

PRESENTED AT

27th Annual Admiralty and Maritime Law Center
South Texas College of Law Houston
September 21, 2018
Houston, Texas

**Maintenance and Cure: Experimental and
Speculative Treatments**

Jeffrey R. Bale
Brandon K. Best

The Bale Law Firm, PLLC
Kensington I
1600 Highway 6 South, Suite 200
Sugar Land, Texas 77478
(281) 295-6000
jbale@balelawfirm.com
bbest@balelawfirm.com

TABLE OF CONTENTS

The Law Regarding Maintenance and Cure	2
Seaman May Choose Their Own Physician.....	4
What is “Experimental”?	7
Right-to-Try Legislation	11
Conclusion	14

TABLE OF AUTHORITIES**Cases**

<i>Aguilar v. Standard Oil Co. of N.J.</i> , 318 U.S. 724 (1943).....	2
<i>Allholm v. Am. Steamship Co.</i> , 144 F.3d 1172 (8th Cir. 1998)	14
<i>Al-Zawkari v. Am. Steamship Co.</i> , 871 F.2d 585 (6th Cir. 1989)	9
<i>Barto v. Shore Const., L.L.C.</i> , 801 F.3d 465 (5th Cir. 2015)	11
<i>Boudreaux v. Transocean Deepwater, Inc.</i> , 721 F.3d 723 (5th Cir. 2013)	3
<i>Breese v. AWI, Inc.</i> , 823 F.2d 100 (5th Cir. 1987)	4
<i>Brister v. A.W.I., Inc.</i> , 946 F.2d 350 (5th Cir. 1991)	2
<i>Caulfield v. AC & D Marine, Inc.</i> , 633 F.2d 1129 (5th Cir. 1981)	5
<i>Cooper v. Diamond M Co.</i> , 799 F.2d 176 (5th Cir. 1986)	2
<i>Freeman v. Thunder Bay Transp. Co., Inc.</i> , 735 F.Supp 680 (M.D. La. 1990).....	2
<i>Gautreaux v. Scurlock Marine, Inc.</i> , 107 F.3d 331 (5th Cir. 1997)	1
<i>Guevara v. Mar. Overseas Corp.</i> , 59 F.3d 1496 (5th Cir. 1995)	4
<i>Hall v. Noble Drilling (U.S.) Inc.</i> , 242 F.3d 582 (5th Cir. 2001)	2
<i>Harden v. Gordon</i> , 11 F. Cas. 480 (C.D.D. Me. 1823).....	1
<i>Harper v. Zapata Off-Shore Co.</i> , 741 F.2d 87 (5th Cir. 1984)	4
<i>Holland v. Int'l Paper Co. Ret. Plan</i> , 576 F.3d 240 (5th Cir. 2009)	9
<i>In Matter of Gulf Pride Marine Serv., Inc.</i> , Civ. A. No. 96-1104, 1997 WL 118394 (E.D. La. Mar. 14, 1997).....	4

