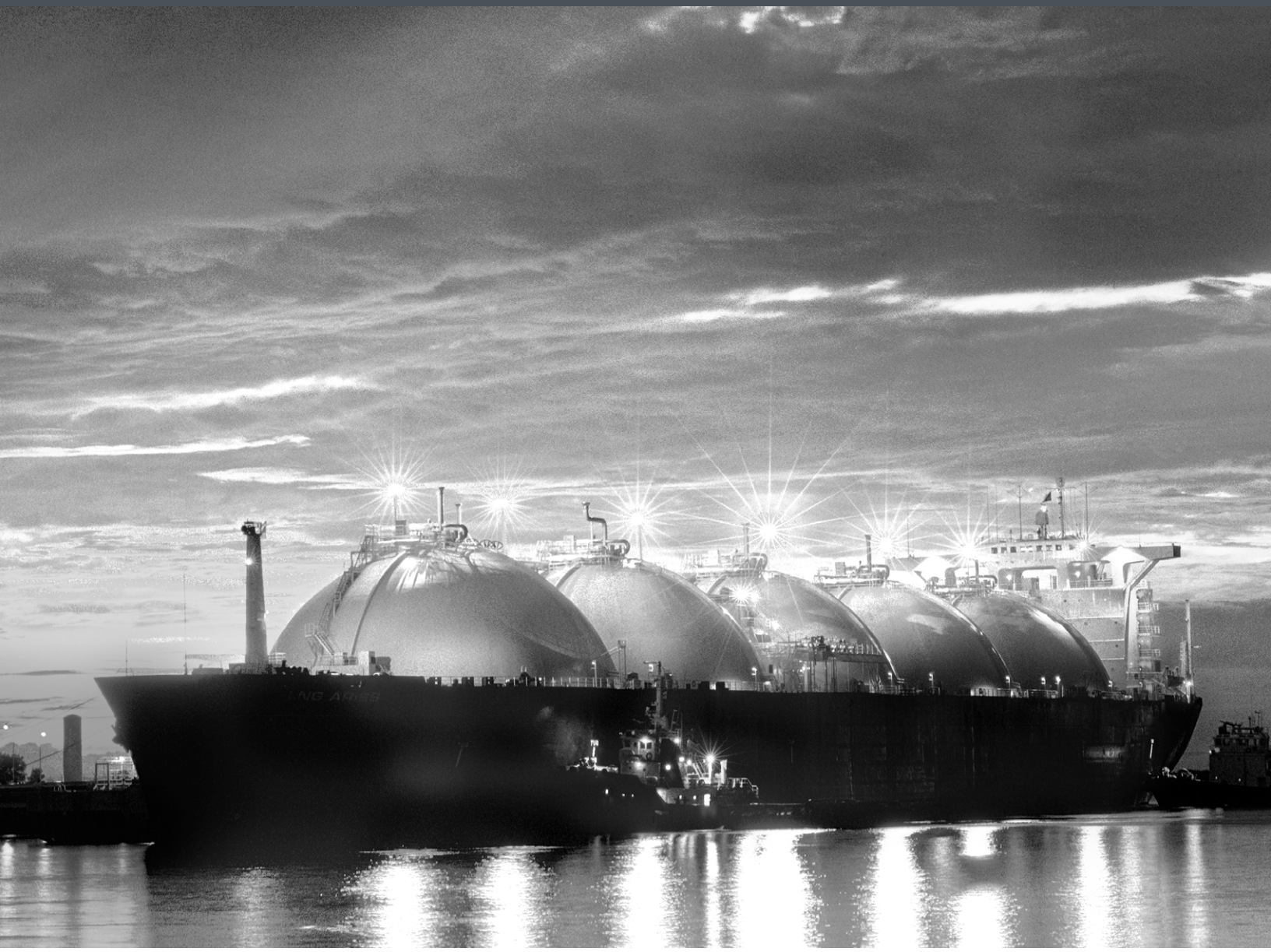

MEDICAL CARE FOR SEAMEN: COURTS CONTINUE TO SCRUTINIZE THE SHIPOWNER'S DUTIES

Courts continue to scrutinize the shipowner's duty to provide prompt and reasonable medical care to ill or injured seamen, as well as the proper rate of maintenance to be paid while recuperating.

The duty to provide prompt and reasonable medical care and vicarious liability for the medical negligence of physicians treating seamen

In *David J. Randle v Crosby Tugs, LLC*, the Court of Appeals for the Fifth Federal Circuit reviewed a shipowner's duty to provide prompt and reasonable medical care, and its potential vicarious liability for the negligence of shoreside medical providers[1]. David Randle, a seaman, suffered a stroke while his vessel was at a dock in Amelia, Louisiana. Realizing something serious was amiss, the Captain called 911 to summon the local emergency medical services. At the direction of the Louisiana Emergency Response Network (LERN), Acadian Ambulance Service responded and transported Randle to a nearby hospital, Teche Regional Medical Center (TRMC), where physicians failed to properly diagnose his condition. Crosby Tugs did not instruct Acadian to take Randle to TRMC or any particular medical provider, nor did it hire, authorize, or otherwise contract with TRMC to administer medical care to its seamen.

