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to the detriment of efficient performance of their judicial duties. A further consequence would be the frustration of the primary objective sought by creation of administrative agencies, *i.e.*, to provide for disposition of specialized and complicated problems by agencies equipped with expert knowledge and experience essential to more efficient disposition of such problems.

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Admiralty—Recovery of Counsel Fees as Damages in Maintenance and Cure Actions

In *Gore v. Maritime Overseas Corp.*[1] the libellant, a seaman with an extended history of back trouble, brought six consolidated admiralty actions against shipowners for maintenance and cure. Although it was impossible to establish the origin of the seaman's back condition, it was established that the libellant had had separate attacks while aboard different ships, followed by periods of remission sufficient to make him fit for duty. The owners of the ships upon which an attack occurred were found to be primarily liable for the seaman's maintenance until he again became fit for duty. The owners of the ships upon which the seaman became ill or disabled due to an attack that had occurred on a previous ship, but from which the seaman had not yet obtained maximum cure, were held to be secondarily liable for the libellant's maintenance. In each of the claims for maintenance and cure, the recovery of counsel fees was allowed as an element of damages. Secondarily liable shipowners were even awarded recovery from primarily liable shipowners of counsel fees that the former were obligated to pay the seaman.

Traditionally, counsel fees have not been an element of recovery for maintenance and cure actions.[2] However, in 1962, the United States Supreme Court in the historic decision of *Vaughan v. Atkinson*,[3] a maintenance and cure action, awarded counsel fees to the

[1] 256 F. Supp. 104 (E.D. Pa. 1966).

[2] In maintenance and cure claims, the courts have allowed consequential damages, Sims v. United States of America War Shipping Administration, 186 F.2d 972 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951); and necessary expenses, Cortes v. Baltimore Insular Line, 287 U.S. 367 (1932).

[3] 369 U.S. 527 (1962), *reversing* 291 F.2d 813 (4th Cir. 1961), 200 F. Supp. 802 (E.D. Va. 1959).

libellant as an element of damage.[4] In that case, the seaman entered a United States Public Health Service Hospital five days after the termination of a voyage aboard the respondent shipowner's vessel. For approximately three months, he was treated as an inpatient for suspected tuberculosis. After being discharged, he was treated as an outpatient for two years before again being declared fit for duty. Shortly after being admitted, the libellant forwarded to the owner's agent an abstract of his clinical record at the hospital showing a strong probability of active tuberculosis. However, the owner made no investigation of the seaman's claim and did not even bother to admit or deny the validity of it.[5] As a result, for two years the libellant was on his own and ultimately had to hire an attorney to recover his claim. Though there was no precedent for allowing counsel fees as damages in a maintenance and cure action, the Supreme Court followed the logic that admiralty courts were authorized to invoke equitable principles,[6] that there is precedent for allowing counsel fees in equity actions[7] and thus, that counsel fees might be an appropriate element of recovery for maintenance and cure.[8]

As to the test that the Supreme Court used to determine when counsel fees could be recovered in maintenance and cure actions, at least two distinct views have developed. In *Vaughan*, the Supreme Court spoke of the "callous" attitude on the part of the shipowner in "making no investigation of the libellant's claim"[9] and the default of the shipowner "being willful and persistent."[10] It was found "difficult to imagine a clearer case of damages suffered for failure to pay than this one."[11] In subsequent lower court decisions the problem arose whether a callous attitude on the part of the shipowner was a prerequisite to recovery of counsel fees, or whether it merely made the case for counsel fees stronger.

[4] The court definitely stated that the question involved damages and "not the usual problem of what constitutes 'costs' in the conventional sense." 369 U.S. at 530.

[5] *Id.* at 528.

[6] See, *e.g.*, Rogers v. Paul, 232 F. Supp. 833 (W.D. Ark. 1964).

[7] See, *e.g.*, Swift & Co. Packers v. Compania Colombiana Del Caribe, 339 U.S. 684 (1950); The Apollon, 22 U.S. (9 Wheat.) 362 (1824).

