975).

Let me begin with the word “cure.” In one study, 81% of the clinical oncologists surveyed said that they were hesitant to use the word “cure.”⁵³ The study indicates the overlap between types of diseases, treatment, and cure as follows:

The intent of medical therapy may be curative, palliative, restorative, or sometimes each of these for the same patient. In treating cholecystitis or appendicitis, a surgeon would have curative intent and then, after treatment, indicate that their patient is cured. In other diseases, such as diabetes or hypertension, the intent of treatment is typically to manage or control disease, and the term cure would not be expected. In cancer care, however, there is often curative intent, yet the term cure is infrequently used, if it is used at all.⁵⁴

Thus, medicine does not focus only on cure but also on management and control of a condition. The modern medical emphasis is not merely on curing but on treating the relevant condition and allowing the patient to live with the condition. There are lessons here for the law, especially when the law calls the extent of the cure obligation a medical decision.

On its website, the contract research organization, VIAL, provides a helpful introductory discussion of the notion of treatment versus cure. It states:

One of the most misunderstood concepts in medicine is captured with a single word: cures. Many patients, media personalities, advocates, and everyday people are

⁵³ Kenneth Miller, Joseph H. Abraham, Lori Rhodes, and Rachel Roberts, Use of the Word “Cure” in Oncology, National Library of Medicine (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3710180/>. This study says:

Appendicitis is cured surgically, and pneumonia is cured with antibiotics. In contrast, diabetes, hypertension, and HIV are managed, treated, or controlled. In cancer care, several terms are used for patients who are free of disease including, “in remission,” “no evidence of disease,” and “doing well.” Sometimes the word cured is used, but it is difficult to find an accepted cancer-related definition of the word cure.

⁵⁴ Id.

focused on the idea of curing disease. At times, this leads to heightened expectations and inaccurate assumptions, a situation that can harm the perception of legitimate treatments.

Doctors, clinical research experts, and other medical professionals often shy away from the word “cure,” and with good reason.

When looking at cure vs. treatment, in a terminology sense, the two represent very different concepts. According to Merriam-Webster, to cure someone means to “restore health, soundness, or normality.” Often, cures are viewed as permanent and complete solutions, ridding a patient of any signs of disease or health-related woes.⁵⁵

Thus, the scientific community seems to be moving away from drawing lines like maximum medical improvement and focusing on alleviating the effects of a condition and preventing its worsening as well as curing, if possible.

Let us turn now to the word “palliative.” One literature study found 24 different definitions for “palliative care.”⁵⁶ Thus, doctors and researchers use the word in slightly different

⁵⁵ <https://vial.com/blog/articles/finding-cures-the-difference-between-cures-vs-treatments/>?

⁵⁶ David Hui, Maxine De La Cruz, Masanori Mori, Henrique A. Parsons, Jung Hye Kwon, Isabel Torres-Vigil, Sun Hyun Kim, Rony Dev, Ronald Hutchins, Christiana Liem, Duck-Hee Kang, and Eduardo Bruera, Concepts and Definitions for “Supportive Care,” “Best Supportive Care,” “Palliative Care,” and “Hospice Care” in the Published Literature, Dictionaries, and Textbooks, National Library of Medicine, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3781012/>.

The authors state in part:

Common concepts defining palliative care included quality of life symptom control ($N=24/25$), interdisciplinary care ($N=20/25$), caregiver support ($N=22/25$), and patients with life-limiting advanced illness ($N=25/25$). Twelve of the 25 articles discussed the role of palliative care earlier in the disease trajectory ([Table 1](#)). Eleven of the 25 articles reported “palliative care” as confusing and 8 of 25 described the euphemistic use of terms in palliative care.

ways. Thus, it is inevitable uncertain exactly what a court means when it refers to palliative care. The National Institute on Aging states that:

Palliative care is specialized medical care for people living with a serious illness, such as cancer or heart failure. Patients in palliative care may receive medical care for their symptoms, or palliative care, along with treatment intended to cure their serious illness. Palliative care is meant to enhance a person's current care by focusing on quality of life for them and their family.⁵⁷

Again, one sees a growing concern with focusing on quality of life—meaningfully living with a condition. And critically, the treatment of pain has evolved and improved since courts first created the obligation and limits of the doctrine of cure.

Pain management has developed since the mid-1600's when Descartes wrote about “phantom” limbs and pain being felt in the brain.⁵⁸ Today, it is a multidisciplinary field,⁵⁹ with an international association, The International Association for the Study of Pain, and a dedicated research journal, *Pain*.⁶⁰

⁵⁷ National Institute on Aging, What Are Palliative Care and Hospice Care? <https://www.nia.nih.gov/health/what-are-palliative-care-and-hospice-care>.

⁵⁸ Kern A. Olsen, History of Pain: A Brief Overview of the 17th and 18th Centuries, *Practical Pain Management* 2013, 13(6), <https://www.practicalpainmanagement.com/pain/history-pain-brief-overview-17th-18th-centuries>. See also, Kern A. Olsen, History of Pain, A Brief Overview of the 19th and 20th Centuries, *Practical Pain Management* 2013, 13(7), <https://www.practicalpainmanagement.com/treatments/history-pain-brief-overview-19th-20th-centuries>, Roger Collier, A Short History of Pain Management, National Library of Medicine, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5760261/>, Marcia L. Meldrum, A Capsule History of Pain Management, https://mcc-klik.nl/system/ckeditor_assets/attachments/455/Capsule_history_pain_management_JAMA_2003.pdf [hereinafter, “Meldrum”].

⁵⁹ The Pain Management Best Practices Inter-Agency Task Force Report, *Pain Management Best Practices*, 1 (2019 Draft Final Report) [hereinafter “Pain Management Best Practices”].

⁶⁰ Meldrum, *supra* note 58 at 2473.

Physicians' attitudes towards the treatment of pain have significantly changed. Doctors no longer say: "Pain is a symptom of disease, and that's it."⁶¹ Herbert Snow, who was the chief surgeon at the London Cancer Hospital lamented his colleagues' eschewal of drug treatment and their philosophy of cancer treatment which he described as "operate, or failing this, do nothing."⁶² Today doctors work to treat the pain. They treat pain as a part of the patient's disease or condition, rather than merely a result of the disease or condition.

The Pain Management Best Practices Inter-Agency Task Force noted in its Draft Final Report on Pain Management Best Practices: "It is also important for patients to understand that *pain can be a disease in its own right*, particularly when pain becomes chronic and loses its protective function. In this context, pain is often detrimental to the patient's health, functionality, and QOL [quality of life]."⁶³ One will note the emphasis on pain as a disease in itself as well as the importance of quality of life as part of pain treatment. If one views pain as a disease, then one's concept of maximum medical improvement necessarily shifts. If pain is a disease, in and of itself, then alleviating pain is bettering or improving the seaman's condition. Thus, to use terms I am uncomfortable with, pain management is not merely "palliative;" it is "curative." Thus, if pain is a disease, pain management is not merely palliative. As noted, I would prefer to eliminate the concept of maximum medical improvement rather than play logical word games with outmoded legal concepts.⁶⁴

Moreover, pain is a very significant societal problem. Fifty million Americans suffer from chronic daily pain and 19.6 million Americans suffer from high impact chronic pain that

⁶¹ Id.

⁶² Meldrum, *supra* note 58 at 2471.

⁶³ Pain Management Best Practices, *supra* note 59 at 64.

⁶⁴ Predictably, pain management therapies vary from patient to patient; it is individualized treatment. Id. 1.

adversely effects their daily like or work activities.⁶⁵ The Pain Management Best Practices Inter-Agency Task Force noted that as regards certain chronic pain diseases: “there is rarely a cure, but appropriate assessment; accurate diagnosis; and patient-centered, multidisciplinary treatment can optimize pain relief, improve function, and enhance QOL.”⁶⁶ So medicine today is not merely concerned with eliminating pain or shrugging its metaphorical shoulders at it. Instead doctors work to minimize, alleviate, and treat chronic pain to improve the patient’s quality of life. Focusing on maximum medical improvement in determining the extent of the vessel owner’s obligation to provide cure is inconsistent with these changes in medicine. Treatment of pain is part of the continuum of treatment of the patient and the condition to which the pain is attached. If the extent of cure is really a medical decision as the courts say it is, then the law should follow the direction in which medicine has gone.

Indeed, in *Messier v. Bouchard Transportation*,⁶⁷ the court acknowledged the implications of developments in medicine for the right to recover cure. It wrote:

[T]here is no reason to limit maintenance and cure to the medical science of centuries ago. Even if “[t]he concept that a slow-growing, symptomless disease might lurk inside a human body for years or decades was undreamed of” in the Fifteenth Century, ... it is a well-known reality today. And rather than fixing the doctrine in medicine of ages past, admiralty courts have viewed maintenance and cure as a flexible doctrine, and have allowed it to evolve with new technology.⁶⁸

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ 688 F. 3d 78 (2d Cir. 2012).

⁶⁸ Id. at 87.

Judge Weinstein struck that same chord in *Haney v. Miller's Launch, Inc.*,⁶⁹ which is discussed below, when he said that the law of cure should respect pain management developments in medicine. Now, let me turn to the background jurisprudence, specifically dealing with the extent of the vessel owner's obligation to provide cure.

III. The Jurisprudence Interpreting the Extent of the Vessel Owner's Obligation to Provide Cure

In this section, I will consider the paths courts have trailblazed and taken in determining the scope of the vessel owner's duty to provide cure. Early in American history, Justice Story, riding circuit, made clear that the obligation to provide cure was not indefinite. In *Reed v. Canfield*,⁷⁰ he wrote:

The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability.⁷¹

The vessel owner's obligation to provide cure lasted until the seaman was cured or when medicine reached its limit on making the seaman better.

Just over 100 years later, the United States Supreme Court considered the question of the extent of cure in *Calmar S.S. Corporation v. Taylor*.⁷² *Calmar* squarely presented the issue that is the focus of this piece: how long does the vessel owner's obligation to provide cure last? In

⁶⁹ 773 F. Supp. 2d 280, 291 (E.D. N.Y. 2010).

⁷⁰ 20 F. Cas. 426 (C.C.D. Mass 1832).

⁷¹ *Id.* at

⁷² 303 U.S. 525 (1938).

Calmar, the Court considered whether a vessel's obligation to provide cure for a seaman's chronic illness had ended even though future medical care would be required for the injured seaman.

After stubbing his toe aboard defendant's vessel, plaintiff crewmember, Taylor, was diagnosed with Buerger's disease, an incurable circulatory disease which can cause gangrene. While treatment and amputations can halt the progress of the disease in an affected area, it may recur in other parts of the body. Buerger's disease is progressive and may ultimately end in death. Ongoing treatment and periodic medical observation can help to slow the disease's progress.⁷³

The crewmember sued the vessel seeking maintenance and cure.⁷⁴ The lower court found that plaintiff's disease was incurable but still awarded plaintiff maintenance and cure for so long as medical treatment was necessary and awarded a lump sum based on plaintiff's life expectancy.⁷⁵ The Court of Appeals affirmed⁷⁶ and the United States Supreme Court granted certiorari and reversed.⁷⁷

The Court, in an opinion by Justice Stone, first concluded that the obligation to provide cure could extend beyond the end of the voyage on which the relevant injury occurred or on which the condition manifested itself if the injury or illness persisted beyond the voyage's end.⁷⁸ Otherwise, the seaman might be left uncared for in a foreign port or, even if the seaman's discharge occurred in the home port, failure to extend cure might slow the seaman's return to

⁷³ Id. at 526.

⁷⁴ He also sued for negligence which claim was unsuccessful. Id. at 527.

⁷⁵ Id.

⁷⁶ Id.

⁷⁸ *Calmar*, 303 U.S. at 528; *Wilson v. United States*, 229 F. 2d 277 (2d Cir. 1956)..

duty, deter others from undertaking the work of seamen, and possibly disincentivize vessel owners from caring for injured or ill seamen.⁷⁹ Additionally, Justice Stone noted that while the plaintiff's disease was not caused by him stubbing his toe aboard ship, the vessel owner still had an obligation to provide cure.⁸⁰ Thus, *Calmar* involved a medical condition that manifested itself during the seaman's service to the ship but which was not caused by the seaman's service of the ship.

