

7-1-1970

## Maintenance and Cure-Jones Act-Seaman Going and Coming from Ship Held in Service of Ship-Shipowner Held to Accept Duty for Safe Transportation in Providing Travel Pay and Attempting to Control Transportation. *Williamson v. Western Pacific Dredging Corp.* (D. Ore. 1969)

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### Recommended Citation

George D. Tice, *Maintenance and Cure-Jones Act-Seaman Going and Coming from Ship Held in Service of Ship-Shipowner Held to Accept Duty for Safe Transportation in Providing Travel Pay and Attempting to Control Transportation. Williamson v. Western Pacific Dredging Corp.* (D. Ore. 1969), 7 SAN DIEGO L. REV. 689 (1970).

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Thus both the public and the plaintiff benefited from the plaintiff's action and the court's decision. At some point, however, a court may have to complete the delineation, begun in *Burns*, of the rights of various parties. The court mentioned that the plaintiff is subject to public regulation, but it deliberately declined to set forth to what extent and for what purposes the plaintiff's beach/wharf may be regulated.<sup>34</sup> Undoubtedly the plaintiff's right to due process must be observed if authorities seek to regulate his beach/wharf.<sup>35</sup> But will he have to share his beach/wharf with the public to a greater extent than if he had built a conventional dock?<sup>36</sup> Can others make use of his beach/wharf for their own boating, swimming or camping purposes?<sup>37</sup> Is it possible that the government might take over the new land as public beach to such an extent that the plaintiff's use of the land as a wharf might become impracticable if not impossible?<sup>38</sup>

The case has interesting facts and an imaginative solution. The court went a long way to protect the plaintiff's rights as a riparian owner. It also protected the public's rights in what had been submerged land. In so doing it reached a result that seems fair and legally sound but which leaves some interesting questions unanswered. These questions may require future decisions giving preference to either the public or the private owner, when those rights become incompatible.

Jack L. Schoellerman

**MAINTENANCE AND CURE—JONES ACT—SEAMAN GOING AND COMING FROM SHIP HELD IN SERVICE OF SHIP—SHIPOWNER HELD TO ACCEPT DUTY FOR SAFE TRANSPORTATION IN PROVIDING TRAVEL PAY AND ATTEMPTING TO CONTROL TRANSPORTATION.** *Williamson v. Western-Pacific Dredging Corporation* (D. Ore. 1969).

Maintenance and cure and damages for wrongful death under the Jones Act<sup>1</sup> were the counts involved in an action brought by

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33. 412 F.2d at 998. *See also*, text accompanying note 23 *supra*.

34. 412 F.2d at 998.

35. *See* text accompanying notes 22-24 *supra*.

36. *See* *Tiffany v. Town of Oyster Bay*, 234 N.Y. 15, 136 N.E. 224 (1922).

37. *Id.*

38. *Id.*; *see also*, text accompanying notes 22-24 *supra*.

1. 46 U.S.C. § 688 (1964).

the administratrix of the estate and widow of deceased Joel Dwaine Williamson. Williamson was seriously injured in an automobile accident on December 21, 1967 while enroute from his home in Clarkamas, Oregon to work on the dredge *H. W. McCurdy* operating in the Columbia River near Woodland, Washington. He died the same day at a Vancouver, Washington hospital as a result of the injuries suffered in the accident. A fellow-employee, third party defendant Don L. Ferguson, owned and operated the vehicle at the time of the accident.<sup>2</sup>

Defendant Western-Pacific Dredging Corporation is an Oregon corporation with its principal place of business in Portland, Oregon and is owner and operator of the dredge, *H. W. McCurdy*. At the time of the accident the *McCurdy* was being operated by the defendant in the performance of a contract with the United States Army Corps of Engineers in connection with dredging the Columbia River for the purpose of maintaining and improving the channel for use in navigation and commerce.