[8] Vaughan v. Atkinson, 369 U.S. 527, 530 (1962). See Vaughan v. Atkinson, 291 F.2d 813, 816 (4th Cir. 1961) (dissent by Chief Judge Sobeloff).

[9] 369 U.S. at 530.

[10] 369 U.S. at 531.

[11] 369 U.S. at 531.

The majority of the courts dealing with this have required a finding of willful default or callous action by the shipowner before an award of counsel fees is allowed in a maintenance and cure case.[12] This is perhaps a means of refraining from too radical a departure from the general rule that counsel fees are not recoverable.[13] Thus, a shipowner who paid maintenance to a seaman until the Public Health Service certified the seaman as fit for duty was held not liable for counsel fees because he had not acted in bad faith, callously, or unreasonably.[14] Another shipowner, who depended on a prediction by the Public Health Service that the libellant would be fit for duty on a certain date, quit paying maintenance on that date although the libellant had actually failed to recover. There was no evidence that the shipowner knew of this, though there was never any investigation by the shipowner to see if the seaman had in fact recovered, or examination by the Public Health Service certifying the seaman as fit for duty. Still, attorney's fees were denied because the court could not say that the defendant acted in bad faith, callously, or unreasonably.[15] In another case, a seaman who made no claim for maintenance and cure prior to the institution of the lawsuit, was denied counsel fees because there had been no default, willful or otherwise, by the shipowner.[16] Many of these courts have specifically rejected a more liberal interpretation of *Vaughan* and have considered a showing of callousness or recalcitrance on the part of the

[12] See notes 14-17 *infra* and accompanying text.

[13] See, *e.g.*, McCORMICK, DAMAGES §§ 61, 71 (1935).

[14] Pyles v. American Trading & Prod. Corp., 244 F. Supp. 685 (S.D. Tex. 1965). The court held that good faith reliance on the Public Health Service certification enabled the shipowner to suspend maintenance payments and remove the case from the rule of *Vaughan*. It stated that the better authorities limited the Vaughan case to situations in which the defendant deliberately, flagrantly or unjustifiably refused to pay maintenance at any time. *Accord,* Diddlebrock v. Alcoa Steamship Co., 234 F. Supp. 811, 814 (E.D. Pa. 1964).

[15] Diaz v. Gulf Oil Corp., 237 F. Supp. 261 (S.D.N.Y. 1965). The court pointed out that even a flat finding by the Public Health Service that the seaman was fit for duty would not be conclusive evidence in court. The court cited Koslusky v. United States, 208 F.2d 957, 959 (2d Cir. 1953) and Diniero v. United States Lines Co., 185 F. Supp. 818, 820 (S.D.N.Y. 1960), *aff'd,* 288 F.2d 595. Thus, a prediction that the libellant will be fit for duty on a certain date would carry even less weight and could conceivable raise the duty of the shipowner to investigate the libellant's claim to determine its merit. An investigation might have clearly shown the libellant's right to maintenance and cure and might have precluded the necessity of a lawsuit.

[16] Connorton v. Harbor Towing Corp., 237 F. Supp. 63 (D. Md. 1964).

shipowner a necessary requirement for recovery of attorney's fees. These courts consider this the overwhelming majority view.[17]

Other courts have used language similar to the above test of callousness or recalcitrance in speaking of the duty of a shipowner to properly investigate the libellant's claim to determine its merits.[18] The *Vaughan* opinion noted this duty of the shipowner to properly investigate and found that the shipowner had callously breached it.[19] The principal case developing the shipowner's duty to investigate a claim for maintenance and cure with reasonable diligence was *Stewart v. S.S. Richmond.*[20] It found the shipowner's breach to be arbitrary and unreasonable in the face of the overwhelming proof of the merit of the claim. The libellant had presented the shipowner an unfit for duty certificate from the Public Health Service along with his own doctor's report that maximum cure had not been reached. The court found that the shipowner was lax in investigating a claim which they would have found to have merit.[21]

It seems possible that the duty to investigate could be negligently breached by the shipowner, so that he could become liable for the seaman's counsel fees without a specific showing of bad faith. However, there does not seem to be any authority specifically allowing recovery of attorney's fees by the seaman for the shipowner's negligent failure to investigate the merits of the maintenance and cure claim. But such a test would seem to be consistent with the liberal policies in favor of the seaman enumerated by the courts in expanding the application of maintenance and cure.