How long after the voyage would the right to cure continue? Justice Stone noted that the lower federal courts had settled upon a "reasonable time" depending upon the special circumstances of each case,⁸¹ including whether the injury occurred or arose in the service of

⁷⁹ Id. at 528-29. As support for its holding on this point, Justice Stone relied upon Justice Story. Justice Stone wrote: The reasons underlying the rule, to which reference must be made in defining it, are those enumerated in the classic passage by Mr. Justice Story in *Harden v. Gordon*, C.C., Fed.Cas.No.6047: The protection of seamen, who, as a class, are poor, friendless and improvident from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; the maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service.

Id. at 528.

To quote Justice Story:

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour [sic]. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some *83 provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behaviour [sic] might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt.... On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency.

Harden v. Gordon, 11 F. Cas. 480 (C.C.D. Me. 1823).

⁸⁰ Justice Stone noted that requiring the injury to be caused by the employment before the seaman could recover cure would be problematic. He wrote: "The practical inconvenience and the attendant danger to seamen in the application of a rule which would encourage the attempt by master or owner to determine in advance of any maintenance and cure, whether the illness was caused by the employment, are manifest." Id. at 530.

⁸¹ Id. at 529. Interestingly, the Court did not expressly tie the reasonable time during which the obligation to provide cure would continue to the phrase "maximum medical improvement."

the ship. Did a reasonable time mean for “so long as medical attention and care are beneficial, until death if the need lasts so long?”⁸² No, the Court said. The shipowner had no continuing, indefinite obligation to provide cure to a seaman with an incurable disease. The duty to provide cure persisted for a “fair time after the voyage in which to effect such improvement as may be expected to result from nursing, care, and medical treatment.”⁸³

But Justice Stone added that a more liberal rule might be appropriate where the injury was caused by the employment.⁸⁴ Thus, the precise holding of *Calmar* was limited to a case in which the seaman’s condition was not caused by the employment but manifested itself while the seaman was in the service of the ship.⁸⁵ The Court left open the issue of whether a more extensive obligation to provide cure might be applicable if the injury or condition was caused by the service of the ship. That is, the Court did not decide whether the risk of an injured seaman’s care should be attributable to the vessel when the injury was caused by the seaman’s service of the ship.

Under my proposal, since the seaman’s injury in *Calmar* was not caused by the seaman’s service of the ship, the right to cure would cease upon the determination that the condition was not caused by the service of the ship. Concomitantly, my proposal embraces Justice Stone’s suggestion that the obligation to provide cure might extend for a longer period—beyond

⁸² Id. at 530.

⁸³ Id.

⁸⁴ He wrote:

In answering ... we lay to one side those cases where the incapacity is caused by the employment.... But we find no support in the policies which have generated the doctrine for [imposing]...on the shipowner an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease, which manifests itself during his employment, but is not caused by it.... Beyond this we think there is no duty, at least where the illness is not caused by the seaman’s service.”

Id.

⁸⁵ The Court also reversed the lower courts’ award of a lump sum, id. at 530-32, and remanded for the lower courts to determine the amount to which the plaintiff was entitled.

maximum medical improvement—if the seaman’s service of the ship caused the medical condition.

The Supreme Court next considered the length of cure issue in *Farrell v. United States*.⁸⁶ There, a 22- year-old merchant marine, Farrell, in the service of the U.S. merchant ship, *S.S. James E. Haviland*, was on shore leave in Palermo, Italy. Returning to the ship late at night, Farrell became lost, received bad directions to his ship, and fell into a lighted drydock. Farrell was seriously injured and, after treatment, was discharged as completely disabled. As a result of his injuries, Farrell was blind, suffered convulsions, and had headaches. Over time, the convulsions would become more frequent and there was no cure for his condition; it would not get better. Farrell sued, seeking maintenance and cure for as long as his medical conditions persisted--the rest of his life.⁸⁷ The lower court awarded maintenance and cure only to the time “when the maximum cure possible has been effected.”⁸⁸

In the Supreme Court, Farrell pointed to the *Calmar* Court’s dictum about how long the vessel owner’s obligation to provide cure might last if the injury or illness was actually caused

⁸⁶ 336 U.S. 511 (1949).

⁸⁷ Id. at 512-13. In addition, Farrell claimed the defendant was negligent, but the lower court dismissed that claim and it was not before the Court. Id. at 512. Plaintiff relied, in part, on two medieval maritime codes. Id. at 513. The Court seemed to limit those codes to cases involving seamen defending ships from pirates. Id. In addition, the Court noted that there was “rational basis for awarding lifetime maintenance against the ship on the theory that he was wounded or maimed while defending [the ship]...against enemies.” Id. at 515.

⁸⁸ Id. at 513. *See also*, *Martinez v. Permanente S.S. Corp.*, 237 F. Supp. 380, 382-83 (D. Hawai’I 1965) (head injury case resulting in disability wherein the court said: “The Court finds that the plaintiff is not entitled to maintenance and cure for any period subsequent to the time of trial, for the reason that the Court finds by a preponderance of the testimony of the medical witnesses, and other evidence, that at that time it was established that the plaintiff had reached a condition of chronic or static illness as to which there could be no prediction with reasonable medical certainty that further treatment would cure him, or would effect a permanent improvement of his then chronic and static condition. True, he will continue to need treatment to alleviate his present condition, but the Court sees no reasonable prospect of a cure, or a permanent betterment of his condition, and in line with the rule that maintenance and cure is allowable either until the seaman has recovered, or maximum cure has been achieved (Gilmore and Black, *The Law of Admiralty*, p. 268), the Court holds that liability for maintenance and cure terminated as of December 15, 1963, which is somewhere between the commencement of the final pretrial and the actual taking of testimony before the jury in this case.”).

by the seaman's service to the ship,⁸⁹ as opposed to merely arising during the service of the ship. Farrell argued that the *Calmar* dictum created a "separate class [of injury] for a different measure of maintenance and cure."⁹⁰ He made the argument I am making in this piece. But, the Court, in an opinion by Justice Jackson, rejected his claim.⁹¹ First, Justice Jackson reasoned that the right to maintenance and cure was relatively straightforward. If the seaman was injured in the service of the ship and the injury was not the result of the seaman's gross misconduct or insubordination, the seaman was entitled to maintenance and cure. The simplicity of the doctrine facilitated speedy recovery of maintenance and cure without inviting litigiousness.⁹² To differentiate a claim for maintenance and cure for an injury caused while in the service of the ship from a maintenance and cure claim for an injury or illness which was not caused by the service of the ship but merely arose during the seaman's service of the ship would unduly complicate matters. Justice Jackson wrote:

For any purpose to introduce a gradation of rights and duties based on some relative proximity of the activity at time of injury to the "employment" or the "service of the ship," would alter the basis and be out of harmony with the spirit and function of the

⁸⁹ *Farrell* 336 U.S. at 515.

⁹⁰ *Id.* The argument is a negative pregnant argument. In *Calmar*, the technical holding of the case was that when the seaman had a chronic disease which manifested itself while the seaman was in the service of the ship, but not caused by it, the obligation of cure only lasted for a reasonable period of time after the end of the voyage. The negative pregnant argument would be that when the injury or illness was caused by the seaman's employment during the course of the seaman's service to the ship cure would be available for a longer period of time. *See, e.g.,* <http://www.meriam-webster.com/dictionary/negative%20pregnant> consulted on 2/1/2023.

⁹¹ *See also*, *Norfolk Dredging CO. v. Wiley*, 450 F. Supp. 2d 620, 626 (E.D. Va. 2006) (also rejecting the argument that the obligation to provide cure should be more expensive when the condition is caused by the service of the ship). The case is discussed below.

⁹² *Farrell*, 336 U.S. at 516. In *Messier v. Bouchard Transportation*, 688 F. 3d 78 (2d Cir. 2012), the court, in adopting an occurrence rule for the recovery of cure, rather than a manifestation rule, acknowledged that the occurrence rule may add more complexity to many maintenance and cure actions but still thought the occurrence rule was more consistent with the purposes of maintenance and cure. In doing so, the Court refused to unthinkingly follow Justice Jackson's simplicity argument.

doctrine and would open the door to the litigiousness which has made the landman's remedy so often a promise to the ear to be broken to the hope.⁹³

Second, even if the Court recognized the *Calmar* dictum distinction, it would not seem to apply to the case before the Court where the seaman was late reporting back for duty for personal reasons and negligently fell into a lit drydock.⁹⁴ So, while the *Farrell* Court frowned on the *Calmar* Court's suggestion of a distinction between injuries caused by being in the service of the ship versus injuries merely arising during the service of the ship, it did not rest its decision wholly on a rejection of the distinction. Justice Jackson provided an alternative reason for not extending the cure obligation to the duration of Farrell's incapacity: Farrell's having been on leave when he fell and his fault. Even though a seaman's fault is not supposed to impact the right to recover cure, it was clearly a factor in Justice Jackson's consideration of the length of time in which the vessel owner's obligation to provide cure would continue based on the facts involved.

Turning then to just how long the obligation to provide Farrell with maintenance and cure should last in the case before it, the Court pointed to a convention of the General Conference of the International Labor Organization at Geneva which the Senate had ratified and the President had signed. The Court also considered a Department of Labor summary of the Convention, which stated that the obligation to provide cure lasted until "the injured person has been cured, or

⁹³ *Farrell*, 336 U.S. at 516.

⁹⁴ Interestingly, unless the seaman's fault rises to the level of gross misconduct or insubordination or otherwise vicious conduct, *Warren v. United States*, 340 U.S. 523, 528 (1951); *Murphy v. Light*, 224 F. 2d 944, 946 (5th Cir. 1986), the seaman's fault will neither affect the right to recover maintenance and cure nor reduce that recovery. *Bertram v. Freeport McMoran, Inc.*, 35 F. 3d 1008, 1013 (5th Cir. 1994). Of course, the story would not be complete without noting that a seaman who knowingly and fraudulently conceals a condition from the employer forfeits the right to recover maintenance and cure. *McCorpen v. Central Gulf Steamship Corp.*, 396 F. 2d 547 (5th Cir.), *cert. denied*, 393 U.S. 894 (1968). Returning to *Farrell*, the Court, while not denying the right to maintenance and cure to a negligent seaman arguably took that negligence into account in deciding how long the vessel's obligation to provide cure lasted.

until the sickness or incapacity has been declared of a permanent condition.”⁹⁵ Justice Jackson also noted the testimony of union representatives to Congress when it was considering enactment of a workman’s compensation statute for seamen. The union representatives had said that the vessel’s obligation to provide maintenance and cure lasted “during a period of convalescence or until maximum cure is obtained” or “until his physical condition becomes fixed.”⁹⁶

Justice Jackson also pointed to the right of the seaman, in an appropriate case, to pursue negligence and unseaworthy claims, which I will discuss below.⁹⁷ “But maintenance and cure is more certain if more limited in its benefits.”⁹⁸ The obligation of the vessel owner is not to provide a pension. It is to provide the benefit as it comes due (often with cure in kind) until the seaman’s condition is “fixed.”⁹⁹ Justice Jackson did expressly note that the “Government does not contend that if Farrell receives future treatment of a curative nature he may not recover in a new proceeding the amount expended for such treatment and for maintenance while receiving it.”¹⁰⁰ So, there was the possibility of future cure.

Before moving on to discuss Justice Douglas’ dissent, it is incumbent to respond to one of Justice Jackson’s reasons for rejecting the argument that there should be different treatment of those injuries which arise from the service of the vessel than for those which merely manifest themselves or arise during the seaman’s service of the ship. He contended that recognizing the distinction I draw in this paper would unduly complicate what should be an efficient and expeditious procedure—determining whether the seaman is entitled to maintenance and cure.

⁹⁵ Id. at 517-18.

⁹⁶ Id. at 518.

⁹⁷ Id.

⁹⁸ Id. at 519.

⁹⁹ Id. The Court also refused to disturb the lower court’s decision that Farrell was only entitled to wages until the voyage on which the ship was engaged when Farrell was injured, not for twelve months.

¹⁰⁰ Id. at 519.