Although the Acadian paramedics suspected a stroke, the TRMC physicians failed to diagnose his condition as such. As a result, they did not administer "tissue plasminogen activator," a medication that could have improved Randle's post-stroke recovery if administered within three hours of the stroke. By the time TRMC physicians properly diagnosed the stroke, it was too late for the medication to have any effect. As a result, Randle was permanently disabled by the stroke and required constant custodial care. Randle filed suit against Crosby alleging the typical three-count seaman's action of Jones Act negligence, unseaworthiness, and maintenance and cure. The parties settled his maintenance and cure claim. The United States District Court for the Eastern District of Louisiana granted summary judgment dismissing the negligence and unseaworthy actions. On appeal, the Fifth Circuit addressed only the negligence action, finding the plaintiff had not properly presented the unseaworthiness claim for appellate review. Randle argued: (1) the Captain acted negligently by merely calling 911 in response to the stroke, and (2) Crosby was vicariously liable for the TRMC physicians' alleged medical malpractice.

At the outset, the Court cited *Gautreaux v Scurlock Marine Inc.*[2] and reiterated "A seaman is entitled to recovery under the Jones Act, therefore, if his employer's negligence is the cause, in whole or in part, of his injury[3]." It also noted under this standard, that the employer of the seaman is liable for the negligence of its officers, agents, or employees[4].

The direct negligence claim

The Court first analyzed the direct negligence claim. The Supreme Court has long held that a shipowner has a non-delegable duty to provide prompt and adequate medical care to its seamen[5]. Failure to do so renders the shipowner directly liable to the seaman under the Jones Act[6]. The extent of the shipowner's duty varies with "the circumstances of each case" and "the nature of the injury and the relative availability of medical facilities[7]." A shipowner can violate this duty when it takes its seaman to a doctor it knows is not qualified to care for its seaman's injury[8]. Turning to the facts of *Randle,* the Court held that Randle suffered from an unknown but clearly urgent medical event[9]. The ship was away from its home port[10]. By calling 911, the Captain's actions were reasonably calculated to get the seaman to a medical facility that could treat him as soon as possible[11]. Randle himself acknowledged that TRMC could have properly diagnosed and treated him[12]. That TRMC failed to do so did not mean that Crosby was directly liable for the failure to procure adequate medical care[13]. Under the circumstances, Crosby made reasonable efforts to procure appropriate medical treatment and was not negligent[14].

At HFW, our experience has yielded the impression that the Master's duty to properly triage on-board illnesses and injuries is best analogized to that of a parent. While a parent is not a doctor or specialized medical provider, it uses common sense to choose whether to take its child to the emergency room, general practitioner, or specialist.

The vicarious liability claim

The Court next considered whether TRMC was the agent of Crosby, noting that the word "agent" requires only that an employee's injury be caused by the fault of others performing, under contract, operational activities of his employer[15]. The Court recognized that the shipowner can be held liable for the negligence of a doctor the shipowner selects to treat its seamen. The Court was clear, however, that a shipowner will not be vicariously liable for the acts of a physician the seaman chooses himself[16].

That is, the Court found an agency relationship is formed only when the principal takes an affirmative act to select the agent, regardless of the shipowner's non-delegable duty to provided medical care[17]. Because Crosby did not manifest authority to TRMC or its physicians or express any assent to TRMC's treating its seaman, and because there was no evidence of any relationship between Crosby and TRMC, no such agency relationship was formed[18]. The Court concluded that Crosby did not, by calling 911, intend to designate TRMC to act as its agent in the provision of Randle's medical care. It therefore affirmed the District Court's summary dismissal.

Best practices for shipowners

Shipowners relying on emergency medical services to transport ill or injured seaman to local medical facilities should take heed of the *Randle* case. They should be most concerned about vicarious liability for medical negligence where they direct their seamen to specific doctors or have a contract in place with a particular clinic or doctor. The tele-medical services some shipowners use for directing the treatment of seamen ashore and afloat also gives cause for concern. When entering into contracts with such providers, the shipowner should ensure it does not agree to any limitation of liability provisions or waive the right to file a third-party

action for contribution against the provider in the event it is sued by its seaman for the medical negligence of the contracted facility. The shipowner should also carefully consider any defense and indemnity or additional assured obligations in contracts with such medical care providers.