<i>Johnson v. Marlin Drilling Co.</i> , 893 F.2d 77 (5th Cir. 1990)	3
<i>Johnson v. Offshore Exp., Inc.</i> , 845 F.2d 1347 (5th Cir. 1988)	2
<i>Joiner v. Diamond M. Drilling Co.</i> , 688 F.2d 256 (5th Cir. 1982)	14
<i>Light v. Jack's Diving Locker</i> , Civ. A. No. CV 05-00706 BMK; U.S. District Court of Hawaii.....	9, 10
<i>Loftin v. Kirby Inland Marine, L.P.</i> , 568 F.Supp.2d 754 (E.D. Tex. 2007).....	2
<i>Manderson v. Chet Morrison Contractors, Inc.</i> , 666 F.3d 373 (5th Cir. 2012)	4
<i>Mar. Overseas Corp. v. Waiters</i> , 923 S.W.2d 36 (Tex.App.--Houston [1 st Dist.] 1995), aff'd as modified, 917 S.W. 2d 17 (Tex. 1996).....	3
<i>Matter of Cooper/T. Smith Stevedoring Co., Inc.</i> , 942 F.Supp. 267 (E.D. La. 1996).....	5
<i>McAllister v. Magnolia Petroleum Co.</i> , 319 S.W.2d 411 (Tex.Civ.App.--Dallas 1958, writ ref'd n.r.e.)	7
<i>McBride v. Estis Well Service, L.L.C.</i> , 853 F.3d 777 (5th Cir. 2017)	2
<i>Moody v. Noble Drilling (U.S.) LLC</i> , Civ. A. No. 6:15-CV-02417, 2016 WL 6999442 (W.D. La. Nov. 28, 2016).....	3
<i>Morales v. Garijak, Inc.</i> , 829 F.2d 1355 (5th Cir. 1987)	3, 4
<i>Oswalt v. Williamson Towing Co., Inc.</i> , 488 F.2d 51 (5th Cir. 1974)	5
<i>Pelotto v. L & N Towing Co.</i> , 604 F.2d 396 (5th Cir. 1979)	2, 3
<i>Pylant v. Hartford Life & Acc. Ins. Co.</i> , 497 F.3d 536 (5th Cir. 2007)	9
<i>Seymour v. Bluecross Blueshield of South Carolina</i> , 205 F.Supp.3d 827 (E.D. La. 2016).....	8, 9
<i>The Osceola</i> , 189 U.S. 158 (1903).....	1
<i>Tullos v. Resource Drilling, Inc.</i> , 750 F.2d 380 (5th Cir. 1985)	4
<i>Weeks Marine, Inc. v. Watson</i> , 190 F.Supp.3d 588 (E.D. La. 2016).....	2

Statutes

29 U.S.C. § 1001.....	7
21 U.S.C. § 301.....	11
Tex. Health & Safety Code Ann. § 1003.051	12, 13
Tex. Health & Safety Code Ann. § 1003.051(1)	12
Tex. Health & Safety Code Ann. § 1003.051(2)	12
Tex. Health & Safety Code Ann. § 1003.053	12
Tex. Health & Safety Code Ann. § 1003.054(a).....	13
Tex. Health & Safety Code Ann. § 1003.057	13
Tex. Health & Safety Code Ann. § 1003.058(a).....	13
Tex. Health & Safety Code Ann. § 1003.058(b)	13

Other

Thomas J. Schoenbaum, 1 Admiralty and Maritime Law § 6-28 (5 th ed. 2017)	1
David W. Robertson, <i>Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend</i> , 70 La. L. Rev. 463 (2010)	1
R. Randall Bridwell, <i>Primer on Maintenance and Cure – The Meaning of the Words Maximum Medical Cure</i> , 1 Ann.2005 ATLA-CLE 43.....	6, 7
<i>Platelet Rich Plasma (PRP) Treatment</i> (https://www.spinemd.com/treatments/platelet-rich-plasma)	8
Kenneth G. Engerrand, <i>Primer on Maintenance and Cure</i> , 18 U.S.F. Mar. L.J. 41 (2006).....	9
Tamara J. Patterson, <i>The Cost of Hope at the End of Life: An Analysis of State Right-to-Try Statutes</i> , 105 Ky. L.J. 685 (2017)	11
Trickett Wendler, Frank Mongiello, Jordan McLinn and Matthew Bellina <i>Right to Try Act of 2017</i>	11
Kelly Servick, <i>Texas Has Sanctioned Unapproved Stem Cell Therapies. Will It Change Anything?</i> (http://www.sciencemag.org/news/2017/06/texas-has-sanctioned-unapproved-stem-cell-therapies-will-it-change-anything).....	11
<i>Right to Try</i> (http://www.righttotry.org)	11
<i>Approved Cellular and Gene Therapy Products</i> (https://www.fda.gov/BiologicsBloodVaccines/CellularGeneTherapyProducts/ApprovedProducts/default.htm)	11
<i>President Trump Signs Johnson’s Right to Try Bill into Law</i> (https://222.hsgac.senate.gov/media/majority-media/president-trump-signs-johnsons-right-to-try-bill-into-law).....	11
Danielle DeGrosso, <i>Fighting for Your Life in America: A Study of “Right to Try” Laws Throughout the Country</i> , 91 St. John’s L. Rev. 743 (2018).....	12, 13
<i>Disability Evaluation Under Social Security, Part I – General Information</i> (https://www.ssa.gov/disability/professionals/bluebook/general-info.htm)	13