Perhaps, the distinction might make the *ultimate* procedure more complicated but that does not mean the *initial* determination of entitlement to maintenance and cure would be more difficult. The vessel would be responsible for maintenance and cure whenever the seaman's medical condition was caused by or arose during the seaman's service of the ship. That entitlement decision would not be more difficult or complicated—the vessel would owe cure either way. What could be more complicated would be the subsequent determination of the duration of the obligation to provide cure, i.e., the causal determination. But that litigation would occur only if the vessel owner contested whether the seaman's injury was caused by the plaintiff's service of the ship and/or whether the effects of the injury continued.¹⁰¹

Moreover, despite Justice Jackson's hope that maintenance and cure litigation would be swift, there is actually a significant amount of litigation over the right to recover maintenance and cure so the argument for efficiency is not all that persuasive.¹⁰² As one court has noted, determining when maximum cure has occurred is "deceptively simple"¹⁰³ and noted that the "fuzzy boundary" between improvement and palliation.¹⁰⁴ So to decide which rule is truly more efficient would require balancing the benefits of avoiding a determination of causation versus the costs of deciding maximum medical improvement.

Finally, having rights turn on a determination of maximum medical improvement that determination is inconsistent with modern medicine's approach to injury and disease, as

¹⁰¹ Indeed, a "seaman's right to maintenance and cure may sometimes require the filing of successive suits, and so it has been said that: '(t)hus the seaman is to keep biting at his cherry.'" *Pelotto v. L & N Towing Co.*, 604 F. 2d 396, 1981 A.M.C. 1047 (5th Cir. 1981), *citing*, *G. Robinson, Admiralty* 299 (West 1939).

¹⁰² A WestLaw search of "maximum medical improvement" in the federal cases database yielded 560 cases. Not all of them involved the issue of when a seaman reaches maximum medical improvement, but a significant number did. A search of the WestLaw All states database of "maximum medical improvement cure seaman" yielded 87 cases.

¹⁰³ *Tern Shipholding Corp. v. Rockhill*, 2006 WL 1788507 (N.D. Fla. 2006).

¹⁰⁴ *Id.*

described in the last section. Thus, Justice Jackson's reliance on legislative history is suspect because the content of that legislative history is based on outmoded medical theory.

Justice Douglas, joined by Justices Black, Murphy, and Rutledge dissented in *Farrell*.¹⁰⁵ Douglas noted that the Court was squarely presented with the *Calmar* Court's open question concerning the distinction between injuries caused by the service of the ship and those conditions which were not caused by that service but manifested themselves during that service. Justice Douglas wrote:

Even though a maximum cure has been effected, two entirely different states of being may result when the injured man is left totally disabled.

(1) He may be totally disabled but no longer in need of medical aid to care for the condition created by the injury nor without means of providing maintenance. That is not the present case, at least so far as medical care is concerned. And we need not determine what rights to maintenance and cure one so situated has.

(2) One injured in the service of a ship may not only be permanently disabled after reaching the point of maximum cure. He may also be in need of future medical aid to sustain that condition and be without means of maintenance. These needs may extend to end of life. That is the present case, at least so far as medical care is concerned. In this situation payments to give continuing needed care of wounds have been allowed, even though a maximum cure has been effected.¹⁰⁶

¹⁰⁵ *Farrell*, 336 U.S. at 521 (Douglas, J. dissenting).

¹⁰⁶ *Id.* at 522-23.

To refuse recovery of cure in *Farrell*, per Justice Douglas, would be to ignore the “salutary policy supporting the doctrine of maintenance and cure.”¹⁰⁷ That policy was based on the protection of seamen, oft referred to as wards of the court¹⁰⁸ and the nation’s need to maintain a merchant marine.¹⁰⁹ The right to recover maintenance and cure provided an inducement for vessel owners to care and provide for seaman; and, it provided some security for workers who were injured while in the service of the ship.

Justice Douglas went on to state that through the doctrine of maintenance and cure the injuries of seamen were made “a charge against the enterprise”¹¹⁰ that employs them. In language characteristic of the general period and the tone of the Court’s language in maritime personal injury cases,¹¹¹ Justice Douglas said: “[M]aintenance and cure was indeed part of the cost of the business. It is ... a legitimate cost though the expense continues beyond the time when a maximum cure has been effected.”¹¹²

Thus, the dissenters would clearly have awarded further cure in a case where the injury or illness was caused by the seaman’s service of the ship. They articulated the position I take herein and expressly referred to the attribution of risk and how an injury caused by the service of the

¹⁰⁷ Id. at 523.

¹⁰⁸

¹⁰⁹ *Farrell*, 336 U.S. at 523 (Douglas, J., dissenting).

¹¹⁰ Id. at 524.

¹¹¹ See, e.g., Thomas C. Galligan, Jr., “*Sieracki*” Lives: A Portrait of the Interplay Between Legislation and the Judicially Created Maritime Law, 47 Tulane Maritime Law Journal 1, 11 (2023) (“As noted, Justice Rutledge’s opinion in *Sieracki* was a paradigm example of what would follow during the expansion of tort liability through the late-70s or so. Justice Rutledge rejected notions of privity as a limit on the ship owner’s liability to the employee of a third-person stevedore, i.e., there was not contractual relationship between the vessel owner and the injured worker but that did not mean there was no liability. Like other developments of the period, it expanded the categories of injury victims who could recover for strict liability. The Court also relied upon notions of deterrence and risk spreading.”).

¹¹² *Farrell*, 336 U.S. at 524 (Douglas, J., dissenting).

ship was a risk which was attributable to the vessel owner's enterprise. And thus, the obligation should arguably last as long as the condition lasts.¹¹³

After *Farrell*,¹¹⁴ in *Vella v. Ford Motor Co.*,¹¹⁵ a seaman sought maintenance and cure for a head injury incurred in the service of the ship. The precise factual issue before the Court was whether a shipowner had an obligation to provide cure from the date that a "seaman leaves the ship to the date when a medical diagnosis is made that the seaman's injury was permanent immediately after his accident and therefore incurable."¹¹⁶ The jury that heard the case had awarded maintenance and cure for the period before the diagnosis but the Sixth Circuit had reversed because, it reasoned, the right to recover cure does not apply where the injury is permanent immediately after the accident.¹¹⁷

The United States Supreme Court reversed. Justice Brennan, cited and relied upon *Farrell* for the proposition that the right to recover maintenance and cure was broad and inclusive.¹¹⁸ Denying the right to recover maintenance and cure for a permanent injury before a medical diagnosis of permanence would dissuade the goals of encouraging maritime commerce and "assuring the well-being of seamen."¹¹⁹ A shipowner who was not sure if a seaman's injury

¹¹³ In *Desmond v. United States*, 217 F. 2d 948, 1955 A.M.C. 17 (2d Cir. 1954), a seaman, who had been diagnosed with incurable cerebral arteriosclerosis, sought maintenance and cure. The seaman's doctor testified that his treatments were not designed to cure the seaman but to "'carry him along,' to relieve him, and to 'make him more comfortable.'" Judge Jerome Frank, an arch-Legal Realist who wrote *Law and the Modern Mind* (1930), wrote that: "The writer of this opinion thinks the ruling unduly harsh; but what he thinks is immaterial (unless, perhaps, it induces the Supreme Court to change the doctrine it has adopted)." *Id.* at 950.

¹¹⁴ In between *Farrell* and *Vella*, the Court decided *Salem v. U.S. Lines, Co.*, 370 U.S. 31, 1962 A.M.C. 1456 (1962), which involved the sufficiency of the evidence in an unseaworthiness and Jones Act case. But the Court also briefly considered an award for future maintenance and cure which the Court of Appeals had set aside. The Supreme Court affirmed on that point, reasoning that amounts for future maintenance and cure must be for a period which can be definitely ascertained, and the record did not support an award for three years future maintenance and cure.

¹¹⁵ 421 U.S. 1 (1975).

¹¹⁶ *Id.* at 2.

¹¹⁷ *Id.* at 3.

¹¹⁸ *Id.* at 4.

¹¹⁹ *Id.* at 5.

was permanent might withhold maintenance and cure or a seaman might be made to reimburse an employer who paid benefits for a condition later determined to have been permanent at the time of injury.¹²⁰ If an employer did not owe maintenance and cure between the time an injury occurred and a medical diagnosis of its permanence, even though that diagnosis was that the injury was incurable when incurred

uncertainty would displace the essential certainty of protection against the ravages of illness and injury that encourages seamen to undertake their hazardous calling. Moreover, easy and ready administration of the shipowner's duty would seriously suffer from the introduction of complexities and uncertainty... .¹²¹

Notably, the Court did not question the notion that once a condition was permanent or incurable, the obligation to provide cure ceased, even, on the facts, where the injury was caused by the service of the ship. The Court made clear that the obligation to provide cure would continue until a medical diagnosis of permanency. Clearly, that requirement, while mitigating uncertainty, as Justice Brennan said, is also an indication that whether cure was due depended upon a medical decision.

Critically, the Court, in a footnote, raised serious doubt about whether the obligation to provide cure extended beyond a medical diagnosis that a condition was permanent. In footnote 4, Justice Brennan said, in part:

Moreover, in light of our holding that the shipowner's duty continued until Dr. Heil's testimony, it is not necessary to address the question whether the jury award might also be

¹²⁰ Id. On the reimbursement point, *see*, *Boudreaux v. Transocean Drilling*, 721 F. 3d 723 (5th Cir. 2013), holding that an employer who had established a *McCorpen* defense (see note *supra*) could not recover maintenance and cure it had already paid. *Accord*: *Block Island Fishing, Inc. v. Rogers*, 844 F. 3d 358 (1st Cir. 2016).

¹²¹ *Vella*, 421 U.S. at 5.

sustained on the ground that the shipowner's duty in any event obliged him to provide *palliative* medical care to arrest further progress of the condition or to reduce pain, and we intimate no view whatever upon the shipowner's duty in that regard. Compare *Ward v. Union Barge Line Corp.*, 443 F. 2d 565, 572 (CA3 1971), with the opinion of the Court of Appeals in this case.¹²²

Thus, Justice Brennan clearly left open the question of whether the obligation to provide maintenance and cure applied when, even though a doctor had diagnosed a seaman's medical condition as permanent, treatment—what Justice Brennan called palliative care--was necessary to “arrest further progress of the condition or to reduce pain.”¹²³

In *Ward*, which Justice Brennan cited in *Vella's* footnote 4, the Third Circuit recognized that *Farrell* had held that the obligation to provide maintenance and cure ended when the seaman attained maximum medical cure. But the court also said: “this limitation has been interpreted in this court to extend the obligation where medical care is needed to arrest further progress of the disease or to relieve pain.”¹²⁴ *Ward* cited three cases for that proposition: *Neff v. Dravo, Corp.*;¹²⁵ *Yates v. Dann*;¹²⁶ and *Gibson v. United States*.¹²⁷

¹²² *Id.* at n.4 (emphasis added).

¹²³ In *Haney v. Miller's Launch, Inc.*, 773 F. Supp. 2d 280, 291 (E.D. N.Y. 2010), Judge Weinstein specifically noted that *Vella* “expressly reserved decision on the issue of payment for pain and suffering.”

¹²⁴ *Ward*, 443 F. 2d at 572.

¹²⁵ 407 F. 2d 228 (3d Cir. 1969).

¹²⁶ 124 F. Supp. 125 (D. Del. 1954), *aff'd*. 223 F. 2d 64 (3d Cir. 1955). In *Yates*, the court stressed the persistent pain from which the injured seaman was suffering after having his foot crushed. 124 F. Supp. at 140.