Some courts have disregarded the requirements of willful default, callous action, or breach of duty to investigate as prerequisites to the recovery of counsel fees in favor of a more liberal interpretation of *Vaughan.* These courts grant that bad faith by the ship-

[17] Roberts v. S.S. Argentina, 359 F.2d 430 (2d Cir. 1966); *cf.* Johnson v. Mississippi Valley Barge Line Co., 335 F.2d 904 (3d Cir. 1964).

[18] See notes 19-21 *infra* and accompanying text.

[19] 369 U.S. at 530.

[20] 214 F. Supp. 135 (E.D. La. 1963).

[21] When a claim for maintenance is made, there is an affirmative duty upon the shipowner to investigate the claim with reasonable diligence. . . . Moreover when there is substantial evidence that a shipowner is dilatory in making such an investigation or if it fails to make an investigation which would have disclosed the merit of the seaman's claim, the seaman may recover the damages resulting from the failure to pay maintenance as well as attorney's fees incurred in getting the maintenance from the shipowner.

Id. at 137.

owner makes the case for counsel fees stronger, but feel it is not a prerequisite to recovery. One group of opinions has interpreted *Vaughan* as meaning counsel fees are discretionary with the court. In *Hurte v. Socony-Mobil Oil Co.*,[22] the Eighth Circuit allowed counsel fees in an action for maintenance and cure with no discussion other than that the libellant can recover attorney's fees for the shipowner's failure to provide that to which the libellant was entitled. The court made no mention of the revelance of the shipowner's attitude or actions in dealing with the libellant's case. The same judge, two years later, in awarding attorney's fees in another action for maintenance and cure, simply stated that recovery was discretionary with the court.[23] Under this interpretation of *Vaughan*, recovery of counsel fees is not automatically required as a payment of damages. Valid reasons might exist for not voluntarily paying a claim. So long as the shipowner acted equitably with a bona fide desire to comply with the law, and provided maintenance that was justly and obviously due, damages by way of counsel fees would not necessarily be allowed.[24] This interpretation of *Vaughan* seems to be more in line with the policy favoring seamen in maintenance and cure actions than the interpretation that callous actions on the part of the shipowner must be shown before counsel fees are awarded. The need for callous actions places a burden on the seaman to show that the shipowner did indeed act callously, while the discretionary or honest dispute interpretation would seem to generally assume that counsel fees may be awarded in maintenance and cure actions. This would place on the shipowner the burden of showing that he is within the exception of not being liable for counsel fees because he acted equitably and an honest dispute did exist.

An even more radical departure from the requirement of a showing of callous action by the shipowner has been made by some courts. This is the theory of allowing the seaman to recover his counsel fees anytime he is forced to litigate his claim for mainte-

[22] 221 F. Supp. 885, 890 (E.D. Mo. 1963). See Smith v. Seitter, 225 F. Supp. 282, 287 (E.D.N.C. 1964); Sims v. Marine Catering Serv., Inc., 217 F. Supp. 511 (D. La. 1963).

[23] Rowald v. Cargo Carriers, Inc., 243 F. Supp. 629, 633 (E.D. Mo. 1965).

