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Admiralty — The Maximum Cure Rule as a Limitation on the Maintenance and Cure Remedy — Cox v. Drano Corp

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Admiralty—The Maximum Cure Rule as a Limitation on the Maintenance and Cure Remedy—*Cox v. Dravo Corp.*[1]—Plaintiff's deceased, William Cox was employed as a seaman on one of defendant Dravo Corp.'s vessels.[2] Cox sustained spinal injuries while serving aboard the ship and instituted an action under the Jones Act[3] to recover damages caused by the negligence of the defendant and the unseaworthiness of the ship.[4] Cox sought compensation for total and permanent disability, past and future pain and suffering, and past and future lost earnings.[5] The jury returned a verdict for the plaintiff in the amount of $75,000.[6] Since the defendant had been paying Cox maintenance from the time of his injury, no claim for maintenance and cure[7] was filed.[8] Defendant continued to pay such maintenance until December 7, 1966, almost one year after the jury verdict establishing defendant's negligence.[9]

In 1968, plaintiff instituted an action in the federal district court claiming maintenance from December 7, 1966 in the amount of $19,524 plus interest and cure in the amount of $3,111.13.[10] The

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[1] 517 F.2d 620 (3d Cir. 1975).

[2] Cox v. Dravo Corp., 372 F. Supp. 1003, 1004 (W.D. Pa. 1974).

[3] 46 U.S.C. § 688 (1970).

[4] 517 F.2d at 621. If an individual is injured because a vessel is unable to withstand the perils of an ordinary voyage at sea, he may seek compensation based on a theory of unseaworthiness. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960); Mahnich v. Southern S.S. Co., 321 U.S. 96, 100 (1944).

[5] 517 F.2d at 621.

[6] 372 F. Supp. at 1004.

[7] Maintenance is defined as the food and lodging to which a seaman is entitled while in the service of the shipowner, and cure is defined as the medical care to which the seaman is entitled if he is injured, or becomes ill while in the service of the shipowner. 2 M. NORRIS, THE LAW OF SEAMEN §§ 539, 542, 543 (3d ed. 1970).

"In the service of the ship" generally means that the seaman is answerable to the call of duty rather than the fact that he is actually performing the tasks required of his employment. Farrell v. United States, 336 U.S. 511, 516 (1949); Shaw v. Ohio River Co., 526 F.2d 193, 198 (3d Cir. 1975).

The maintenance and cure remedy is not derived from any duty of indemnification or compensation, or from concepts of negligence. The shipowner's liability for the remedy arises solely from his functional relationship with the seaman he has employed. Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371 (1932). Negligence on the part of the seaman, short of culpable or wilful misconduct will not preclude the seaman's entitlement to maintenance and cure. Aguilar v. Standard Oil Co., 318 U.S. 724, 731 (1943).

An injured or ill seaman may bring actions against the shipowner for negligence and unseaworthiness under the Jones Act, 46 U.S.C. § 688 (1970), and actions for maintenance and cure. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 (1938); Cortes v. Baltimore Insular Line, Inc., *supra* at 371. *See* note 4 *supra*. Damages awarded for the two claims are not duplicative when the law controlling each is properly applied. *See Cox*, 517 F.2d at 622-23.

[8] Ordinarily, negligence and unseaworthiness claims under the Jones Act, 46 U.S.C. § 688 (1970), and claims for maintenance and cure must be joined when the claims arise under the same set of facts. Fitzgerald v. United States Lines Co., 374 U.S. 16, 21 (1963).

[9] 517 F.2d at 621-22.

[10] The claim for maintenance was calculated at $8.00 per day for 2,453 days.

claim for cure was based upon Cox's need for physiotherapy and medical attention necessary for the alleviation of pain resulting from his spinal injuries.[11] The court noted that Cox had been compensated for his total and permanent disability by the jury verdict in the prior action.[12] Nevertheless, the court felt bound by applicable prior decisions[13] of the United States Court of Appeals for the Third Circuit to award cure for the reduction of pain.[14] Accordingly, the court awarded plaintiff the amount of his claim for cure, but denied the claim for the requested maintenance.[15]

On appeal by both parties, the Third Circuit affirmed the judgment of the district court on the maintenance claim and reversed the judgment on the award of cure. The Third Circuit HELD: A seaman who has suffered total and permanent disability while in the service of the ship is entitled to maintenance and cure only until his condition has reached the point of maximum medical recovery; that is, the point at which further medical care cannot produce any curative improvement in the disabling condition. He cannot thereafter recover for continuing pain.[16] In deciding this case, the Third Circuit partially overruled the cases which had heretofore provided authority for

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The claim for cure was based upon the actual costs of physiotherapy and medical attention required by Cox for the alleviation of pain resulting from his spinal injuries. The costs involved in both claims were calculated from December 7, 1966 until William Cox's death on August 8, 1973. 517 F.2d at 622.

The maintenance which an ill seaman may secure from a shipowner is of a kind and quantity to which the seaman would be entitled while at sea. *See, e.g.*, Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 528 (1938). Although the remedy is referred to as maintenance and cure, most seamen seek only payments for maintenance since cure is often effected through access to the marine hospitals operated by the United States Public Health Service. Seamen availing themselves of these medical facilities receive treatment on a reduced or no-cost basis. 2 M. NORRIS, *supra* note 7, § 595 at 135. However the seaman may avail himself of other medical facilities, and recover the costs expended for maintenance and cure while undergoing treatment at such alternative facilities. *See* Scott v. Lykes Bros. S.S. Co., 152 F. Supp. 104 (E.D. La. 1957). A claim for maintenance does not include the time that the seaman is an in-patient at a marine hospital, or for which he receives other collateral compensation for maintenance costs. Farrell v. United States, 336 U.S. 511, 518 (1949); Shaw v. Ohio River Co., 526 F.2d 193, 200 (3d Cir. 1975).