¹²⁷ 100 F. Supp. 954 (E.D. Pa. 1951), *aff'd*. 200 F. 2d 336 (3d Cir. 1952). In *Gibson*, the plaintiff seaman suffered a heart attack while serving on defendant's ship. The plaintiff suffered damage to his heart and after fourteen months there was “little or no physiological improvement.” 100 F. Supp. at 955. But plaintiff had received treatment that had alleviated his symptoms of pain and discomfort. Defendant claimed that even though future treatment would continue to deal with pain and discomfort, its obligation to provide maintenance and cure had ceased because the damaged heart was not improving. The district court distinguished *Farrell*; there the seaman was totally disabled after the injuries. *Gibson* was not totally disabled. He was working and was entitled to recover for the period of his rehabilitation. The court noted freedom from pain and stress as being conducive to *Gibson's* rehabilitation. [I]t is

In *Neff*, the seaman was suffering from a number of medical conditions and there was evidence that his work for defendant had at least contributed to those conditions. His condition was incurable, but one doctor had testified: “You can't let him go without medical attention. It would give him relief, but not stop the progressive deterioration.”¹²⁸ The court rejected the notion that one’s medical status is somehow “frozen in time, that on a day certain one is cured” and there is no more right to recover maintenance and cure.¹²⁹ Then, the court, almost fifty-five years ago, said:

In this day of rapid change in the field of medicine and surgery, when miracle drugs are daily advancing man's life expectancy, and longevity is increasing, the connotation of ‘cure’ must be considered a continuous process. At least in cases where, as here, the medication is allegedly necessary to arrest what would otherwise be a deteriorating condition, we think it may be of a sufficiently curative nature to be encompassed within the doctrine of maintenance and cure.¹³⁰

unrealistic to say that once physiological improvement in Gibson's heart muscle ceased, further treatment was not “of a curative nature”. Any treatment which relieved him of physical pain and the attendant mental anguish, under the circumstances was “curative” in the true sense of the word, even though the damage to his heart may never be further repaired. *Id.* at 957. The court awarded maintenance and cure up to the time he went to work at his then current employer, less days he had worked before that. The district court took a very functional approach to cure. It did not hold that the obligation to provide cure stopped when the heart stopped physically improving but rather considered how the treatment to alleviate discomfort, pain, and stress had led to improvement. In a one paragraph affirmance, the Third Circuit said:

A careful examination of the briefs and the record in this appeal and consideration of the oral arguments of counsel have convinced us that the court below committed no error in its decision. We can add nothing to the careful analyses contained in the findings of fact, in the conclusions of law, and in the opinion of Judge Kalodner. See 100 F.Supp. 954. Accordingly the judgment of the court below will be affirmed.

200 F. 2d 336 (3d Cir. 1952). For a case in which the court found that a seaman who suffered a heart attach had reached maximum medical improvement, *see*, *Carleno v. Marine Transport Lines, Inc.*, 317 F. 2d 662 (4th Cir. 1963).

¹²⁸ 407 F. 2d at 232, 233.

¹²⁹ *Id.* at 235.

¹³⁰ *Id.*

Thus, the *Neff* court viewed maintaining the medical status quo in the face of what would otherwise be a deteriorating condition as a justification for continued cure. The court was prescient in its prediction of where medicine was headed.

Alas, subsequently, the third circuit, in *Cox v. Dravo*,¹³¹ overruled both *Ward* and *Neff*. In *Cox*, an injured seaman sued the owner of the vessel on which he served; and a jury determined that he was totally and permanently disabled. Apparently, his injuries were sustained in the performance of the duties of his employment, i.e., caused by his service of the ship. Subsequently, *Cox* sought recovery for medical expenses for treatment received after the jury verdict.¹³² *Cox* suffered from headaches and dizzy spells and was unable to perform any strenuous activity. He took medication and physical therapy treatments which made him feel better and which relieved his pain. The treatment would not cure of his condition. It just made his life better. The district court, feeling itself bound by *Neff* and *Ward*, awarded \$75,000 for the medications and physical therapy.

The court of appeal reversed. In reference to maintenance and cure, the court said: “[that] “remedy has nothing to do with his employer’s duty to indemnify him for permanent injury; a duty which arises from other sources.”¹³³ Those other sources might be the Jones Act or an unseaworthiness claim. But, according to the court, the right to recover maintenance and cure was not open-ended.

¹³¹ 517 F. 2d 620 (3d Cir.), *cert. denied*, 423 U.S. 1020 (1975).

¹³² The seaman actually died during the pendency of the action and his wife became the substitute plaintiff.

¹³³ *Id.* at 623. The court also said: “cure is the equivalent of the medical care to which an ill or injured seaman is entitled while at sea.” *Id.* Of course, that is an incorrect statement since the obligation to provide cure, as recognized by the Supreme Court in *Calmar* may extend beyond the end of the voyage.

Yet the thrust of the *Neff* and *Ward* cases seems to be that this is indeed the scope of a vessel's duty in this circuit. For so long as palliative treatment to arrest further progress of the disease or to relieve pain is still medically possible, these decisions permit an award of maintenance and cure even when a seaman has become totally and permanently disabled. In the hypothetical context of an illness entirely unrelated to the seaman's employment, a malignancy for example, the rule on its face seems expansive. Such a result is not, we believe, permitted by the definition of maintenance and cure in *Calmar*... and *Farrell*..., recently reiterated in *Vella*. See also, *Salem v. United States*, 370 U.S. 31... .¹³⁴

The *Cox* court relied upon *Farrell* and its apparent rejection of the *Calmar* suggestion concerning the source of the injury. Like Justice Jackson in *Farrell*, the third circuit left open the possibility of future cure “such as a new drug or a *new* surgical technique,” but not what it called palliative treatment.¹³⁵ The *Cox* court also pointed to the Supreme Court’s failure to reconsider the issue in *Vella* even though the Supreme Court was “aware of our holdings in *Neff* and *Ward*.”¹³⁶

But the third circuit did not discuss the *Vella* Court’s express statement in footnote four that it did not need to decide whether the award could be sustained as palliative and that was the context in which Justice Brennan had cited *Ward*. Chief Judge Seitz concurred in *Cox*. He also would not have awarded cure, where the only effect of treatments was pain relief. But he thought it was “unnecessary and unwise to go out of our way to announce that there is no duty to provide treatment which arrests the progress of a deteriorating physical condition. That issue is not

¹³⁴ Id.

¹³⁵ Id. The court also pointed to the Supreme Court’s unanimous affirmance of the refusal to award future maintenance and cure in *Salem* as evidence of the Court’s satisfaction with *Farrell*’s limitations on liability for maintenance and cure. *Salem* actually seems to have little to do with the issue of this paper and what was at issue in *Cox*.

¹³⁶ Id. at 626.

presented and, indeed, is expressly left open by the Supreme Court in *Vella*.”¹³⁷ Chief Judge Seitz would distinguish pain relief from anti-regression treatment, a distinction I would not draw.

Subsequently, in *Haney v. Miller’s Launch, Inc.*,¹³⁸ Judge Weinstein denied a vessel owner’s motion for a summary judgment that a seaman had reached maximum medical improvement and that the obligation to provide cure did not include pain relief. Judge Weinstein, while noting that other courts had held that pain relief was palliative care and not part of the vessel owner’s obligation to provide cure, questioned those views in light of advances in medicine. There, the condition was caused by the seaman’s service of the ship, when he was thrown to the deck when the vessel on which he served ran into a pier and then a bulkhead while docking. The seaman, Haney, suffered back and neck injuries for which he sought cure; he also brought Jones Act and unseaworthiness claims. The defendant, employer, moved for summary judgment on all claims, which the court denied.

On the cure claim, the court was faced with the issue of whether “medical treatment to reduce pain and suffering come[s] within the definition of ‘cure?’”¹³⁹ Noting that the traditional answer was “no,” Judge Weinstein said that “changes in the view of the medical profession and the public on the subject of pain amelioration” changed that “no” to “yes.”¹⁴⁰ Judge Weinstein noted that courts in the Second Circuit had indicated that palliative treatment was not part of cure but he also said those decisions relied on precedent which was “somewhat ambiguous” on the question.¹⁴¹ Then, Judge Weinstein stated that the Supreme Court had not decided the issue, citing

¹³⁷ Id. at 627 (Seitz, C.J., concurring).

¹³⁸ 773 F. Supp. 2d 280, 291 (E.D. N.Y. 2010).

¹³⁹ Id. at 283.

¹⁴⁰ Id.

¹⁴¹ Id. at 291.

and quoting *Vella*. While admitting that other circuits and commentators had also refused to recognize “palliative” treatment as cure before saying:

Current general medical practice raises doubts about these hoary limitations on medical treatment to alleviate the kind of persistent pain and suffering Haney is allegedly experiencing. New theories on medical treatment for pain relief, and an evolving sense of the importance to doctors and patients of well-being and quality of life issues, include pain management. Palliative care is now encompassed in the notion of recovery and maximum improvement.¹⁴²

As I pointed out above, Judge Weinstein also remarked that the medical profession had created a specialty for pain medicine and had created the American Academy of Pain Medicine, an association devoted to advocacy, research, and training in the field. Pain relief was one of the most common reasons why people sought medical advice. “When a patient is assessed for treatment at a medical facility it is now standard practice to measure the individual’s pain along with his temperature, pulse, respirations and blood pressure.”¹⁴³ Judge Weinstein concluded his discussion of the issue by saying: “It is time to reconsider the old rule, now out of the main stream of medical practice.”¹⁴⁴ In response, I say: “Amen!” *Haney* is on point with my proposal. In a case where the seaman’s injury or condition was caused by the service of the vessel, all resulting medical treatment should be recoverable as cure because that is consistent with modern medical theory and science.¹⁴⁵

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id. Judge Weinstein also pointed out that Haney had a need for further surgery which suggested that treatment had not been completed in the traditional sense.

¹⁴⁵ For another great jurist recognizing the importance of developments in medicine when determining the extent of the obligation to provide maintenance and cure, *see*, *Scott v. Lykes Bros. S.S. Co.*, 152 F. Supp. 104 (E.D. La. 1957). There, Judge Skelly Wright wrote:

Concomitantly, in *Barto v. Shore Construction, L.L.C.*,¹⁴⁶ a seaman was suffering pain after a workplace accident. His doctor performed surgery to remove pressure from a nerve sac which was the root cause of some of the pain. The employer argued that the surgery was not a cure because it alleviated pain; it did not eliminate the underlying condition. The court disagreed and held that the surgery was part of the defendant's obligation to provide a cure because it eliminated the main cause of the pain; thus, it was not merely palliative. The court's approach to pain and pain management is consistent with modern medicine's approach to pain, although its use of the word palliative may be foggy. Since the underlying injury in *Barto* was caused by the service of the ship, it would be recoverable under my proposal as well, without the need to determine whether the surgery was "merely palliative."¹⁴⁷

As with recovery for palliative treatment as part of a cure, while the Supreme Court has not addressed the issue of recovery for anti-regression treatment, courts routinely state that "where it appears that the seaman's condition is incurable, or that future treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition, it is proper to declare

This case graphically depicts one man's courageous fight for control of his mental and physical faculties after suffering a disabling brain injury which paralyzed his speech process as well as his left arm and leg, already badly broken in the accident. By determined and continuous application of modern methods of rehabilitation under supervision, this plaintiff seaman has delivered himself from the life of a gibbering, hopeless, helpless cripple to that of a functional human being, able to speak, to walk, to work, and even to contain himself after months of being fitted with an artificial evacuation receptacle. The defendant maintains that the plaintiff, admittedly injured in the service of his ship, is not entitled to maintenance during this period of rehabilitation, that the ship's obligation to pay maintenance ended when plaintiff's condition became medically 'static,' and that the plaintiff was on his own during that period of time required to relearn to speak, to walk, to use his hands, to be a useful human being. This court holds that maximum cure, as defined by the Supreme Court,¹ is not achieved by the administration of pills and poultices alone, that maximum cure is reached, in the circumstances of this case, when, through the application of modern methods of rehabilitation under medical supervision, the seaman is returned, as near as may be, to the status of a functional human being.

¹⁴⁶ 801 F. 3d 465 (5th Cir. 2015).

¹⁴⁷ *Id.* at 476.

that the point of maximum cure has been achieved.”¹⁴⁸ Naturally, hard cases present themselves and they are not easy to reconcile with one another.

In *In re RJF International Corporation for Exoneration from or Limitation of Liability*,¹⁴⁹ the court considered a case remarkably similar to *Farrell*, albeit without the tinge of seaman’s fault. In *RJF*, 18-year-old James Avery was working on defendant’s yacht when he fell, hit his head on the dock, and fell into the water. Avery was underwater for 7 to 10 minutes and suffered an anoxic brain injury. After release from the last of several hospitals he “could not speak intelligibly but could follow commands, respond to questions by closing his eyes, make sounds, and was starting to use his head and chin to activate assistive equipment.”¹⁵⁰ Avery’s doctors formulated plans for additional rehabilitation because they opined that “more cognitive and functional progress was possible.”¹⁵¹ The plan called for treatment at a specialized facility in Chicago and then additional daily treatment in Florida. The vessel owner refused to authorize the plan and contended that Avery’s condition was permanent and its obligation to provide maintenance and cure had ceased.