"Let it Snow, Let it Snow, Let it Snow" – The shipowner's duty to provide maintenance payments to ill or injured seamen continues to receive expansive application by the Courts

In *Mark Hendsbee v Ciri Alaska Tourism Corp.*, the Superior Court of Alaska, Third Judicial District, evaluated the proper maintenance rate in a case where Mark Hendsbee, a boat captain, sustained injuries during a fire and boat drill[19]. Following his injury in 2014, he underwent spinal surgeries in 2015 and 2016. Mr. Hendsbee sought an increase in his maintenance payments from the Court.

The Alaska Court relied heavily on the oft-cited Fifth Circuit case of *Hall v Noble Drilling (U.S.) Inc*. noting maintenance payments are "to ensure that the seaman can afford reasonable food and lodging while recuperating from an injury[20]". The standard for maintenance payments requires two findings: (1) the actual expense incurred and (2) the reasonable cost of food and lodging for a seaman living alone in the seaman's locality[21]. The burden is on the seaman to produce evidence of his expenses[22]. The Court held the seaman's burden was "featherlight" – meaning that Hendsbee need not prove actual expenses, but reasonable expenses[23].

The Court began its analysis of Hendsbee's motion by noting three ways to determine reasonable costs: (1) the seaman's actual costs, (2) reasonable costs in the locality, and/or (3) a union contract that sets the maintenance rate[24]. Hendsbee presented the Court with an affidavit and receipts for his food and living expenses[25].

With regard to Hendsbee's food expenses, Hendsbee presented US$900 in monthly food receipts[26]. His employer presented government data showing food costs of US$328 per month for males between the ages of 20 and 50 years[27]. The Court found US$750 per month to be reasonable[28].

With regard to the living expenses claimed, the Court did have concerns over Hendsbee's demand for the expenses of shoveling snow from his home[29]. Supreme Court jurisprudence suggests that the amount a seaman receives for the food and lodging expense called "maintenance" is that which the seaman would have received on ship had he not been injured. See *Calmar S.S. Corp. v Taylor*[30], where the High Court noted, "The maintenance exacted is comparable to that to which the seaman is entitled while at sea". The Court found snow removal to be part of a seaman's living or lodging expense in the Alaska area[31]. The Court commented it was reasonable for him to hire someone to shovel his snow because of his injuries. Snow shoveling is "necessary to the provision of habitable housing" in Seward, Alaska[32].

While this expansive view of maintenance may appear to exceed what lodging is provided a seaman aboard ship, it exemplifies the liberal nature of this remedy as seen in the Fifth Circuit's *Hall v Noble*. Even in the *Calmar S.S. Corp.* case itself, the Supreme Court noted, "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[33]".

Best practices for shipowners

While courts may not specifically say it, many still treat seamen as "wards of the court" – especially in maintenance and cure situations. Shipowners considering litigating close calls in such situations should keep in mind that generally speaking, courts are likely to give the seaman the benefit of the doubt and such discretionary rulings will usually be in his favor.

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Footnotes

1 No. 17-30963, 2018 WL 6628032 (5th Cir. Dec. 19, 2018).
2. 107 F.2d 331 (5th Cir. 1997)(en banc).
3. Id. at 2 (quoting *Gautreaux v Scurlock Marine Inc.*, 107 F. 3d 331, 335 (5th Cir. 1997)).
4. Id.
5. Id. (citing *De Zon v Am. President Lines*, 318 U.S. 660, 667 (1943)).
6. Id. (citing *Cent. Gulf S.S. Corp. v Sambula*, 405 F. 2d 291, 298 (5th Cir. 1968)).
7. Id. (quoting *Cent. Gulf S.S. Corp. v Sambula*, 405 F. 2d 291, 300 (5th Cir. 1968)).
8. Id. at 2 (citing *Cent. Gulf S.S. Corp. v Sambula*, 405 F. 2d 291, 299-300 (5th Cir. 1968)).
9–12. Id. at 2.
13–14. Id. at 3.
15. Id. at 3 (citing *Hopson v Texaco, Inc.*, 383 U.S. 262, 264 (1966).
16. Id. at 3.
17–18. Id. at 4.
19. No. 3AN-16-06535 CI, 2018 WL 6511142 (Alaska Super. Jan. 24, 2018).
20. Id. at 1 (citing *Hall v Noble Drilling (U.S.) Inc.*, 242 F.3d 582, 588 (5th Cir. 2001)).
21. Id. at 1 (citing *Hall v Noble Drilling (U.S.) Inc.*, 242 F.3d 582, 587-88 (5th Cir. 2001)).
22– 24. Id. at 2.
25. Id. at 1.
26– 30. Id. at 2.
31. Id. at 2 (internal quotation marks omitted).
32. *Calmar S.S. Corp. v Taylor*, 303 U.S. 525, 528 (1938).

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