[11] 372 F. Supp. at 1005.

[12] *Id.* at 1007-1008.

[13] Ward v. Union Barge Line Corp., 443 F.2d 565 (3d Cir. 1971); Neff v. Dravo Corp., 407 F.2d 228 (3d Cir. 1969).

[14] 372 F.Supp. at 1006.

[15] *Id.* at 1008. The maintenance and cure remedy is generally perceived as a single remedy. Establishing a right to cure necessarily establishes a coextensive right to maintenance while undergoing cure. *See* Vitco v. Joncich, 130 F. Supp 945, 949 (S.D. Cal. 1955), *aff'd*, 234 F.2d 161 (9th Cir. 1956); G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 305 (1975). In *Cox*, however, the district court denied Cox's claim for maintenance upon a finding that the award in the negligence and unseaworthiness actions brought previously under the Jones Act included damages representing the costs of maintenance for the period in question. 372 F. Supp. at 1009. The denial of maintenance in the district court action was thus employed to prevent a duplication of damages. *Id.; accord*, Shaw v. Ohio River Co., 526 F.2d 193, 198 (3d Cir. 1975).

[16] 517 F.2d at 627.

plaintiffs such as Cox to recover maintenance and cure. The stated purpose of overruling these cases was one of conforming the Third Circuit's application of the maintenance and cure doctrine with that pronounced by the United States Supreme Court.[17] The significance of the *Cox* decision lies not only in the fact that the Third Circuit is now in line with the Supreme Court's decisions, but also in the fact that in a brief concurring opinion[18] it was implied that a different result may be appropriate where the plaintiff seeks payments to arrest a deteriorating physical condition, rather than payments for the alleviation of pain.[19]

This note will analyze the *Cox* decision in light of the present scope of the maintenance and cure doctrine upon which the decision is superimposed. A brief history of the doctrine will be presented, focusing on the extent to which liability has been imposed on shipowners and employers. The *Cox* decision will then be examined against this historical background. Particular attention will be given to the implications of the concurring opinion which seem to have opened the door to expansion of the traditional scope of maintenance and cure in cases where the disability is of a deteriorating character. The note will conclude by proposing substantive changes in the administration of the doctrine designed to better effectuate the purposes upon which the doctrine rests.

The origins of the maintenance and cure doctrine may be traced back to medieval sea codes. As international sea trade and travel developed into a vital and necessary instrumentality for stimulating economic growth and providing a new method of military capability, it was recognized in Europe that maritime fleets were in need of continually increasing numbers of competent seamen.[20] The hazards of the sea, however, coupled with the ever present fear of abandonment in a foreign port when injury or illness struck, often deterred men from becoming seamen.[21] In response to this situation, a number of political entities with strong interest in expanding their maritime enterprises formulated sea codes which imposed upon shipowners a duty of care toward seamen who became ill or were injured while in the service of the ship.[22]

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[17] 517 F.2d at 621. *See* Farrell v. United States, 336 U.S. 511 (1949); Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938).

[18] *Id.* at 627.

[19] *Id.*

[20] 2 M. NORRIS, *supra* note 7, §§ 540-41.

[21] *See* Aguilar v. Standard Oil Co., 318 U.S. 724, 727 (1943). In Harden v. Gordon, 11 F. Cas. 480 (No. 6047) (C.C.D. Me. 1823), Justice Story described the conditions which accompanied the seaman's life. "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence." *Id.* at 483. This stereotype has had considerable effect upon the evolution of the maintenance and cure doctrine in the United States. *See* note 44 *infra*.

[22] *See* 2M. NORRIS, *supra* note 7, § 540 for text and discussion of some of the sea codes which gave rise to the maintenance and cure doctrine in American admiralty law.

In the United States, the doctrine of maintenance and cure was first applied by Justice Story in two decisions which he rendered on circuit. The first case, *Harden v. Gordon*[23] was decided in 1823. In *Harden*, the seaman became ill while in a foreign port, and subsequently sued the owner of the vessel for the costs of maintenance and cure which he had procured in the foreign port.[24] Justice Story, surveying the old sea codes, held that a duty was imposed upon shipowners to maintain and effect cure for seamen who became ill, or are injured while in the service of the ship.[25] Without delineating the precise scope of this duty, Justice Story did state that the duty is not limited to the time that the seaman is actually aboard the ship.[26] Once again the impetus for the imposition of the duty was an awareness of the harsh conditions which accompanied life at sea, and the need to stimulate expansion of maritime enterprises in the United States.[27]

The question left open in *Harden* was the extent of the liability imposed on the shipowners; that is, the period of time for which the shipowner must provide maintenance and cure. Justice Story, recognizing that the *Harden* decision arguably exposed the shipowner to the possibility of paying a lifetime pension to a permanently disabled seaman, addressed this question nine years later in *Reed v. Canfield*.[28] In *Reed*, the seaman sued the owner of the vessel to recover maintenance and cure costs which resulted from the seaman's feet being frozen while in the service of the ship.[29] In holding the shipowner liable, Justice Story stated that this liability extended only so far as was necessary to effect a cure of the seaman's illness or injury:

> [W]hat are the limits of this allowance? May they be extended over years or for life? Are they to be . . . like the pensions allowed by some of the maritime ordinances . . . . My answer to suggestions of this sort is that . . . they [shipowners] 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. . . .[30]

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[23] 11 F. Cas. 480 (No. 6047) (C.C.D. Me. 1823).