[24] The intention and purpose of the Supreme Court in *Vaughan* was that "the trial court should make the seaman 'whole,' i.e. he should not be required to pay money out of his pocket to collect maintenance lawfully due him." Vaughan v. Atkinson, 206 F. Supp. 575, 576 (E.D. Va. 1962) (on remand).

nance and cure. The payment of counsel fees by the shipowner in a litigated maintenance and cure claim is felt by such courts to be an automatic obligation that does not turn on the issue of the shipowner's recalcitrance. The main case espousing this interpretation of *Vaughan* is *Jordan v. Norfolk Dredging Co.*[25] There, according to the libellant and the finding of the court, Jordan had injured his back while aboard ship five or six months before his employment was terminated. He then reinjured his back before he left the ship and was able to continue work only with the help of his fellow deckhands. However, no complaint of back trouble was ever made to officials of the operating company until one month after the libellant had quit work. After Jordan made his claim, a company representative told him it was doubtful whether he was entitled to maintenance and cure and as a result, Jordan had to litigate his claim to recover. The court expressed grave doubts that there was any callous behavior on the part of the shipowner toward the libellant. However, it felt that the Supreme Court in *Vaughan* had expressly rejected the recovery of counsel fees on the basis of unconscionable behavior by the shipowner.[26] The court admitted that the Supreme Court did refer to callous, willful and persistent behavior, and that the language of the *Vaughan* opinion was not clear, but defended its view in light of the policies and authority upon which the decision rested.[27]

[25] 223 F. Supp. 79 (E.D. Va. 1963). This case was tried in the same district in which the *Vaughan* case was originally tried and to which it was remanded.

[26] 223 F. Supp. at 82.

[27] The court placed heavy reliance on Sims v. United States of America War Shipping Administration, 186 F.2d 972 (3d Cir.), *cert. denied*, 342 U.S. 816 (1951), in which consequential damages were included in a recovery for maintenance and cure. In *Sims* the shipowner's good faith did not save him from liability; the court drawing an analogy to tort law in which

> a wrongdoer hurts another in an accident but fails to provide medical care or to alleviate the harm honestly thinking that (1) he was not himself negligent or (2) the victim was contributorily negligent. If the trier of facts disagrees with the actor on these conclusions, the defendant is liable for full damages suffered, although some of them could have been mitigated by prompt action of his part.

Id. at 974, 975.

However, in *Sims* the consequential damages from the withholding of the maintenance and cure were physical as a prolongation of the seaman's illness and no mention was made of monetary damages in the form of counsel fees. It should be noted that the Supreme Court in *Vaughan* did not cite the *Sims* opinion or use the phrase 'consequential damages.' Nevertheless, the *Jordan* court felt that counsel fees had been brought within the sphere of consequential damages in maintenance and cure action. 223 F. Supp. at 83.

> Apparently the Supreme Court intended to put shipowners on notice that if, in any case, they saw fit to contest a claim for maintenance and cure, regardless of the reasonableness of the grounds upon which the refusal to pay is based, and if it was ultimately determined on the merits that maintenance and cure was indeed owing, then counsel fees should be paid as compensation for 'necessary expenses' incurred. In other words, attorney's fees have been made a routine element of damages to be paid any seaman who wins a contested maintenance and cure suit. Apparently this added and unusual onus is put on the shipowners' shoulders in maintenance and cure actions in an attempt to equalize the always poor and usually ignorant seaman with the powerful, wealthy, and well-informed shipping company which is better able to evaluate the legal merits of a claim and to pay the, to them, relatively small amounts usually involved in maintenance and cure actions.[28]

In the *Gore* case, the court did not require a finding of recalcitrance by the shipowners before counsel fees could be awarded.[29] There was, however, no express statement that the recovery of counsel fees was treated as an automatic obligation to be placed on a shipowner in any litigated maintenance and cure claim. In allowing the seaman to recover counsel fees in one of the actions, the court did not permit the shipowner to escape liability due to the fact that he in good faith believed that ultimate responsibility for the maintenance and cure rested with another shipowner.[30] Against another shipowner counsel fees were awarded with the statement that the shipowner failed to pay maintenance concurrently with the need.[31] In the discussion as to whether secondarily liable shipowners could recover from primarily liable shipowners counsel fees paid to the seaman, the court made a strong argument in favor of a liberal interpretation of *Vaughan*. Citing the *Jordan* opinion, the court said that "the awarding of counsel fees in all these cases is a corollary of the strong policy of the admiralty law favoring prompt payment

[28] *Id.* at 83.