The district court found that Avery had not yet reached maximum cure. The First Circuit Court of Appeals affirmed. The court said that where a condition has stabilized and progress ended short of full recovery, there may be no obligation to provide cure, citing *Farrell* and *Vella*. But the district court had found that further improvement was still possible based on the testimony of the treating physicians, including further but not complete cognitive improvement. Critically the court noted the “fuzzy boundary between improvement and palliation.”¹⁵² And it rejected the

¹⁴⁸ *Pelotto v. L & N Towing Co.*, 604 F. 2d 396, 400, 1981 A.M.C. 1047 (5th Cir. 1981).

¹⁴⁹ 354 F. 3d 104, 2004 A.N.C. 355 (1st Cir. 2004).

¹⁵⁰ *Id.* at 105.

¹⁵¹ *Id.*

¹⁵² *Id.* at 107.

defendant's argument that maintenance and cure ceased whenever a permanent condition existed, even if "its severity can be reduced."¹⁵³ According to the court, not allowing recovery in the case before it, would be inconsistent with treating maximum medical recovery as the dividing line between recovery and on-recovery of cure. In essence, then the court held that even if a permanent condition exists, cure is available if that condition's severity can be reduced, at least where some further improvement is the purpose of the cure. It seems to me that reduction of severity, in and of itself, is improvement and I think it would be to the patient as well. But despite the holding and reasoning in *RJR*, I fear other courts might disagree. Clearly, much potentially turns on the precise words a physician uses and how a factfinder interprets those words. While factfinders often consider complex medical testimony about causation, the law seems better suited to determining what causes an injury than determining whether a person is still medically "improving" or not.

Defendant in *RJR* had also argued that some of the treatment at issue was to alleviate muscle spasms and contractions, which were symptoms of permanent brain damage. Thus, according to defendant, those treatments were to alleviate permanent conditions, not provide any cure. But the court noted that the treating physicians hoped the treatments could permanently lessen the spasms so the treatment would be more than palliative. "This is enough to support an award of maintenance and cure in aid of permanent improvement short of a complete cure."¹⁵⁴

Under my proposal, the obligation to provide cure would continue in *RJR*, whether the treatment was improving the seaman's condition or simply making the seaman's life better even if long-term permanent improvement in symptomology was not necessarily occurring. This is because, under my proposed analysis, the condition was caused by the seaman's service of the ship

¹⁵³ Id. *Accord*: *Mabrey v. Wizard Fisheries, Inc.*, 2008 WL 110500 (W.D. Wa. 2008) (citing and relying upon *RJR*).

¹⁵⁴ Id. The court, on its own, raised the possibility that defendant could have tried to segregate curative treatment from purely palliative treatment but noted that "[s]ome segregation would be silly."

so the obligation to provide cure would continue for treatment designed to make life better and/or prevent regression.

After *RJR*, the First Circuit Court of Appeals came to what I consider a different result in *Whitman v. Mills*.¹⁵⁵ Melodee Whitman was a cook on defendant's ship. On July 17, 2000, after falling several times, burning herself while cooking, and experiencing other symptoms, she was taken to a hospital and diagnosed with multiple sclerosis ("MS"). Her disease was "relapse-remitting" MS, which means the "symptoms manifest themselves in sporadic, unpredictable exacerbations that flare up and then die down."¹⁵⁶ Thereafter, Whitman visited her doctors several times and began taking Betaseron, a drug that operates at the cellular level to alter the immune system response. Additionally, consistent with the nature of her disease, Whitman experienced exacerbations and improvements.

Whitman's employer admitted responsibility for maintenance and cure for a short time after diagnosis and agreed to pay medical expenses up to August 15, 2000 (a little over one month after she first went to the hospital).¹⁵⁷ The district court granted the defendant's motion for summary judgment holding that it was not liable for cure after August 15, 2000. On appeal, Whitman argued that her condition could improve with treatment, in reliance upon *RJF*, and pointing to her medication, Betaseron. Rejecting Whitman's claims, the court said, any treatment would "at best, slow or arrest the progression of her MS, but would not reverse her symptoms or improve her condition beyond the point of maximum medical recovery."¹⁵⁸

But isn't arresting progression an improvement from progression? Whitman's doctor

¹⁵⁵ 387 F. 3d 68, 2005 A.M.C. 120 (1st Cir. 2005).

¹⁵⁶ *Id.* at 70.

¹⁵⁷ That admission was made at oral argument in the district court. Initially, the defendant had refused to pay maintenance and cure after Whitman's diagnosis.

¹⁵⁸ *Id.* at 72.

testified that the point of her treatment was to prevent disability. Not being disabled thanks to treatment would certainly seem to improve one's condition vis-à-vis no treatment and more certain disability. Without considering those possibilities, the *Whitman* court summarily described *RJF* as a case where treatment would not merely arrest symptoms of the underlying condition but would result in further improvement. The *Whitman* court seems to be drawing fine factual lines and a well-prepared medical witness, as noted above, might have meant the difference between recovery and no-recovery in a case where the quality of the seaman's life was really the crux of the case.¹⁵⁹ That is where the maximum medical improvement test leads.

Of course, *RJF* is a case where the injury which caused the seaman's permanent condition was caused by the seaman's service of the ship. Alternatively, *Whitman's* MS was not caused by her employment but rather manifested itself during her employment. Thus, *Avery's* injuries arose out of a risk which was attributable to his employer's enterprise while *Whitman's* did not. Consequently, the result in *Whitman* is consistent with my proposal, the obligation to provide cure would cease when it is determined that the condition was not caused by the seaman's service of the ship. But the reasoning is not because the court relied on what today is an artificial medical concept—maximum medical improvement.

As noted, courts have stated that if a seaman's condition is incurable, the vessel's obligation to provide cure ends, even though future treatment might "restrain degeneracy."¹⁶⁰ This restraint of degeneracy concept is clearly at issue in the second hypothetical I posed above involving the liver transplant necessitated by the infection. In the next section I will discuss four

¹⁵⁹ See, *Bingham v. Shaver Transp. CO.*, 2022 WL 17176842 (W.D. Wash. 2022) (distinguishing *Whitman* and denying summary judgment in a case where the seaman claimed maintenance and cure for post-traumatic stress disorder).

¹⁶⁰ *Haney v. Miller's Launch, Inc.* 773 F. Supp. 280, 290-91 (E.D.N.Y. 2010); *San Martin v. U.S. Lines*, 1960 WL 98914, 1963 A.M.C. 935 (S.D.N.Y. 1960).

important district court decisions that rather dramatically consider the issue of treatment needed to prevent or restrain degeneracy after a medical condition becomes permanent

IV. Degeneracy and Death in the District Courts: Costa Crociere, S.p.A., Tern Shipholding, Norfolk Dredging, and Stemmler

1. Costa Crociere, S.p.A.

In *Costa Crociere, S.p.A. v. Rose*,¹⁶¹ the court found that life-sustaining dialysis treatments were part of the plaintiff seaman's cure, and the employer was responsible for them. In *Costa Crociere*, an employer brought suit seeking a determination that a seaman had reached maximum medical improvement and that it no longer owed maintenance and cure.¹⁶² Rose, a seaman, had IgA nephropathy, a progressive incurable kidney disease; the condition pre-existed Rose's service on Costa's ship. Thus, his work on the ship did not cause his condition. But while serving on Costa's ship, Rose became ill and needed emergency medical care, after suffering total renal failure with acute high blood pressure. He was immediately placed on dialysis.

Rose's doctors testified that a dialysis patient can live 10-20 years.¹⁶³ Additionally, Rose was a viable transplant candidate and his brother had volunteered to donate a kidney. Other than dialysis and/or a transplant, there was no way to retard the progress of the IgA nephropathy. And without the dialysis, or the transplant, Rose would die. And perhaps it goes without saying, the quality of his life would be worse.

The court extensively discussed both the possibility of a transplant and dialysis. The experts disagreed on whether a transplant would increase Rose's life expectancy. Costa's expert opined that a transplant would increase longevity. Rose's doctor, Dr. Roth, opined that there were

¹⁶¹ 939 F. Supp. 1538 (S.D. 1996)

¹⁶² BY the time of trial, Costa had paid over \$100,000 in cure.

¹⁶³ Id. at 1541.

benefits from a transplant and, that in informing his patients, he focused on quality of life rather than extension of life. The doctor also believed that if a patient was doing well on dialysis the risks of a transplant may outweigh the benefits. But the doctor did state that a transplant usually offers a better chance of returning to normal life and thus the doctor was “pro-transplant.”¹⁶⁴ Critically, for my purposes, Roth testified that a transplant does not eliminate the underlying cause of the kidney failure.¹⁶⁵ While a transplant will help to mitigate the patient’s condition, it will not remove all traces of the disease from the patient’s body.¹⁶⁶ Ultimately, the court found that whether transplantation increased life expectancy or not, it would result in “objectively verifiable improvement over a similarly situated patient on chronic dialysis.”¹⁶⁷

Since courts, as noted, had indicated that the obligation to provide cure does not include palliative treatment, the *Costa Crociere* court carefully analyzed the experts’ attempts to define “curative” and “palliative” treatment. The discussion merits lengthy quotation:

Roth [plaintiff’s expert] testified that to “cure” a disease is to eliminate the disease to the extent that it is not likely to impact the patient’s health in the future. On the other hand, he explained that “palliative” is used to describe a treatment (1) administered to a patient with an illness that probably will take his life over a short, definite period of time, and (2) simply intended to make the patient feel more comfortable. As an example of a palliative treatment, Roth cited chemotherapy for a patient with terminal [cancer](#). He added that he views a treatment as palliative only when he knows the patient’s prospects for maintaining

¹⁶⁴ Id. at 1541-42.

¹⁶⁵ He also said that a disease such as IgA nephropathy may affect the new kidney in 20–60 percent of cases, although it is relatively uncommon for the new kidney to fail as a result of the disease.

¹⁶⁶ Id. at 1542.

¹⁶⁷ Id. The court also engaged in an extensive discussion of the evidence concerning the differential success rates for various treatments for blacks and white. Id. at 1542-45. The evidence also showed that a transplant is more cost-effective than dialysis roughly three years after the transplant. Id. at 1545.

life for a meaningful period of time are poor. Roth testified that a third type of treatment, known as “therapeutic,” falls between curative and palliative. He defined “therapeutic” as a treatment that, while not capable of curing the patient's underlying disease, is nevertheless capable of sustaining the patient's life in some kind of meaningful sense for a meaningful period of time.¹⁶⁸

Roth used the provision of insulin to someone with diabetes mellitus as an example of therapeutic treatment. The insulin will improve the patient’s condition and facilitate long-term survival but will not cure the patient.¹⁶⁹ Additionally, Dr. Roth used coronary artery bypass surgery as an example of a therapeutic treatment. The surgery does not cure the coronary artery disease, but it assures sufficient blood flow for a meaningful period of time. Roth noted that some procedures can be both curative and therapeutic. The court accepted Dr. Roth’s description of how the terms curative, palliative, and therapeutic are used in practice.¹⁷⁰

Applying those terms, Dr. Roth thought that both dialysis and a kidney transplant were therapeutic treatment, not palliative and curative.¹⁷¹ Critically, Dr. Roth stated that “medical

¹⁶⁸ Id. at 1545-46.

¹⁶⁹ The doctor also used the example of Wilson’s disease, a genetic disease that prevents the body from removing extra copper.
https://www.gatewaytrialwilsondisease.com/?gclid=CjwKCAjwl6OiBhA2EiwAuUwWZcA2r_N9n9O_nqvXKJDqdTDOb3V8oWSnAGdyDE_pX6fK8u-Tm3lsWhoC_64QAvD_BwE checked on 4/26/23. A patient with Wilson’s disease can live for years with the administration of penicillamine. Without the drug, the patient will die.