[24] *Id.*

[25] *Id.* at 482.

[26] *Id.*

[27] *See* note 21 *supra*. Justice Story further stated:

> If some provision be not made for them [seamen] 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 want of suitable nourishment. . . . Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. . . .

11 F. Cas. at 483.

[28] 20 F. Cas. 426 (No. 11,641) (C.C.D. Mass. 1832).

[29] *Id.* at 427.

[30] *Id.* at 429. Justice Story departed to some extent from the sea codes which he had considered in formulating the maintenance and cure doctrine. For example, Article

This limitation provided the core concept for the present formulation of the "maximum cure" rule. In the absence of pronouncements by the United States Supreme Court on the issue, however, other federal courts pursued different lines of reasoning regarding the extent of the shipowner's duty.[31]

In 1938, the United States Supreme Court finally addressed the issue of the extent of liability to be imposed under the doctrine of maintenance and cure in *Calmar S.S. Corp. v. Taylor*.[32] The Court reversed a lower court decision which had held that if medical treatment is necessary to arrest the progress of a deteriorating disability, the seaman may be entitled to maintenance and cure for the rest of his life.[33] Instead, the Court held that the shipowner is liable to provide maintenance and cure only until the seaman's condition reaches the maximum point of physical improvement which may be achieved through the application of proper medical treatment.[34] Liability beyond this point would be a pension and as such, is not properly encompassed within the doctrine of maintenance and cure.[35] The Court supported its holding by examining the purposes for which the doctrine was created, by concluding that the remedy was designed to

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35 of the Laws of Hanse Towns reads: "Art XXXV. The seamen are obliged to defend their ship against rovers, on pain of losing their wages; and if they are wounded, they shall be healed and cured at the general charge of the concerned in a common average. If anyone of them is maimed and disabled, he shall be maintained as long as he lives by a like average." *Quoted in* Farrell v. United States, 336 U.S. 511, 513-14. While this language seems to indicate a possible basis for establishing a lifetime entitlement to maintenance, such provisions in the old sea codes have been construed by American admiralty courts as based on circumstances which are not part of the reality of maritime enterprises in the contemporary world. *Id.*

[31] *See, e.g.*, The Ben Flint, 3 F. Cas. 183 (No. 1299) (D. Wis. 1867) (the remedy is coextensive with the period of time that the shipper holds a shipping contract); The Atlantic, 2 F. Cas. 121 (No. 620) (S.D.N.Y. 1849) and Nevitt v. Clark, 18 F. Cas. 29 (No. 10,138) (S.D.N.Y. 1846) (the remedy is coextensive with the period of time that the seaman is contractually entitled to wages).

[32] 303 U.S. 525 (1938).

[33] Calmar S.S. Corp. v. Taylor, 92 F.2d 84 (3d Cir. 1937). The court stated:

> However, in the present case we have the further fact that the incurable disease from which the libelant suffers is of a progressive nature and is very likely to produce fresh manifestations in the future in other parts of his body. The uncontradicted evidence indicates that continuing care and treatment is of the utmost importance in arresting the further progress of the disease. Under these circumstances we cannot say that the ordinary means which medical science affords for the treatment and care of this disease will be exhausted prior to his death. On the contrary, during the remainder of his life medical care will be necessary to restrain the ravages of the disease. His remaining life is, therefore, a reasonable time during which to provide maintenance and cure. It follows under the principles of the admiralty law to which we have referred that he is entitled to the cost of his maintenance and care from the respondent during the remainder of his life. . . .

Id. at 87.

[34] 303 U.S. at 530.

[35] *Id.* at 531.

meet the difficulties of medical disability, and not to provide a lifetime pension.[36]

Valuable insight was also provided into the nature of damage awards recoverable under the maintenance and cure remedy. Pursuing the distinction between pension payments and the limited scope of maintenance and cure liability, the Court stated that in cases where a seaman brings an action for maintenance and cure prior to achieving maximum physical improvement, the court may, in its decision, award the seaman damages to cover the cost of future ascertainable maintenance and cure needs in addition to payment for costs already expended.[37] The Court made it clear, however, that such awards would generally be very small and that the certainty of future expenses would be essential to such a recovery.[38] This reluctance to award large sums, even in cases where it was clear that some future need would exist, stemmed in part from a desire to protect the seaman from his own improvidence: seamen receiving large awards might be tempted to spend the money in ways unrelated to improving their physical conditions.[39]

In *Farrell v. United States*,[40] decided eleven years after *Calmar*, the Supreme Court more clearly articulated the reasoning and implications of the *Calmar* decision. In *Farrell*, the seaman was seriously injured when he tripped over a guard rail while returning to the ship after overstaying his shore leave. As a result of the injuries, the seaman suffered episodic attacks of headaches and epileptic convulsions[41] from which he would suffer for life.[42] In affirming the judgment of the court below, the Supreme Court held that the policies which underlie the doctrine would be distorted if the seaman was allowed to recover for the rest of his life; since maximum physical recovery had been effected in the disability, no further payments were proper.[43]

The Court also reiterated its concern, expressed in *Calmar*, for distinguishing between pensions and maintenance and cure awards, and for not awarding speculative lump sums in cases where liability for maintenance and cure would continue beyond the present court action:

> It [maintenance and cure liability] does not hold a ship to a permanent liability for a pension, neither does it give a lump sum award based on some conception of expectancy of life. Indeed the custom of providing maintenance and cure in kind and concurrently with its need has had the ad-

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[36] *Id.* at 528, 530-31.
[37] *Id.* at 531-32.
[38] *Id.* at 531.
[39] *Id.*
[40] 336 U.S. 511 (1949).
[41] *Id.* at 512-13.
[42] *Id.* at 513.
[43] *Id.* at 519.