[29] Gore v. Maritime Overseas Corp., 256 F. Supp. 104 (E.D. Pa. 1966).

[30] When a seaman leaves any ship after he has become disabled, the ship that he leaves is responsible for providing maintenance and cure. See, *e.g.*, GILMORE & BLACK, ADMIRALTY § 6-8, at 257 (1957); 1 NORRIS, SEAMAN § 568 (2d ed. 1962); ROBINSON, ADMIRALTY § 36, at 292 (1939).

[31] Gore v. Maritime Overseas Corp., 256 F. Supp. 104, 116 n.9 (E.D. Pa. 1966). The court did note that Public Health Service records clearly indicated the merits of the libellant's claim which could be construed to raise an inference of bad faith.

of maintenance claims."[32] Although there was evidence that ruled out any contention that the primarily liable shipowner was acting in bad faith, the court assessed counsel fees as damages under a policy of encouraging shipowners to pay maintenance claims rapidly, and discouraging the denial to seamen of just claims for long periods while competing shipowners, or a court, resolved the issue of ultimate responsibility.[33] Thus, this court seems to have adopted a very liberal position in favor of seamen in the awarding of counsel fees in maintenance and cure cases.

The Supreme Court has not yet clarified its position on this issue, but the liberal policy considerations lying behind the action for maintenance and cure[34] make it seem probable that it will adopt a rule similar to the language of the *Gore* opinion. There could conceivably be a dispute over a maintenance and cure claim where the shipowner acted with the highest equitable regard toward the seaman's rights, but the seaman failed to cooperate in an investigation of the merits of the claim. Thus, the obligation on the shipowner to pay counsel fees should not be absolute and automatic in any contested maintenance and cure action that the shipowner loses. In such a situation where the equities lie on the side of the shipowner in the parties' attempt to settle prior to the litigation, the shipowner should not be responsible for the seaman's counsel fees.[35]

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[32] *Id.* at 125.
[33] *Id.* at 126.
[34] Vaughan v. Atkinson, 206 F. Supp. 575 (E.D. Va. 1962) (on remand).
[35] Allowing the recovery of counsel fees as damages has also raised other problems. For example, most courts speak of reasonable counsel fees. In *Vaughan*, on remand, the district court held that a fifty per cent contingent fee contract could not be approved. Vaughan v. Atkinson, 206 F. Supp. 575 (E.D. Va. 1962). Other courts have allowed fees of thirty-three and one-third per cent of the recovery. See Rowald v. Cargo Carriers, Inc., 243 F. Supp. 629 (E.D. Mo. 1965); Hurte v. Socony-Mobile Oil Co., 221 F. Supp. 885 (E.D. Mo. 1963). However, if counsel fees are to be considered damages, who should determine the reasonableness? Should a lawyer be permitted to set his own fee or should it be determined by a judge or jury? In allowing recovery for reasonable counsel fees in *Gore*, the court held that if counsel could not agree on the amount of fee then affidavits should be filed by each side with the court in support of their claims. The court would then make a determination. 256 F. Supp. at 127 n.32. In Burkert v. Weyerhaeuser S.S. Co., 350 F.2d 826 (9th Cir. 1965), the court directed an award of counsel fees incurred by seaman on his appeal in an amount the district court thought reasonable. Other problems may well arise if the policy of allowing counsel fees in maintenance and cure cases is extended to seamen's actions based on unseaworthiness. See BAER, ADMIRALTY LAW OF THE SUPREME COURT § 1-7 (1963).