¹⁷⁰ *Costa Crociere*, 939 F. Supp. at 1546. The defense expert Dr. Arieff substantially agreed.

He defined a palliative treatment as one that does little other than make the patient more comfortable, and cited chemotherapy for a terminally ill cancer patient as his example. At some points, he defined a curative treatment as one that either eliminated the underlying disease or eliminated the effects of the disease. At other points, he referred to eliminating the effects of the disease, without eliminating the disease itself, as therapeutic. Arieff, like Roth, described the provision of insulin to a diabetic and penicillamine to a Wilson’s disease patient as therapeutic interventions.

Id.

¹⁷¹ In addition:

At one point, Plaintiffs’ counsel asked Roth to consider Wilson’s disease in the context of a definition of palliative as “a treatment that serves to relieve or alleviate without curing.” Roth testified that, using this definition, he would describe Wilson’s disease as palliative. Roth also testified, upon further questioning from Plaintiffs’ counsel, that if he could not use his preferred term (therapeutic), he would describe dialysis and transplantation as palliative rather than curative procedures.

Id.

practitioners reject the palliative/curative duality.”¹⁷² Both experts agreed that neither dialysis nor transplantation would cure IgA nephropathy.¹⁷³ Thus, it would seem that under the traditional cure rules, there would be no recovery for either treatment. That is not what the court decided.

Turning to the law, the court reviewed the history of cure and noted that, given its beneficent purpose, doubts as to its application are resolved in favor of the seaman.¹⁷⁴ The court noted a lack of precision in the language courts used to determine when the obligation to provide cure ceased and that the issue was “contextually-driven.”¹⁷⁵ The court stated that the primary concern in resolving the issue was “the seaman’s overall medical condition, rather than the discrete ailment or ailments that afflict him.”¹⁷⁶ It said that in the Eleventh Circuit, based on previous Fifth Circuit precedent, the focus should be on the possibility of betterment not simply, as in the Second Circuit, on the incurability of a condition.¹⁷⁷ And the word condition encompasses more than curability. “The broad term ‘condition’ permits a court to tailor the remedial doctrine of maintenance and cure to fit the unique facts and circumstances of the case before it.”¹⁷⁸

¹⁷² The court also rejected the definition of palliative in Taber’s Medical Dictionary. *Id.*

¹⁷³ Indeed, the National Institute of Diabetes and Digestive and Kidney Diseases has the following on its web site concerning dialysis:

Does dialysis cure kidney failure?

No. Even when very well done, dialysis only replaces part of your kidney function. Hemodialysis and peritoneal dialysis allow people with kidney failure to feel better and continue doing the things they enjoy, but neither replaces all of the jobs that healthy kidneys do.

<https://www.niddk.nih.gov/health-information/kidney-disease/kidney-failure/choosing-treatment#:~:text=about%20peritoneal%20dialysis-.Does%20dialysis%20cure%20kidney%20failure%3F,jobs%20that%20healthy%20kidneys%20do.>

Thus, dialysis does not cure the disease but allows the patient to “feel better and continue doing the things they enjoy”, i.e., to maintain the quality of one’s life to the fullest extent possible.

¹⁷⁴ *Costa Crociere*, 939 F. Supp. at 1547.

¹⁷⁵ *Id.* at 1549.

¹⁷⁶ *Id.* at 1550. *But see*, *Giroir v. Cenac Marine Services, LLC*, 2019 WL 2233763 (E.D. La. 2019) (court decided seaman had reached maximum medical improvement after being allowed to return to work even though a doctor testified that seaman’s condition was continuing to heal and continuing to improve).

¹⁷⁷ *Stemmler, supra*, of course is a case in the Second Circuit.

¹⁷⁸ *Costa Crociere*, 939 F. Supp. at 1550.

Consequently, the court did not end its inquiry with whether Rose’s condition was incurable.

What about the argument that the treatment Rose received and sought was “palliative?” Accepting Dr. Roth’s testimony on the subject, the court said that it did not find the curative/palliative framework helpful. Neither expert described the alternative treatments available as palliative. Both testified that the term palliative is primarily used in reference to treatments administered to terminally ill patients. Both regarded the alternative treatments as therapeutic. The court noted that several earlier Fifth Circuit cases supported the notion that cure included therapeutic benefits.¹⁷⁹

The court made clear that either of the alternative treatments—dialysis or transplant--would unquestionably better the seaman’s condition and that without medical attention he would die. The treatments would do more than ease pain and suffering. The court then listed the many ways in which the treatments would better Rose’s condition.¹⁸⁰

Beyond the words used to define the treatment:

maintenance and cure, if it means anything, necessarily encompasses a situation where the proposed treatment represents the difference between life at a reasonable level of functioning for an indefinite period of time, and plain, certain and immediate death. The doctrine was designed and intended to hold the shipowner responsible for treatments that move the patient to an improved state of health. For purposes of comparison, when the

¹⁷⁹ Id. at 1551-52.

¹⁸⁰ Id. at 1552. The court said:

In the most basic sense, of course, dialysis and a transplant “better” Rose’s medical condition by removing toxins and replacing other vital kidney functions that were destroyed as a result of the disease, and would not be performed in lieu of appropriate medical care. *Id.* at 14. Yet dialysis and transplantation will improve other aspects of Rose’s condition, among which are his level of blood abnormalities, his overall body chemistry, his cardiac function and the responsiveness of his peripheral nerve system. *Id.* at 14, 20. These changes do more than improve quality of life or simply make him “feel better;” they *extend life*, and make the patient healthier in the most marked and profound sense. We stress that neither Dr. Roth nor Dr. Arieff suggested that no further improvement in Rose’s condition would be possible after receiving dialysis or a kidney transplant.

available treatment leaves the seaman feeling better *without* enhancing his bodily function and moving him to an improved state of health, then the point of maximum medical cure has been reached, and the shipowner's liability may be extinguished. Here, dialysis and transplantation will improve Rose's condition in the most profound sense: by creating a reasonable prospect of life for an indefinite period of time at a reasonable level of functioning.¹⁸¹

Betterment here boiled down to the simple question of life or death, which distinguished Rose's situation from someone with an incurable disease whose treatment dealt only with pain. Again, the court reiterated that further improvement was possible in the case before it, but the concept of betterment is factually and logically mingled with the notion of maintaining some quality of life, rather than simply curing the seaman, which no treatment could do.¹⁸²

The court then considered whether Rose was entitled to a kidney transplant in lieu or in addition to the dialysis. Costa contended that it had no obligation to provide a transplant. Costa argued that a transplant was costly and would do no more than improve Rose's quality of life. The court rejected those arguments. The record indicated that Rose had a reasonable probability of survival with a transplant. Without resolving the expert's disagreement over whether a transplant would lengthen Rose's life expectancy, there was clear evidence, as noted above, that a transplant would do "certain things to improve the patient's actual bodily condition that dialysis cannot do."¹⁸³

¹⁸¹ Id. at 1552-53.

¹⁸² Id. at 1554.

¹⁸³ Id. 1555. These included: doing a superior job removing toxins, creating a better chemical balance in the body, producing hormones that would increase production of red blood cells, help to stabilize blood pressure and more. *See also*, Smith v. Omega Protein, Inc., 459 F. Supp. 3d 787 (S.D. Miss. 2020) (additional surgery might benefit seaman o seaman had not reached maximum medical improvement):Hurtado v. Balerno International Ltd., 408 F. Supp. 3d 1315 (S.D. Fla. 2019) (seaman had not reached maximum medical improvement where additional surgery might improve his condition); Matter of Cooper/T. Smith Stevedoring Co., Inc., 942 F. Supp. 267 (E.D. La. 1996) (surgery might be beneficial so no maximum medical improvement); DeBenedetto v. Williams, 880 F. Supp. 80 (D.

Costa Crociere argued that maintenance and cure should not be construed to create an obligation that would last for the duration of the seaman's life. But the court noted that nothing in the law limits the obligation to provide cure due to the cost or length of time involved. The court said that there does not have to be a definite and absolute endpoint for maintenance and cure awards. Likewise, the court said that because medical science might not be able to better a condition today does not mean that a seaman cannot resume their claim in the future when a new treatment is discovered. "In this sense, therefore, the shipowner's obligation *may* continue for the life of the seaman."¹⁸⁴

In its conclusion the court said:

At its core, maintenance and cure, like negligence and other common law doctrines, is essentially about allocating cost, benefit and risk. At least at first blush, it is not unreasonable for the law to require a shipowner to provide medical care to one of its crew members—who is capable of meaningful medical improvement after suffering an ailment while in the service of the ship—as part of the cost of doing business.¹⁸⁵

So, in the end, the court concluded that both dialysis and a transplant could improve Rose's condition and since improvement was possible, Rose had not achieved maximum medical improvement.¹⁸⁶

Costa Crociere's treatment of recoverable medical expenses as part of cure jives with my

R.I. 1994) (two doctors testified that seaman could still benefit from wrist surgery; thus, seaman had not reached maximum medical improvement).

¹⁸⁴ *Costa Crociere*, 939 F. Supp at 1556-57. Notably, Rose had agreed that Costa's obligation to provide cure would cease once the transplant occurred and his condition had stabilized.

¹⁸⁵ *Id.* at 1558. Rose's counsel had agreed that after the transplant when Rose's condition had stabilized the employer's obligation to provide cure would cease and the transplant would improve Rose's body's ability to remove toxins, create a better chemical balance in the body, produce hormones that would increase production of red blood cells, help to stabilize blood pressure and more. But the court was also swayed by the fact that terminating dialysis would mean possible death.

¹⁸⁶ *See also*. *Dejean v. St. Charles Gaming Co., Inc.*, 903 So. 2d 521, 526 (La. App. 3d Cir. 2005), *writ denied*, 924 So. 2d 166 (La. 2006) (awarding cure because treatments, in part, would arrest further deterioration).

proposal in the way it deals with medical treatment. The court took a very modern, functional approach to defining what treatments constituted recoverable treatment costs. It did not limit itself to the idea that when one's condition had reached a point when it could not be cured, in the layperson's sense, the obligation to provide cure ended. Instead, the court emphasized quality of life, the chance of betterment, and avoiding regression and ultimate death. Of course, the court did all that in considering what maximum medical improvement meant. That is, it analyzed the necessary treatment from a broad therapeutic perspective, as the doctors counselled, but it did so in deciding what was maximum medical improvement. To reiterate, I would abandon that vague concept and focus on whether the condition was caused by the seaman's service of the ship. And here. I would regrettably part company with the *Costa* court.

Of course, Rose's kidney disease was not caused by his service of the ship. It does not seem that incurable kidney disease, which was not caused by any injury or exposure on the vessel, is a risk attributable to the vessel owner. Thus, I would argue that the vessel owner would have had an obligation to provide cure but only up until the evidence established that the kidney disease was not caused by the seaman's service of the ship. Thereafter, the cost of dealing with the risk of incurable kidney disease would fall upon the seaman through either private or public insurance. While my proposal would involve a determination of causation, it would avoid the messy determination of maximum medical cure which is messier today thanks to advances in medicine than it was when court first created the obligation. Let me now turn to a case with a result consistent with my proposal but whose analysis of the medical treatment involved is not consistent with the theme I have tried to develop about advances in medical theory.

2. *Tern Shipholding Corp.*

In *Tern Shipholding v. Rockhill*,¹⁸⁷ John Rockhill was a seaman, working for Osprey. Rockhill left the ship on which he worked because of illness, which was later diagnosed as limited small cell lung cancer. Rockhill received chemotherapy and radiation treatments, but the cancer metastasized to the brain changing the cancer from limited to extensive. Thus, the treatment changed from cure to “hopeful remission, but not ever a cure.”¹⁸⁸ Thereafter, doctors determined that the cancer was in remission and Rockhill returned to work. Several months later, Rockhill terminated his employment and thereafter, found out that his cancer had recurred. The issue before the court was whether Osprey and/or an insurer were responsible for cure after Rockhill’s termination of employment.