Williamson had been employed by the defendant for more than two years, first as a deck hand and subsequently as a mate on the *McCurdy*. The *McCurdy* was at the time of Williamson's death using three shifts of eight hours each per day. Western-Pacific rotated the shifts so that its employees would work one week on the day, the next week on the swing, and the following week on the graveyard shift. Western-Pacific designated a point on shore to which the employees reported to be picked up and discharged by launch at the beginning and end of each shift. Each employee, by virtue of a union contract, was entitled to and allotted "travel pay" of \$4.00 per day by the defendant. Each employee was subject to work extra hours past the end of his regular shift if a member of the succeeding shift did not report for work. Defendant had a policy, which was not enforced, that required each employee to use his own automobile in going to and coming from work. Defendant did not provide sleeping quarters on board the *McCurdy*, thus requiring its employees to go ashore for each sleeping period. Western-Pacific provided coverage under the Workmen's Compensation Law of the State of Oregon through a contract with Argonaut Insurance Company, a

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2. The issues between third-party plaintiff, Western-Pacific, and third party defendant, Ferguson, were segregated prior to trial. Williamson's action under the Jones Act can be only against the employer.

California corporation. It also provided a health and accident insurance plan which paid for Williamson's medical expenses. An accidental death life insurance policy provided for by Western-Pacific had a \$2,500 death benefit and an additional \$2,500 benefit for an off-the-job death. The widow applied for and received the full \$5,000.

The administratrix of the deceased brought an action for maintenance and cure, and for damages for wrongful death under the Jones Act in the United States District Court for the Oregon District, sitting in Admiralty. *Held*: both Williamson and third-party defendant Ferguson were seamen in the "service of the ship" at the time of the accident so as to permit an award for maintenance and cure and for damages under the Jones Act to the administratrix of Williamson's estate. *Williamson v. Western-Pacific Dredging Corporation*, 304 F. Supp. 509 (D. Ore. 1969).

In *Williamson* the court discussed three specific areas relative to awarding compensation for the injury or death of a "seaman." These areas were 1) Compensation Acts, 2) Maintenance and Cure, and 3) the Jones Act.

The court initially considered the applicability to the injured seaman of both the Oregon Workmen's Compensation Act<sup>3</sup> and the Longshoremen's and Harbor Worker's Compensation Act.<sup>4</sup> The court conceded that a "twilight" zone may exist in which a seaman may elect to pursue a state-oriented remedy under a state workmen's compensation act, a state employment liability act, or to press a federal claim under the Longshoremen's and Harbor Workers' Compensation Act.<sup>5</sup> The court concluded that benefits under the Oregon Workmen's Compensation Act are not available to an injured workman, or his beneficiaries, if protection is provided by the laws of the United States<sup>6</sup> and that the Longshoremen's and Harbor Workers' Compensation Act specifically excludes from coverage a member of the crew of a vessel.<sup>7</sup> Accordingly, the finding that Williamson was a member of the crew of the *McCurdy* prohibited recovery under the Compensation Acts.

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3. ORE. REV. STATS. § 656.126(1) (1969).

4. 33 U.S.C. § 901-50 (1964).

5. *Williamson v. Western-Pacific Dredging Corporation*, 304 F. Supp. 509, 514 (D. Ore. 1969).

6. *Id.* at 514, ORE. REV. STATS. § 656.027(4) (1969).

7. *Id.* at 514, 33 U.S.C. § 903(a)(1) (1964).

The liability for maintenance and cure of a seaman becoming ill or injured during the period of his service has since ancient times been imposed on shipowners.<sup>8</sup> In the United States this obligation has been recognized as an implied provision in contracts of marine employment.<sup>9</sup> To sustain an action for maintenance and cure a plaintiff has the burden of showing 1) his employment as a seaman, 2) his illness or injury occurring while in the ship's service, and 3) the cost of the maintenance and cure.<sup>10</sup> Negligence of the shipowner, the crew, or unseaworthiness of the ship do not enter into consideration as to the recovery. The remedy of maintenance and cure has been held to be a broader liability than that imposed by workmen's compensation statutes.<sup>11</sup>