Yi Lang, et al., <i>The Propensity for Tumorigenesis in Human Induced Pluripotent Stem Cells is Related with Genomic Instability</i> (https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3845575/).....	14
Alice Park, <i>Three People Are Nearly Blind After Getting a Stem Cell Treatment</i> (http://time.com/4703909/stem-cell-treatment-lose-vision/).....	14
Claire Wilson, <i>Stem Cell Causes Nasal Growth in Woman's Back</i> (https://www.newscientist.com/article/dn25859-stem-cell-treatment-causes-nasal-growth-in-womans-back/)	14

Maintenance and Cure: Experimental and Speculative Treatments

Jeffrey R. Bale
Brandon K. Best

The duty to provide maintenance and cure is of ancient vintage. Its origins can be traced back to the medieval sea codes. Thomas J. Schoenbaum, 1 Admiralty and Maritime Law § 6-28 (5th ed. 2017). The duty to provide maintenance and cure was incorporated into American admiralty law by Justice Story in *Harden v. Gordon*, 11 F. Cas. 480, 482-83 (C.D.D. Me. 1823). The duty was first recognized and defined by the United States Supreme Court in *The Osceola*, 189 U.S. 158, 175 (1903).

The intent was to ensure that seamen have adequate funds to cover basic living expenses and medical care during their recovery. While the lot of the “poor and friendless” seaman, *Harden*, 11 F. Cas. at 483, has improved considerably over the past two hundred years, the Supreme Court has shown no inclination to depart from its historic solicitude of seamen. They continue to be viewed by the law as “wards of the admiralty.” David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 La. L. Rev. 463, 479 n. 107 (2010) (“The Supreme Court has called seamen ‘wards of admiralty’ in at least twenty-four decisions.”).¹

¹ In addition to maintenance and cure, seaman can take advantage of certain substantive aspects of maritime law which differ from traditional tort law. For example, under the Jones Act, the seaman has a more lenient standard of proximate cause. He can recover against his employer if the employer’s negligence contributed “in the slightest degree” to the seaman’s injury or death. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997). The seaman can also recover under the general maritime law for unseaworthiness. This action does not require proof of negligence by the seaman’s employer. Rather, it requires proof that the vessel was not reasonably fit for its intended purpose, and there was a causal connection between the unseaworthiness and the seaman’s injury. *Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347, 1354 (5th Cir. 1988).

THE LAW REGARDING MAINTENANCE AND CURE

A seaman's right to maintenance and cure is implied in the employment contract between a seaman and his employer. *Brister v. A.W.I., Inc.*, 946 F.2d 350, 360 (5th Cir. 1991). To recover for maintenance and cure, the seaman need only show that he was injured while in service to the vessel and lost wages or incurred expenditures relating to the treatment of his injury. *Loftin v. Kirby Inland Marine, L.P.*, 568 F.Supp.2d 754, 761 (E.D. Tex. 2007). The burden of proof is "relatively light since recovery is not dependent on the negligence or fault of the vessel or its owner." *Freeman v. Thunder Bay Transp. Co., Inc.*, 735 F.Supp. 680, 681 (M.D. La. 1990); *see also Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 730-31 (1943) ("So broad is the shipowner's obligation that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility."). Maintenance is a daily stipend for living expenses, i.e., food and lodging the seaman would have received aboard the vessel. *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582, 586-90 (5th Cir. 2001). Cure involves the payment of therapeutic, medical, and hospital expenses associated with the treatment of a seaman's injury or illness. *Cooper v. Diamond M Co.*, 799 F.2d 176, 179 (5th Cir. 1986).

A seaman is entitled to maintenance and cure until the point of "maximum cure."² *McBride v. Estis Well Service, L.L.C.*, 853 F.3d 777, 783 (5th Cir. 2017). Maximum cure occurs when it appears probable that further treatment will result in no betterment of the seaman's condition. *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979). Thus, where it appears that the seaman's condition is incurable, or that future treatment will

² Also referred to as "maximum medical recovery," "maximum medical improvement," or "MMI". *Weeks Marine, Inc. v. Watson*, 190 F.Supp.3d 588, 596-97 (E.D. La. 2016).

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Maintenance and Cure: Experimental and Speculative Treatments

First appeared as part of the conference materials for the
27th Annual Admiralty and Maritime Law Conference session
"Maintenance and Cure: Experimental and Speculative Medical Procedures"