The medical testimony was essentially that Rockhill had a permanent and incurable illness. There was no treatment available that would “cure” the cancer.¹⁸⁹ The doctors also testified that any on-going treatment was to control Rockhill’s symptoms, reduce his pain and suffering, and improve the quality of his life. It was, according to the doctors “palliative,” which one doctor defined as “treatment that you use to prolong life.”¹⁹⁰ To support his position that the additional treatment was part of the employer’s obligation to provide cure, Rockhill pointed to *RJF* and *Costa Crociere*.

Turning first to *RJF*, the district court noted that the medical testimony there established that there was “likelihood of future gains,” whereas Rockhill’s possibility of future gains was “virtually nonexistent.”¹⁹¹ And, Rockhill’s future treatment would be purely palliative. There was no available treatment that would lead to an improvement in the illness.

¹⁸⁷ 2006 WL 1788507 (N.D. Fla. 2006).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

The court also distinguished *Costa Corciere* because it said in *Costa Crociere* there was a possibility of betterment. The *Tern* court said that *Costa Crociere* had focused on the physical condition of the body as a whole and not just the underlying disease.¹⁹² Additionally, the treatment in *Costa Crociere* could result in the patient living for an indefinite period of time which was not the case for Rockhill. He would not live indefinitely with the treatments at issue.¹⁹³ In so noting, the court once again distinguished palliative treatment from betterment.

Rather coldly, the court said it did “not discount the fact that treatment may extend [Rockhill’s]... life for a period of time, but that issue alone is not enough to justify continued maintenance and cure.”¹⁹⁴ The proposed treatments would not result in indefinite life; it would not permanently control the illness or eradicate his illness. While the sought treatment would make Rockhill mentally feel better, “any improvements in his illness will be temporary at best, and ultimately will not save his life.”¹⁹⁵ It tragically concluded that part of its opinion, as follows:

The Court recognizes the “fuzzy boundary” that exists between improvement and palliation. The Court also recognizes that stopping treatment at this stage may decrease Rockhill’s life span. Nonetheless, keeping in mind that maintenance and cure is not the equivalent of long term disability insurance, the Court finds that the testimony from Rockhill’s doctors demonstrate unequivocally that Rockhill’s illness is permanent, incurable, and not subject to “betterment.” As such, the Court finds that Rockhill has reached the point of maximum cure.¹⁹⁶

Let me consider the decision through the lens of my proposal. First, it does not appear that

¹⁹² Id. It seems rather appropriate to focus on the body as a whole and not simply the underlying disease as the disease’s effect on the body is essentially a part of the symptomology of the disease.

¹⁹³ Id.

¹⁹⁴ Id.

¹⁹⁵ Id.

¹⁹⁶ Id.

the cancer was caused by his service of the ship; thus, Osprey's obligation to provide cure should have only lasted until diagnosis of the cancer and no causation determination. That said, if the cancer had been caused by the service of the ship, then, under my proposal the issue of maximum medical cure would vanish and if there was medical testimony that the treatments were designed to deal with the condition, including palliation or improving the quality of life the cost of the treatments would be recoverable. That view would be consistent with modern medical theory. From a medical perspective, the doctors in *Tern* did not stop treating Rockhill when his condition became permanent; they continued to treat him to ease his pain and improve the quality of his remaining life. If the condition at issue was caused by the service of the ship, the full range of treatment should be available because the condition, its symptoms, and its ultimate impact on the seaman are fairly attributable to the work and to the vessel owner's obligation. Terminating treatment because the condition is permanent does not in one wit change the conclusion that the risk of the condition, if caused by the seaman's service of the ship, was attributable to the employer's enterprise. Put simply, when the condition is caused by the service of the ship maximum medical improvement is an irrelevant red herring in terms of risk allocation.

Additionally, from a technical, legal standpoint, the *Tern* court distinguished *Costa Crociere* because in *Costa Crociere* the dialysis or transplant might mean indefinite life, whereas in *Tern* the treatment would ease pain without indefinitely extending life. But keeping Rose alive does not "cure" his disease. Certainly, keeping Rose alive is better than having him die sooner. But Rockhill was in the same position as the proposed treatments might prolong his life. The postponement would not be indefinite but there is nothing in the jurisprudence that says indefinite prolongation of life makes treatment a cure when the doctors say that the underlying condition is still present. Again, the point is that determining maximum medical improvement is difficult, if

not impossible, and inconsistent with medicine today.

3. Norfolk Dredging Co. v. Wiley

In *Norfolk Dredging Co. v. Wiley*,¹⁹⁷ Wiley suffered an eye injury at work and developed glaucoma. The glaucoma would require lifelong monitoring and treatment. Wiley's doctor declared the condition stabilized and permanent and allowed him to return to work but noted that Wiley still had glaucoma. Thereafter, Wiley underwent two additional procedures to try and control the intraocular pressure in his eye. Wiley's employer brought a declaratory judgment action seeking a determination that the obligation to provide cure did not extend beyond the doctor's declaration that the glaucoma was a permanent condition.

The court said that the: "case poses the legal question of whether a shipowner is obligated to pay for such continuing care as is necessary to keep the seaman's condition stable at the MMI level of recovery."¹⁹⁸ The answer was no. The employer did not have an obligation to pay for treatment after the declaration that the condition was permanent even if that treatment was necessary to prevent degeneracy or future problems with the eye. Wiley had pointed to *Calmar* and argued, as I do here, that the vessel owner's obligation to provide cure should be more extensive when the injury was caused by the service of the ship as Wiley's was. The court rejected that argument. It said:

Wiley relies on *Calmar* to encourage the Court to extend the duty of maintenance and cure to an indeterminate point in time beyond MMI. While defendant Wiley accurately cites *Calmar* as having left open the possibility of extending the duty if physical injury occurs in service of the vessel (as opposed to acquisition of a disease), *Farrell* foreclosed that

¹⁹⁷ 450 F. Supp. 2d 620 (E.D. Va. 2006).

¹⁹⁸ Id. at 625.

possibility and no Court has ever accepted the *Calmar* Court's musing.¹⁹⁹

Of course, under my reform proposal, because the glaucoma was caused by the service of the ship, I would argue that it is a risk attributable to the vessel owner's enterprise and all medical expenses arising therefrom should be recoverable. It seems that Wiley was in a similar position to Rose, the seaman in *Costa*. Although Wiley did not face death without further treatment, he did potentially face blindness.

4. Stemmler

In *Stemmler v. Interlake Steamship Co.*,²⁰⁰ Stemmler manifested serious heart disease while working as a seaman on defendant's ship. The only available treatment option was a heart transplant. There was no indication that the heart disease was caused by the employment. Stemmler sought maintenance and cure from his employer who denied the claim at first but then engaged in settlement negotiations, in part because of the dire state of plaintiff's health. The parties confected a settlement under which the employer agreed to pay premiums on a secondary health insurance policy, which was a condition of Stemmler's acceptance into the heart transplant program at Cedar-Sinai Hospital in California. Stemmler's primary insurer was Medicare. Additionally, the parties to the settlement agreed that the employer would continue to make payments on the secondary policy until the court determined that the employer's obligation to provide maintenance and cure were met in full. The agreement described the condition for which the employer was paying maintenance and cure as "systolic heart failure and any related or resulting cardiac conditions."²⁰¹ The agreement also recognized that the conditions was not "curable."²⁰² Thus, the employer agreed to continue to pay the premiums on the policy until Stemmler reached maximum medical cure.

¹⁹⁹ Id. at 626.

²⁰⁰ 2022 WL 3155137 (E.D.N.Y. 2022).

²⁰¹ Id.

²⁰² Id.

Thereafter, Stemmler underwent a heart transplant and subsequent rehabilitation. After the surgery, Stemmler began a regimen of anti-rejection and immunologic suppressive therapies, which he will probably need to continue for the rest of his life. At one point, he was taking six different medications twice a day, but both the medications and frequency could change based on his bloodwork. In the year after the surgery, Stemmler experienced increased stamina and decreased fatigue. He also needed to periodically visit his doctors for long-term surveillance, angiograms, nuclear stress tests, echocardiograms, chest X-rays, blood draws, medication management and clinical visits. For the six years following surgery the visits would occur twice per year.

After his initial post-operative treatments, Stemmler moved to Las Vegas, Nevada, where he worked as an engineer at a hotel, mostly doing plumbing and electrical work. His employer then asked the court to find that Stemmler had reached maximum medical improvement and that it had fulfilled its obligation to provide maintenance and cure, thereby freeing it of responsibility to continue to pay for the secondary health insurance policy.

At trial, Stemmler's doctors testified that Stemmler would need follow-up care for the rest of his life. Failure to follow the prescribed procedures would increase the risk of organ rejection and a decline in health. Absent the prescribed care, Stemmler would likely decline to the point where he would experience advanced heart failure or die, i.e., without the proscribed treatment Stemmler would regress.²⁰³

Like the doctors in *Costa Crociere*, the defense expert compared Stemmler's condition at the time of trial to an otherwise healthy person with diabetes mellitus—stable but with a need for on-going monitoring and treatment and slightly higher than average propensity to develop certain

²⁰³ Id. at 2-5. According to the doctors, Stemmler had advanced into the maintenance phase following heart transplant, but he still needed the prescribed treatment. Id. at 6.

adverse health consequences.²⁰⁴ The defense expert opined that Stemmler's condition was permanent, that there was nothing curative to be done for him and that the transplant was the "cure." The doctor did note the remote possibility in the distant future of a repeat heart transplant but those are rare because transplant patients are often ineligible for another.²⁰⁵

Stemmler had not availed himself of health care benefits available from his current employer; he had relied upon his Medicare benefits and the secondary policy the employer had provided to pay his medical bills. Additionally, Stemmler was concerned that if he earned more than \$18,000 per year, he would lose his Medicare eligibility because he would no longer be considered disabled. The court said that it would not consider the availability of alternative coverage in rendering its decision on maximum medical cure but the court expressly noted that whatever it decided Stemmler would not be deprived of anti-rejection medication or follow-up doctor visits. Thus, the case was really about who would pay for that medication and those visits. It was about cost allocation.

The court ultimately held that Stemmler had reached maximum medical improvement. An employer's duty to provide cure stops when the seaman's condition is permanent and incurable, and that cure did not include payment for medical treatment intended to restrain degeneracy or relieve pain. The Second Circuit, in which the court sat, had long recognized a distinction between curative treatment and treatment meant to prevent relapse, another way to say restrain degeneracy.

Neither Stemmler's long-term (lifelong) need for anti-rejection medication nor the constant and continuing improvement in Stemmler's condition meant that he had not reached maximum

²⁰⁴ Id.

²⁰⁵ Id.

medical improvement.²⁰⁶ There was nothing else to be done to improve Stemmler's condition. His condition had been chronic heart failure and the cure for that was a heart transplant which had occurred. Stemmler was stable and monitoring would simply prevent organ rejection and heart failure; it would not improve the underlying condition which the court essentially treated as cured as the lay person, rather than the lawyer uses the term. Stemmler was like anyone with a chronic condition who needed monitoring to avoid relapse. And the obligation to provide cure did not, according to the court, cover such treatments.²⁰⁷

Moreover, the fact that Stemmler continued to improve, gaining strength and stamina, did not mean he was in the cure phase of his treatment. Cure, according to the court, does not depend on a medical finding that the seaman is no longer getting better; to the *Stemmler* court maximum medical improvement meant that no further treatments are available for the condition. That conception of maximum medical improvement stands in stark contrast to the *Costa Crociere* and *RJR* progressive and more forgiving betterment analyses. For the *Stemmler* court, medical monitoring and the passage of time are not curative measures for which the vessel owner is responsible.

The hallmarks of maximum medical improvement for the court were "stability and permanence."²⁰⁸ Stemmler's employment and his at-home activities indicated both stability and permanence. The court also stressed that three years had passed since the transplant, thus

²⁰⁶ Id. at 9. *See also*, *Billiot v. Cenac Towing Company*, 2009 WL 3062616 (E.D. La. 2009) (marine towing company was not liable for cure after seaman was released from the hospital for work-related injuries; the defendant was not responsible for treatments due to seaman's pre-existing Hemophilia B).

²⁰⁷ The *Stemmler* court's failure to find that anti-regression treatment was part of the vessel owner's obligation of cure is inconsistent with the *Tern* court's reading of *Costa* that prolongation of life for an indefinite period constituted cure. *See also*, *Dobbs v. Lykes Bros. S.S. CO.*, 243 F. 2d 55, 58 (5th Cir. 1957) ("He was not entitled to maintenance and cure thereafter although he will require continued medical observation.").