> vantage of removing its benefits from danger of being wasted by the proverbial improvidence of its beneficiaries.[44]

Finally, the Court expressly confirmed the implication of *Calmar* regarding the viability of successive maintenance and cure actions brought prior to the time that the seaman achieves maximum physical recovery.[45] Thus, the *Calmar-Farrell* formulation of the maintenance and cure doctrine provided for entitlement to the remedy as long as cure can produce physical improvement in the disability, with a previous termination of benefits not barring subsequent restoration if medical knowledge can later effect improvement.

Against the background of the *Calmar-Farrell* interpretation of the scope of the maintenance and cure doctrine, the Third Circuit Court of Appeals alone chose to pursue what it characterized as a logical refinement of the maximum cure rule.[46] In *Neff v. Dravo Corp.*,[47] the seaman was suffering from a number of physical disabilities which were aggravated by chemical fumes in the engine room where he worked.[48] In a claim for maintenance and cure, the seaman sought medical attention to arrest progressive deterioration of his physical condition despite the fact that maximum physical improvement had been achieved.[49] The court held that in cases of deteriorating disabilities, arrestive medical treatments are sufficiently curative in nature so as to be encompassed within the doctrine of maintenance and cure.[50] This holding was based upon the court's examination of present day medical technology, and an evaluation of how the word "cure" should be interpreted in light of such technology.[51]

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[44] *Id.* It is not clear from the opinion whether the "proverbial improvidence" of seamen is a matter of judicial notice, or derived from some other authority. In *Calmar*, the Court paraphrased Justice Story's evaluation of the conditions of being a seaman. 303 U.S. at 528, *citing* Harden v. Gordon, 11 F. Cas. 480, 483 (No. 6047) (C.C.D. Me. 1823). See note 21 *supra*. This perception of the seaman's improvidence, however well or ill founded, of itself seems to have been little considered beyond Justice Story's stereotype in interpreting appropriate remedies under the maintenance and cure doctrine.

[45] 336 U.S. at 519. The Court stated: "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." *Id.*

[46] *See* Neff v. Dravo Corp., 407 F.2d 228, 235 (3d Cir. 1969).

[47] 407 F.2d 228 (3d Cir. 1969).

[48] *Id.* at 231.

[49] *Id.* at 235.

[50] *Id.*

[51] The *Neff* court stated:

> 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 as 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.

Id. at 235.

This same interpretation was applied in *Ward v. Union Barge Line Corp.*[52] The seaman was suffering from an ulcer and abdominal obstructions which were the result of prolonged steroid treatments for relief from arthritis, undertaken by the seaman while in the service of the ship.[53] The maintenance and cure claim was based upon the seaman's total incapacity caused by the prolonged steroid treatments,[54] and the subsequent need for arrestive medical treatments.[55] The court in *Ward* reaffirmed the position taken in *Neff* and held that the seaman was entitled to maintenance and cure.[56]

The *Neff* decision referred to maintenance and cure entitlement only with regard to arresting a deteriorating condition.[57] In *Ward,* the court interpreted *Neff* as sanctioning recovery for either the arrest of deteriorating conditions, or relief of pain. While *Ward* seems to establish two separate bases for recovery, this distinction was not so clearly made in *Neff* where the reference to reduction of pain was made in the course of a quotation from the jury charge in the action below.[58]

Thus, in the *Neff* and *Ward* decisions, the court apparently extended the definition of cure to encompass medical treatments which are employed to alleviate pain resulting from disabilities which have reached a plateau of physical recovery[59] or are employed to arrest what would otherwise be a deteriorating disability.[60]

In *Cox,* the Third Circuit Court of Appeals had an opportunity to re-examine their definition of "cure" in light of the Supreme Court's development and interpretation of the maintenance and cure doctrine. Upon consideration of the existing case law, the court felt bound to overrule the *Neff* and *Ward* decisions[61] to the extent that they allow maintenance and cure for the reduction of pain after maximum physical improvement of the disability has been achieved.[62]

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[52] 443 F.2d 565 (3d Cir. 1971).

[53] *Id.* at 567.

[54] *Id.*

[55] *Id.* at 572.

[56] *Id.*

[57] 407 F.2d at 235.

[58] 443 F.2d at 572.

[59] *Id.* at 572.

[60] *Id.* at 572; *Neff,* 407 F.2d at 235. It is anomalous that the Third Circuit chose, in the *Neff* and *Ward* decisions, to pursue this definition of cure. *Calmar* represented a reversal of a Third Circuit appeal in which the seaman claimed entitlement to maintenance and cure on the basis of possessing a disability of deteriorating character. See note 33 *supra* and accompanying text.

[61] 517 F.2d at 621.