The *Williamson* court found that Williamson was a seaman acting in the service of his ship at the time of the fatal injuries,<sup>12</sup> and held plaintiff entitled to prevail on the issue of maintenance and cure.<sup>13</sup> In reaching this decision the court reviewed a series of cases allowing maintenance and cure where injury was away from the ship; for a seaman injured while crossing a dock on returning to his ship when this was the only available route between the ship and the public street;<sup>14</sup> for injury to a seaman occurring in a shore-front area about a mile from the ship;<sup>15</sup> and for a seaman injured in a dance hall some distance from the waterfront.<sup>16</sup> A possible distinction between the above cases and the facts in *Williamson* (*i.e.*, that decedent commuted to his home each day after his work shift) was avoided by reference to *Weiss v. Central Ry. of New Jersey*.<sup>17</sup> There the court refused to deny a seaman his right to maintenance and cure because he slept ashore at night. The court applied a test which requires that the seaman be generally answerable to a call to duty rather than actually in the performance of routine tasks or specific orders to be in the service of the ship. In holding *Williamson* answerable to the call of duty

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8. *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943).

9. *Id.*

10. *Id.*, *Telano v. Socony Vacuum Oil Co.*, 114 N.Y.S. 2d 687 (N.Y. Mun. Ct. 1952).

11. *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943).

12. 304 F. Supp. at 515.

13. *Id.* at 516.

14. *Aguilar v. Standard Oil Co.*, 318 U.S. 724 (1943).

15. *Farrell v. United States*, 336 U.S. 511 (1949). The court permitted maintenance and cure during the seaman's period of hospitalization but denied maintenance for life.

16. *Warren v. United States*, 340 U.S. 523 (1951).

17. 235 F.2d 309 (2d Cir. 1956).

at the time of his injury the court made specific reference to defendant's failure to provide sleeping quarters on board the *McCurdy*, thus requiring its seaman to go home for each sleeping period, and the payment by the defendant to its seamen employees an allowance for the travel to and from the vessel.<sup>18</sup> The court acknowledged that the award of maintenance and cure on the facts of *Williamson* was going "somewhat outside the perimeter of established case law" but used as its rationale the rather nebulous argument of a need for flexibility for the protection of seamen in an ever expanding field of admiralty.<sup>19</sup>

Whereas mere status as a seaman allows recovery under maintenance and cure, negligence is the gravamen of a suit under the Jones Act.<sup>20</sup> This act affords an injured seaman a statutory cause of action for negligently inflicted injuries suffered in the course of employment. It calls for an action at law at the election of the seaman and sets forth the right of trial by jury. The negligence must be alleged and proved by the seaman.<sup>21</sup> To sustain an action under the Jones Act the plaintiff must prove that he is a seaman acting in the course of his employment at the time of the injury and that the injury was caused by, or attributable to, his employer.<sup>22</sup> The Federal Employer's Liability Act<sup>23</sup> (FELA) which provides the rules of decision for Jones Act cases creates a cause of action for employees who incur "injury or death resulting in whole or part from the negligence of the officers, agents, or employees of such carrier. . . ." <sup>24</sup>

The court in deciding the maintenance and cure issue found *Williamson* to be a seaman in the service of the ship at the time of the accident.<sup>25</sup> This was applied in the discussion under the Jones Act to find both *Williamson* and *Ferguson*, the driver, to be seamen in the course of their employment for Jones Act purposes.<sup>26</sup> Particular emphasis was placed on *Braen v. Pfeifer Oil Transportation Co.*<sup>27</sup> where in discussing the decisions since

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18. 304 F. Supp. at 516.

19. *Id.* at 515.

20. 46 U.S.C. § 688 (1964), 45 U.S.C. § 51 (1964).

21. *Mullen v. Fitz Simmons and Connell Dredge and Dock Co.*, 191 F.2d 82 (7th Cir. 1951).

22. *Braen v. Pfeifer Oil Transportation Co.*, 361 U.S. 129 (1959).

23. 45 U.S.C. § 51 (1964).

24. *Id.*

25. 304 F. Supp. at 515, 516.