²⁰⁸ *Stemmler* at 10. *See also*, *Mackey v. National Steel Corp.*, 292 F. Supp. 222, 225 (N.D. Ohio 1967) (seaman claiming that they had not reached maximum medical improvement must establish that additional recovery will result in "some lasting medical improvement or improvement in his condition").

distinguishing “hypothetical cases where MMI is not reached either because of a precarious medical condition that precedes further major intervention (such as an organ transplant), or the health of a person who has had more recent transplant surgery.”²⁰⁹

Again, the court indicated that whatever its decision, *Stemmler* would not be deprived of necessary medication or treatment, but its decision was about whether defendant would pay for it through the secondary insurance plan or plaintiff would have to turn to another public or private insurer to pay for the treatment.²¹⁰ The fact *Stemmler* might not be able to obtain the drugs he needs absent his employer’s paying for them has nothing to do with whether he has reached maximum medical improvement. But from a medical perspective it is therapeutic treatment that keeps him alive and allows him to continue to live and function. While the decision literally was based on attaining maximum medical improvement that finding was, in essence, a masquerade for a risk allocation determination.

From my perspective, *Stemmler* reads maximum medical improvement too narrowly from a medical perspective. Should the former seaman stop taking his ant-rejection drugs he would regress and sink below the point of maximum medical improvement. One might predict that the *Stemmler* court would say that risk was attributable to *Stemmler* and not the vessel owner. Be that as it may, the line between betterment, improvement, stabilization, and what we may call classic cure is hazy, particularly in light of the medical testimony in *Costa Crociere* where at least one doctor rejected the palliative/curative distinction and focused instead on therapeutic treatment and quality of life. That is also what Judge Weinstein did in *Haney* and what the *RJR* court essentially did. But relying on the concept of maximum medical improvement to draw legal lines is

²⁰⁹ *Stemmler* at 10. The result in the case might have been different if defendant had moved for a finding of maximum medical improvement one week or even months after the transplant.

²¹⁰ *Id.* at 8.

unsatisfying.

That is why, on another level, *Stemmler* gets it right; the risk of a seaman developing heart failure which was not caused by or aggravated by the seaman's service of the ship does not seem to be one that the employer should bear. It is not a risk fairly attributable to the vessel owner's enterprise. Thus, after a court, or the parties, determine that the seaman's condition was not caused by the seaman's service to the ship, the vessel owner's obligation to provide cure should cease but might, extend later if the causation determination is made when the seaman is in a foreign port. Then, I would argue that the vessel owner has a continuing obligation to provide cure until it gets the seaman home.

5. Recap

Comparing *Stemmler*, *Tern Shipholding*, and *Norfolk Dredging* to *Costa Crociere*, the courts' decisions manifest two very different approaches to maximum medical improvement. In all the cases the seaman needed on-going medical treatment, or their medical condition would deteriorate. In *Stemmler* and *Costa Crociere*, without the treatment the seamen would potentially be in life-threatening situations. In *Tern Shipholding*, Rockhill's condition was terminal. If *Stemmler* did not take anti-rejection medication, he would experience heart failure and die. If Rose did not receive dialysis and/or a transplant, he would experience kidney failure and eventually die. If Rockhill did not receive the sought after treatment, the quality and possibly length of his remaining life would deteriorate. If Wiley did not receive glaucoma treatment his condition would worsen. But one seaman, Rose, recovered the costs of his treatment. The other three did not.²¹¹

²¹¹ Of course, there is a difference between *Stemmler* and *Costa Crociere*. Rose had not yet received a transplant and *Stemmler* had and the *Stemmler* court distinguished *Costa* because that further treatment—a kidney transplant was still available. In the case before it, the court said that if *Stemmler* had not received a heart transplant and it was available then pre-transplant treatments would be part of the defendant's cure obligation, analogizing plaintiff's condition to someone who had diabetes that was under control with treatment. The court also pointed out that the parties, in their agreement, had contemplated exactly the situation which arose. But even though the *Stemmler* court distinguished *Costa* because a kidney transplant was still available, the *Costa* court found both the dialysis and

The *Stemmler*, *Tern Shipholding*, and *Norfolk Dredging* courts take a very traditional approach to maximum medical improvement. In all three the seaman's condition was permanent and the medical treatments at issue would prevent regression and/or improve the quality of the seaman's life. While the courts may not all use the word, they seem to view the treatments at issue as palliative in the sense courts have used that word. Alternatively, in *Costa Crociere*, the court rejects outdated distinctions between cure and palliation. Instead, the court focused on therapeutic treatment and was more concerned with the quality of life even if the treatment at issue would not remove the underlying condition. While it would arguably make the condition better it did not cure it and it is hard to meaningfully distinguish the treatment at issue in *Stemmler*. In short, I am not convinced that the maximum medical improvement test is being consistently applied across the four cases. And I am not sure that it can ever be consistently applied. It is based on outmoded medical theory and should be abandoned.

In the next section, I will briefly discuss how my proposal regarding cure would mesh with other rights that the seaman might have under the Jones Act²¹² or the warranty of seaworthiness.²¹³

V. Reformed Cure, the Jones Act, and Unseaworthiness

In addition to the right to recover maintenance and cure from a vessel owner, when the

the transplant part of cure and it does not seem that it would have held that the dialysis was not part of the obligation of cure if a transplant were not possible. And, what if Rose had decided, for whatever reason, to forego a kidney transplant? Would he then be at maximum medical improvement and the vessel owner's obligation to provide dialysis cease?²¹¹ Would it then be accurate to say that the risk/cost of ongoing dialysis became a risk attributable to the seaman, rather than the vessel owner because of the seaman's choice not to have a transplant? What if the risks of a transplant were simply too great for Rose? What if he turned down the transplant for religious reasons? Or because a suitable donor could not be found? Should the vessel owner's obligation to provide cure continue then?

And, in *Stemmler*, the court repeatedly indicated that whatever it decided *Stemmler* would be able to acquire the anti-rejection medication required and presumably the on-going medical monitoring? But what if that were not the case? What if *Stemmler* would be deprived of the necessary medication unless the vessel owner paid for it? Should that make a difference?

The hypotheticals tug at the heart strings and the variations may cause a court to lean in the seaman's favor to declare the needed treatment within the vessel owner's obligation to provide cure.

²¹² 46 U.S.C. § 30104.

²¹³ *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960).

seaman is injured in the service of the ship or manifests some adverse medical condition during that service, a seaman may have a Jones Act²¹⁴ negligence action against their employer and possibly an unseaworthiness claim against the vessel owner or bareboat charterer.²¹⁵

The Jones Act claim is a negligence claim against the employer.²¹⁶ Likewise, a seaman has a claim for breach of the vessel owner or bareboat charterer's breach of the warranty of seaworthiness—the duty to provide a vessel which is reasonably safe for work.²¹⁷ If the seaman establishes employer negligence and/or unseaworthiness, which causes the seaman to suffer an injury, the seaman will recover in full; that is the seaman will recover all of the recoverable damages suffered, including lost wages, loss of earning capacity, past and future medical expenses, pain and suffering, mental anguish, loss of enjoyment of life, etc.²¹⁸ The availability of the Jones Act and unseaworthiness claims do not impact the seaman's right to recover maintenance and cure, which right the seaman retains;²¹⁹ however, certain categories of Jones Act and unseaworthiness damages may overlap with maintenance and cure awards and so the court must be careful to avoid double recovery.²²⁰ Comparative fault applies to the Jones Act and unseaworthiness claims and thus the seaman's negligence will reduce recovery.²²¹ The seaman's fault will have no impact on the maintenance and cure claim.²²²

The seaman may have a Jones Act claim, as well as the right to recover maintenance and cure, if the employer negligently fails to provide cure and that failure aggravates the underlying

²¹⁴ *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 422 (2009) (“negligent denial of maintenance and cure may also be the subject of a Jones Act claim”).

²¹⁵ *Reed v. S.S. Yaka*, 373 U.S. 410, 414 (1963).

²¹⁶ *See, e.g., Holdan v. Ohio Barge Line, Inc.*, 611 F. 2d 71 (5th Cir. 1980).

²¹⁷ *Colon v. Trinidad Corp.*, 188 F. Supp. 97 (S.D.N.Y. 1960).

²¹⁸ *See, Frank L. Maraist, Thomas C. Galligan, Jr., Dean A. Sutherland, and Sara B. Kubel, Admiralty in a Nutshell*, 261, 275 (8th ed. 2022).

²¹⁹ *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 422 (2009).

²²⁰ *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F. 2d 372 (5th Cir. 1981).

²²¹ *Miller v. American President Lines, Ltd.*, 989 F. 2d 1450, 1463 (6th Cir. 1993).

²²² *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 730 (1943).

injury.²²³ Indeed if the employer arbitrarily refuses to pay maintenance and cure it will expose itself to a punitive damages claim.²²⁴

In relation to this piece, Jones Act and unseaworthiness damages are not limited by the concept of maximum medical improvement. Thus, if *Stemmler* could have established Jones Act negligence and/or unseaworthiness and his heart failure had been caused by that negligence or unseaworthiness then he would have been able to recover his post-transplant anti-rejection treatment costs even if he had reached maximum medical improvement, as long as the court found that the employer's negligence and/or unseaworthiness caused him to need the heart transplant. Under my proposal, making all medical expenses caused by the service of the ship recoverable as cure, Jones Act and unseaworthiness damages for medical expenses would overlap with cure when the condition was caused by the service of the ship.

But, what about the other aspect of my proposal—that the right to recover cure for an injury or illness that manifests itself during the service of the ship but is not caused by it ceases when it is determined that the condition was not caused by the seaman's service of the ship? In that case, the seaman might have a Jones Act negligence claim if the vessel owner negligently failed to provide cure before the determination was made that the condition was not caused by the seaman's service of the vessel. Likewise, if the vessel owner failed to provide an ill or injured seaman with medical care even if the condition was not caused by the seaman's service of the ship, the vessel owner might be liable for its negligent failure to provide that care under the Jones Act. Those damages would include any increased medical expenses the seaman faced because of the negligence. In the next section, I will briefly recap and conclude.

²²³ *Cortes v. Baltimore Insular Line*, 287 U.S. 367 (1932); *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F. 2d 372 (5th Cir. 1981).

²²⁴ *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009).

VI. Conclusion

It is time to jettison the concept of maximum medical improvement. It is a nonsensical way to allocate risk in a world where medicine, insurance, and access to health care have evolved and improved. Instead, the risk allocation of cure should turn on whether the condition was caused by the seaman's service of the ship.

First, even though maintenance and cure is not worker's compensation *per se*, it is no fault compensation to a worker—the seaman--and the requirement that in order to recover compensation a worker must establish that the relevant injury or illness arose out of the employment is pervasive. It is intrinsic to the allocation of risk—worker injury—to the enterprise—the employer. The same should be true for the obligation of on-going cure. Thus, if the seaman's injury was caused by the service of the ship, then the vessel owner should be responsible for medical expenses necessitated by the condition, including any and all therapeutic treatment that allows the seaman to live and that improves and then maintains the quality of their life. The liability for treatment should be based on modern medical theories as the courts in *Neff*, *RJR*, *Haney*, *Messier*, and *Costa Crociere* recognized. Extension of cure to include therapeutic treatment is consistent with the way medicine has evolved in terms of treating pain and maintaining quality of life, as opposed to simply eradicating a condition.

Alternatively, if the seaman's condition is not attributable to the service of the ship, then the obligation to provide cure should cease when the determination is made that the condition was not caused by the service of the ship. This is consistent with the expansion of both private and public first party medical insurance. In any event, the vessel owner would have a duty to

provide reasonable medical care for the injured or ill seaman until causation was determined.²²⁵

Clinging to the historic notion of maximum medical improvement is to let outmoded concepts govern modern legal relations. It is legally living in the past. What was is not longer right.²²⁶

²²⁵ Carr v. Standard Oil Co., 181 F. 2d 15, 16 (2d Cir. 1950) (duty to obtain medical care for an injured seaman).

²²⁶ See note 4 *supra*.