[62] *Id.* at 627 (concurring opinion). In his concurring opinion, Judge Sietz stated that the decision in *Cox* was limited to reduction of pain and that in cases in which the disability is of a deteriorating character, a different rule might apply. This argument was buttressed by citing dicta in *Vella v. Ford Motor Co.,* 421 U.S. 1, (1975), in which the Supreme Court indicated that in such situations a rule different than that previously applied might be appropriate. The Court stated:

> [It] is not necessary to address the question whether the jury award might also be sustained on the ground that the shipowner's duty in any event obliged him to provide palliative medical care to arrest further progress of

While the Third Circuit's opinion in *Cox* is less than clear with regard to the bases for rejecting the plaintiff's claim, the implication is that the court has found, in reduction of pain cases, a sufficient similarity to the disability situations in *Farrell* and *Vella v. Ford Motor Co.*[63] The court further stressed that since the argument favoring the allowance of maintenance and cure was rejected by the Supreme Court in *Calmar* for reduction of pain,[64] continued application of a rule different than that applied by the Supreme Court was tantamount to exceeding their proper law-making authority.[65]

It is submitted that the Third Circuit in *Cox* properly overruled *Neff* and *Ward* to the extent that they sanctioned recovery for the alleviation of pain. The Supreme Court has never squarely addressed the issue of whether cure may be awarded to reduce pain after the achievement of maximum physical improvement. In *Vella,*[66] The Supreme Court's latest decision on the scope of the maintenance and cure doctrine, the Court seemed to open the door by way of dicta to the argument that recovery for the reduction of pain after maximum physical recovery has been achieved should be subject to considerations not yet articulated by the maximum cure rule.[67] Nevertheless, it can be strongly argued that if and when the Court is presented with this specific issue, it will decide, as did the Third Circuit in *Cox,* that such damages are not properly recoverable in an action for maintenance and cure.

This argument is amply supported by past Supreme Court deci-

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the condition or to reduce pain, and we intimate no view whatever upon the shipowner's duty in that regard.

Id. at 5 n.4.

[63] 421 U.S. 1 (1975). *See* text at notes 67-68 *infra.*

[64] 517 F.2d at 627. In *Calmar,* the reduction of pain and arresting of a deteriorating condition were both aspects of the claim for maintenance, although not presented as alternative grounds for entitlement. The Supreme Court apparently rejected the viability of recovery based on either or both grounds. *See* 303 U.S. at 530.

[65] 517 F.2d at 627.

[66] In *Vella,* the Court introduced the distinction between disabilities which are permanent (at the time of illness or injury) but not so diagnosed at the time of injury, and disabilities which are declared to be permanent for purposes of judicial consideration. 421 U.S. at 5-6. The Court stated that in cases in which the disability has become permanent immediately after the illness or injury, upon leaving the service of the ship, the seaman is entitled to maintenance and cure until a medical diagnosis of permanency is made; the date of such diagnosis being the date at which the shipowner is released from further maintenance and cure liability. *Id.* at 5.

Precisely who must make the medical diagnosis was not made clear by the Court. Presumably, a ship's physician would be competent to make such a determination in a majority of cases (those not involving the expertise of medical specialists). This interpretation would appear to be in accord with Desmond v. United States, 217 F.2d 948, 950 (2d Cir. 1954), upon which the *Vella* court relied. 421 U.S. at 6 n. 5. The thrust of this interpretation focuses upon the *reliability* of the determination of permanency, rather than simply who makes that determination. Of course, *Vella* presumes that any determination made by someone other than a medical practitioner is faulty, regardless of extrinsic factors which might render that determination in fact accurate.

[67] 421 U.S. at 5 n. 4. *See* note 65 *supra.*

sions. In both *Farrell* and *Vella,* plaintiffs based their claim to maintenance and cure upon a showing that their disabilities involved episodic flare-ups for which medication would yield symptomatic relief.[68] In both of these cases, the Court strictly adhered to the physical improvement aspect of the maximum cure rule, concluding that because symptomatic relief would not "improve" the plaintiffs' underlying disability, an award for such relief could not be made.[69]

Physical pain, like the convulsions and dizzy spells involved in *Farrell* and *Vella,* is generally an episodic phenomenon. It is the manifestation of a physical disorder rather than the cause of it. Even though it may be intense, and physically disabling in its own right, like convulsions and dizziness it does not aggravate the condition from which it arises. If the occurrence of pain is thus correctly analogized to the episodic disabilities in *Farrell* and *Vella,* it appears that just as recovery will not be allowed for the avoidance of episodic convulsions and dizzy spells, once maximum cure is effectuated, recovery should similarly not be allowed for the reduction of pain.

The concurring opinion of Judge Sietz, in perhaps the most significant aspect of *Cox,* implied that a different result may be appropriate where the seaman's claim is for payments to arrest a deteriorating condition.[70] Dicta in *Vella* provided the basis for this implication. In *Vella,* the Court stated:

> [It] is not necessary to address the question whether the jury award might also be 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.[71]

The concurring opinion stated that the deteriorating condition issue has not been addressed by the Supreme Court, and in view of the facts of *Cox,* the Third Circuit should not express an authoritative view on the issue.

It is submitted that the concurring opinion in *Cox* has read too much into the *Vella* dicta. In *Calmar,* the Supreme Court specifically rejected the Third Circuit's assertion that deteriorating disabilities are subject to judicial consideration which extends beyond the traditional ambit of the maximum cure rule.[72] In *Cox,* the Third Circuit explicitly recognized the need to modify its application of the maximum cure rule in order to be in conformity with the rule applied by the Su-

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[68] *Farrell,* 336 U.S. at 513 (claim based upon the need for medication which controlled attacks of headache and epileptic convulsions); *Vella,* 421 U.S. at 3 n. 3 (claim based upon the need for medication to control dizziness resulting from injury to the inner ear).