26. *Id.* at 516.

27. 361 U.S. 129 (1959).

*Aguilar v. Standard Oil Co.*<sup>28</sup> and *Warren v. United States*<sup>29</sup> the Supreme Court of the United States said, "They also supply relevant guides to the meaning of the term 'course of employment' under the Act since it is the equivalent of the 'service of the ship' formula used in maintenance and cure cases."<sup>30</sup>

The court found additional support for the award of damages under the Jones Act by noting that under Workmen's Compensation cases both *Williamson* and *Ferguson* would be viewed as being in the course of their employment at the time the accident occurred.<sup>31</sup> The court in awarding damages under the Jones Act admitted that, as with its maintenance and cure award, it went beyond established case law, but said:

Although a finding for plaintiff on this record is invading virgin territory, yet untouched by judicial decision, the courts must recognize the monumental march of our present civilization, particularly in the transportation sphere. Inasmuch as defendant found it to its advantage to pay to its employees a fixed transportation fee, rather than provide quarters aboard the ship, it cannot now escape liability by claiming that decedent and Ferguson were not employees in the course of their employment. With modern highways and ultra-modern and fool proof motor vehicles, the defendant had a "fielder's choice"; it could provide quarters aboard ship for decedent and Ferguson, or it could pay the costs of transportation to and from work. Under the union contract, it elected to do the latter. Not to be forgotten is the oftstated dogma that the Jones Act created new rights in seamen arising out of maritime torts and must be given a liberal construction in order to accomplish its beneficent purposes.<sup>32</sup>

The court at this point failed to make any mention of *Williamson's* possible civil action against *Ferguson* thereby relieving the court of the task of extending existing law.

Since seamen have available two distinct remedies, one for maintenance and cure and another under the Jones Act, the court in *Williamson* has in each instance expanded the field of admiralty law so as to permit recovery for injury or death for a seaman

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28. 318 U.S. 724 (1943).

29. 340 U.S. 523 (1951).

30. 361 U.S. at 132, 133.

31. 304 F. Supp. at 517.

32. *Id.* at 518.

ashore traveling to or from his ship where his employer has acted so as to accept a duty with regard to providing safe transportation. Prior case law has refused to hold the employer liable for such a duty. In *Thurnau v. Alcoa Steamship Co.*<sup>33</sup> it was emphatically held that the employer had no duty to provide safe transportation between the ship and a place of amusement. In *Williamson* the court has recognized that an employer accepts a duty to provide safe transportation when he has exercised control over the transportation of his seaman employees by paying a travel allowance rather than providing sleeping quarters on board ship and by exerting control, albeit minor, on the mode of travel of the employees by suggesting that each drive his own car to work. Once this duty to provide safe transportation has been established there is little difficulty under the concept of statutory negligence to impute negligence of fellow-employee Ferguson to the defendant for Jones Act recovery. No doubt, the employer assumed a duty by providing a travel allowance and attempting to control the employee's transportation, but there is no mention of any possible effect the disregard of the directive by Williamson had upon the relationship. This disregard could arguably be viewed as a breach of the agreement by Williamson and thereby voiding recovery based upon this contract.

In reaching this decision, the court has failed to adequately deal with a number of most important issues. As mentioned above, has Williamson by his violation of Western-Pacific's request that he drive his own car voided any duty that the employer may have assumed relative to providing safe transportation; how can Williamson's status be off-the-job for insurance claim purposes and on-the-job for Jones Act recovery purposes; can't a workman such as Williamson be a seaman only when he is on his vessel and not a seaman on his off-duty hours at home and coming from and going home? It would seem that under the facts the court, rather than taking such great efforts to admittedly extend existing law, could have just as easily held Williamson not to be in the service of his ship at the time of the accident and thereby allow recovery under the Workmen's Compensation provisions. Whether this extension was necessary under these circumstances will perhaps be decided in future litigation, but the fact remains that possible existing alternatives were either passed over or not discussed at all.

GEORGE D. TICE

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33. 229 F.2d 73 (2d Cir. 1956).