[69] *See Vella,* 421 U.S. at 3; *Farrell,* 336 U.S. at 519.

[70] 517 F. 2d at 627.

[71] 421 U.S. at 5 n. 4.

[72] *See* text at notes 33-40 *supra.*

preme Court.[73] Unless the *Vella* dicta provides a basis for such different treatment, as implied by the concurring opinion, the concurring opinion diluted this objective of conformity by suggesting that deteriorating disabilities fall outside the ambit of the traditional maximum cure rule.

The *Vella* dicta does not appear to provide such a basis. Arguably, the dicta only indicates that the Supreme Court was not presented with these issues, and thus is indicating that no determination of them is necessary. This interpretation is considerably different from that proposed in the concurring opinion in *Cox*, which interprets the language as an authoritative statement of the Supreme Court's willingness to reconsider these issues. The argument that the *Vella* dicta is inconclusive is buttressed by the fact that the dicta contains a reference to reduction of pain, and it is highly unlikely that the Court would change the rule in this regard.[74]

If, however, the dicta in *Vella* does indicate a willingness on the part of the Supreme Court to reconsider the issue of deteriorating disabilities, the time is then especially ripe to take a close look at this issue. Three specific questions are raised by this examination: (1) whether awards for arresting a deteriorating condition can be encompassed within the present definition of the maximum cure rule; (2) if not, whether a change in the scope of recovery to accommodate such awards would be consistent with the policy considerations underlying maintenance and cure; and (3) whether such a change would upset the administrative objectives upon which the maintenance and cure remedy is presently based.

It appears that by slightly expanding the present scope of the maximum cure doctrine, allowance can be made for awards to arrest deteriorating conditions. As noted above, the Supreme Court, in *Calmar* and *Farrell,* has clearly distinguished between pension payments and the proper scope of maintenance and cure payments.[75] As maintenance and cure awards are fashioned to embrace lengthening periods of time, however, this distinction has become less clear. To alleviate this difficulty, the Court has allowed successive actions for maintenance and cure upon a showing that the claim is properly related to ascertainable medical needs.[76] The crux of finding ascertainable need is a showing that the treatments will result in definite physical improvement.[77]

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[73] 517 F. 2d at 621.

[74] *See* text at notes 68-72 *supra.*

[75] *See* text at notes 36 and 44 *supra.*

[76] *See Farrell,* 336 U.S. at 512-13, 519; *Calmar,* 303 U.S. at 530-32.

[77] *See Farrell,* 336 U.S. at 518; *Calmar,* 303 U.S. at 531-32. *Cf.* Scott v. Lykes Bros. S.S. Co., 152 F. Supp. 104 (E.D. La. 1957). In *Scott,* the plaintiff was crippled as a result of a brain injury sustained while in the service of the ship. In a previous maintenance and cure action, the seaman's benefits had been terminated when the court found that his condition had reached a static physical level. The seaman voluntarily entered a rehabilitation hospital of his own choosing, and after an extended period of therapy, re-

Viewing the arrest of deteriorating disabilities within this framework, it may be argued that a definition of cure which would allow payments in deteriorating disability situations is not inconsistent with the present *Calmar-Farrell* formulation of the rule. Medical treatments employed in deteriorating disability situations will generally follow one of two patterns. They will either effect physical improvement, to some degree, in the deteriorated condition, or they will arrest the progress of the condition as long as the treatment is continued. In the first situation, actual physical improvement, albeit temporary, is effected by the treatment. This fact might be viewed as sufficient to satisfy the requirements of physical improvement under the *Calmar-Farrell* definition of cure.[78] In the second type of deteriorating disability situation, without the medical treatment, the seaman's condition will decline from the plateau which the treatments are capable of maintaining. If maximum cure means achievement of a static level of physical improvement—which has been intimated by several lower federal courts[79] reasoning within the *Calmar-Farrell* framework—then maximum cure is reached and maintained only through the use of the arrestive medical treatment. The treatments are curative since maximum physical improvement is not achieved without their continued use. If "improvement" is thus defined in this relative sense, rather than in terms of a segmented linear progression,[80] the allowance of

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gained the partial use of his limbs and vocal faculties. The court stated:

> This court holds that maximum cure, as defined by the Supreme Court, 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.

Id. at 105.

Based on this language, it seems that the seaman regained physical control of some of his bodily functions through the development of alternative locomotor coordination, rather than actual physical repair of the disabled portions of the body. In awarding the seaman maintenance and cure, the district court thus appears to have extended the definition of cure beyond that of the actual physical improvement of the injured tissues.

[78] *Farrell* incorporated the standard described in the Shipowner's Liability Convention of 1936, 54 Stat. 1693, 1696, which provided in article 4, paragraph 1: "The shipowner shall be liable to defray the expense of medical care and maintenance until the sick or injured person has been cured, or until the sickness or incapacity has been declared of a permanent character." 336 U.S. at 517. *Calmar* conditioned entitlement to maintenance and cure upon a showing of improvement in the seaman's condition. Ostensibly, this meant improvement in the physical manifestations of the disability as well as actual improvement in the affected tissues. 303 U.S. at 530. *Farrell* did not, however, address this distinction, and it is unclear precisely what the Supreme Court's position is. *See* Scott v. Lykes Bros. S.S. Co., 152 F. Supp. 104 (E.D. La. 1957).

[79] *See, e.g.*, Martinez v. Permanente S.S. Corp., 237 F. Supp. 380, 383 (D. Hawaii 1965), *aff'd*, 369 F.2d 297 (9th Cir. 1966).

[80] This phrase is used to describe the judicial view that once a plateau of physical improvement is reached, that plateau is characterized as maximum cure, regardless of the fact that the plateau may not be stable. *See, e.g., Vella*, 421 U.S. 1; *Farrell*, 336 U.S. 511.

maintenance and cure where medical treatments are necessary to arrest a deteriorating disability is not inconsistent with the *Calmar-Farrell* definition of cure. Moreover, since the treatments are demonstrably related to the medical needs of the seaman, the distinction between pensions and maintenance and cure awards is preserved. By thus slightly expanding the scope of the maintenance and cure rule, in a manner not inconsistent with the present *Calmar-Farrell* formulation, awards can be made to arrest deteriorating conditions.

This expansion of the present rule would not violate the underlying policies of the maintenance and cure doctrine. A basic objective of the doctrine is to protect seamen from the hardships of disabilities by providing financial assistance during periods when the seaman is unable to engage in his trade.[81] This objective is effectuated by providing seamen with adequate payments without undue delay[82] while at the same time avoiding imposition of an undue financial burden upon shipowners.[83] In a dissenting opinion in *Farrell,* Justice Douglas observed that the primary focus of the maintenance and cure doctrine should be the welfare of the seaman rather than the financial burden that the maintenance and cure doctrine imposes upon shipowners.[84] This assessment may be overly one-sided; however, the same criticism is applicable to any definition of the maximum cure rule which does not provide payments to arrest deteriorating conditions. Such a definition places primary emphasis on maintaining low operating costs for shipowners while ignoring the seaman's need for adequate payments.

The need for medical treatment to arrest deteriorating disabilities is manifest. If a disabled seaman is unable to subscribe to arrestive medical treatments because of an inability to meet the costs involved,[85] the disability may deteriorate such that future medical advances which could have cured the disability had it been arrested would now be ineffective. To a seaman in such a situation, the right to bring successive actions is of no consequence because the disease will have deteriorated to a state where it cannot be said that medical treatment will effect cure. The right to successive actions has meaning only if, in the interim, a seaman is allowed funds so that he might receive treatment which will prevent the disease from deteriorating to an incurable level. Thus, it appears that an expansion of the maintenance and cure doctrine to accommodate payments to arrest deteriorating conditions is supported by the policy considerations which underlie the doctrine.

Finally, it appears that such an expansion of the maximum cure

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[81] Harden v. Gordon, 11 F. Cas. 480, 483 (No. 6047) (C.C.D. Me. 1823).

[82] *Vella,* 421 U.S. at 4.

[83] *See id.* at 4.

[84] 336 U.S. at 523 (Douglas, J., dissenting). Douglas felt that maintenance and cure payments were part of the cost of doing business. *Id.*

[85] *See* note 10 *supra.* This situation might arise in cases where the marine hospitals are unable to provide a particular treatment which is available at an independent medical facility.

rule would not frustrate the basic administrative objectives upon which the doctrine is based. The doctrine seeks to create a structure of rights and duties which are clear and readily understandable to the parties involved thereby avoiding frequent resort to the courts.[86] The present policy of allowing successive actions for maintenance and cure has been a roadblock to this objective. Since later recovery in a maintenance and cure action is dependent upon a showing of actual physical improvement, a seaman who avails himself of potentially curative treatment at his own initial expense runs the risk of no recovery in a subsequent action if the treatment proves unsuccessful, further adding confusion as to what rights and liabilities flow from the doctrine.[87]

Some of the administrative difficulties of the maintenance and cure doctrine might be remedied by considering the institution of a system functionally similar to workmen's compensation. In some respects, maintenance and cure is analogous to workmen's compensation.[88] In both cases, the duty to provide the benefits arises out of the relationship between the employer and the employee, rather than from any negligence by the employer to the employee.[89] However, maintenance and cure, unlike workmen's compensation is not a substitute for potential tort actions;[90] the seaman is still able to institute suit under the Jones Act[91] for the negligence of the shipowner, or the unseaworthiness of the vessel, irrespective of potential actions for maintenance and cure.[92] Because of the greater liberality of the maintenance and cure doctrine,[93] seamen have understandably preferred this doctrine over workmen's compensation programs.[94] The solution to any administrative problems created by allowing payments to arrest deteriorating conditions may thus lie in the adoption of a new system which incorporates the mechanics of the workmen's compensation program while at the same time embodying the greater liberality of the traditional seaman's remedy. This system may also be more suitable for effectuating the other objectives of the maintenance and cure doctrine and may actually be more amenable to both seamen and shipowners.

Under this proposed system, a federal board could be estab-

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[86] *See Farrell*, 336 U.S. at 516; *Vella*, 421 U.S. at 4.

[87] *See* text at note 77 *supra*. In Scott v. Lykes Bros. S.S. Co., 152 F. Supp. 104 (E.D. La. 1957), recovery presumably would have been denied if the rehabilitative treatments had proven unsuccessful since no improvement of any type would have resulted.

[88] Comment, 5 U. SAN FRAN. L. REV. 105, 110 (1970).

[89] Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371 (1932).

[90] G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 281 (1975).

[91] 46 U.S.C. § 688 (1970).

[92] Cortes v. Baltimore Insular Line, Inc., 287 U.S. 367, 371 (1932). *See Calmar*, 303 U.S. at 528.

[93] 2 M. NORRIS, THE LAW OF SEAMEN § 577 at 99 (3d ed. 1970).

[94] Freedman, *Recent Trends in the Controversy Over the Extension of Workmen's Compensation Into The Maritime and Railroad Fields*. 4 NACCA L.J. 229, 231 (1949).

lished to administer the benefits which accrue under the maintenance and cure doctrine after the seaman is no longer "in the service of the ship." Shipowners would pay compulsory premiums to cover the costs of administering the program. The amount payable could be based upon fixed rate scales, or upon pre-determined "loss ratios" calculated upon the amounts that the shipowner has previously paid in maintenance and cure benefits to injured seamen. This system would not create an undue financial burden upon the shipowner because the costs of the premiums would ultimately be passed on to the consuming public which would pay slightly increased rates for shipping services.[95] The burden of the premium would further be lessened by incorporating an aspect of the present system: the seaman's access to the marine hospitals on a reduced or no-cost basis[96] which presently is provided not by the shipowner but independently by the federal government.[97]

From the seaman's perspective, such a system could operate to provide greater simplicity and certainty as to benefits available under the maintenance and cure doctrine. The board could appoint a committee which would pass upon the certainty of proposed medical cures in cases where the seaman wishes to avail himself of treatment at independent medical facilities because superior care is available at such facilities. This procedure would mitigate the uncertainty, discussed above, of receiving treatments at the risk of not achieving actual physical recovery. In addition, to obviate the judicial concern for awarding lump sums which might not be used by the seaman for proper medical treatment,[98] payments could be made directly to the medical facility, at specified intervals, for the costs of cure, with the seaman receiving only direct payments for maintenance while undergoing the curative treatment. The medical facility would provide the board with periodic reports regarding the progress of the cure, and once cure was completed, the benefits would terminate. The seaman would still be entitled to later bring similar petitions to the board if future medical advances indicated that further cure of the permanent disability could be achieved.[99]

CONCLUSION

In *Cox*, the Third Circuit abandoned its earlier position to align itself with Supreme Court pronouncements on the maintenance and cure remedy. In so doing, the court concluded that payments for the alleviation of pain are not included under maintenance and cure once

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[95] Comment, 5 U. SAN FRAN. L. REV. 105, 111 (1970)

[96] *See* 2 M. NORRIS, *supra* note 93, § 591.

[97] *See* note 10 *supra*.

[98] *See* text at notes 38-39 *supra*.

[99] This procedure would be a substitute for the currently available procedure of bringing a successive action for maintenance and cure. *See* text at notes 40-45 *supra*.

the seaman is permanently disabled. It appears that the *Cox* decision was correctly decided given the present case law. Implications in the concurring opinion in *Cox* suggest that the Supreme Court may be disposed to reach a different result with regard to payments to arrest deteriorating conditions. While this reading of high court precedents is subject to question, it does appear that a basis may exist to provide maintenance and cure in such cases. Expanding the scope of the maximum cure rule to allow for treatment of deteriorating disabilities and the institution of a federal seamen's compensation board would serve to transform maintenance and cure into a doctrine more equitable for the seaman and more understandable for all parties concerned.

MICHAEL ABCARIAN

Motor Vehicle Safety—National Traffic and Motor Vehicle Safety Act—Definition of Safety-Related Defects under Notice Provisions—Manufacturer's Obligations—*United States v. General Motors Corp.*[1]—On September 4, 1968, the National Highway Safety Bureau (NHSB)[2] received a letter[3] which reported an injury-producing accident caused by the failure of a General Motors (GM) product known as the Kelsey-Hayes wheel[4] (Wheels) which had been installed on many GM pickup trucks. In response to the letter, and in view of the wide-spread use of the Wheels,[5] the NHSB initiated an investigation pursuant to section 113(e) of the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA)[6] to determine whether

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[1] 518 F.2d 420 (D.C. Cir. 1975).

[2] The NHSB is now the National Highway Traffic Safety Administration. *See id.* at 426 n.5 & 428.

[3] The letter was sent by consumer advocate Ralph Nader. *Id.* at 428.

[4] The three-piece 15 X 5.50 Kelsey-Hayes disc wheel was introduced by GM in the fall of 1959 as an option item. *Id.* at 427.

[5] A total of 810,000 Wheels were installed on approximately 200,000 of the 321,743 GM trucks manufactured during the 1960-65 model years. *Id.* at 427. It is estimated that 50,000 of these trucks have been equipped with campers or special bodies. *Id.* at 429.

[6] National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381-1431 (1970), *as amended*, 15 U.S.C. § 1391 *et seq.* (Supp. IV, 1974). Section 113(e), 15 U.S.C. § 1402(e) (1970), *as amended*, 15 U.S.C. § 1412 (Supp. IV, 1974), provides:

> (e) If through ... investigation ... the Secretary determines that any motor vehicle or item of motor vehicle equipment ... (2) contains a defect which relates to motor vehicle safety; then he shall immediately notify the manufacturer of such motor vehicle or item of motor vehicle equipment of such defect .... The Secretary shall afford such manufacturer an opportunity to present his views and evidence .... If after such presentation by the manufacturer the Secretary determines that such ... item of equipment ... contains a defect which relates to motor safety, the Secretary shall direct the manufacturer to furnish ... notification ... to the purchaser of such motor vehicle or item of motor vehicle equipment ....