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## When setting rates of maintenance for seamen with a house and family, should the entire mortgage payment be taken into account?

by John Merriam

Cases where the amount of daily maintenance is at issue traditionally have involved unmarried seamen -- often itinerant -- living in a cheap apartment or a flophouse hotel, usually near the docks or the airport. What about seamen who actually have a life on shore, including a family and a house with a mortgage?

Charles "Chuck" Olson is a 47-year-old life-long resident of Whatcom County, Washington who has been a commercial fisherman since age 13. He has lived in Lynden with a wife and two children in the same house for over 15 years. In 2012, when this story starts, his house in Lynden was 22 years old. 2100 feet in size, it is typical for the middle class neighborhood in which it's located. Chuck's mortgage was \$1,919 per month, all of which he paid himself because his wife didn't work.

On July 14, 2012 Chuck was working as deckhand aboard the Bellingham-based F/V Pacific Pursuit, fishing for sardines off the coast of Oregon. The Pacific Pursuit put in to Astoria, Oregon to unload her catch. The sardines were transferred to the cannery by way of a large vacuum hose stuck into the fish hold. The hose lost suction and bucked hard, hitting Chuck who was standing at the edge of the hold. He broke a rib when the impact knocked him across the deck.

The contract of employment did not specify a rate of maintenance to be paid in case of injury. The insurance company paid maintenance at \$37.50 per day. That equals a little over \$1100 per month, less than Chuck's mortgage -- to say

nothing of utilities and food expense. When challenged, defense counsel claimed that the figure was "based on the listing of available rental property . . ." in that area of Whatcom County. When the undersigned pointed out that the rental properties used for comparison were small flops in lousy neighborhoods, and that Chuck needed more to keep his house, defense counsel wrote back: "None of the cases support the proposition that a vessel owner is required to pay a seaman's mortgage until the seaman reaches maximum cure." This practitioner disagreed and demanded \$100 per day in maintenance. Defense counsel refused to pay more than what a single seaman would have to pay to obtain food and lodging in the community where he is staying. Plaintiff filed suit in Whatcom County Superior Court. The battle was joined. (Luckily for Chuck, he recuperated relatively quickly and went back to work before his house was foreclosed on.)

The case was assigned to then-newly-elected Judge Deborra Garrett. Plaintiff filed a motion for partial summary judgment seeking a declaration that a seaman's mortgage expense should be included when setting the proper rate of maintenance, if the finder of fact determines that the seaman's standard of living is reasonable. Oral argument was scheduled for May 24, 2013.

In briefing submitted to the court, both sides relied primarily on the same case: *Hall v. Noble Drilling*, 2001 A.M.C. 1099, 243 F.3d 582 (5th Cir. 2001). The *Hall* case involved seamen living with their families and paying rent or

mortgages on a dwelling that housed them all. The Fifth Circuit ruled that food expense should be pro-rated, so that maintenance covered only the seaman's share, but that the full expense of the rent or mortgage could be included if it was reasonable, because the seaman would have to pay the same amount even if living alone.

This juxtaposition of the ancient right of maintenance, protecting the "poor and friendless" seaman, with the cases of modern seamen with families and mortgages is at the heart of this case. Hall v. Noble Drilling, 2001 A.M.C. at 1102.

The Hall decision has something for everybody. It doesn't provide guidance, however, on what amount of mortgage expense is "reasonable". Defense counsel cited it for the proposition that maintenance should be based on "the reasonable cost of an individual living in the same area where the seaman resides." Plaintiff cited it for the following passage:

A seaman who pays for the rent or mortgage of a home he shares with his family actually spends out-of-pocket the entire amount.

He cannot pay any less without losing his home. Id., 2001 A.M.C. at 1106 (emphasis added).

The issue for Judge Garrett to decide was succinct: Defendants claimed Hall established that shipowners don't have to pay a seaman's mortgage expense as part of maintenance when the mortgage payment is more than the amount of rent one person would pay for lodging in the same area. Plaintiff claimed that the question was: Is it reasonable for the seaman to remain in his pre-injury abode, or should the seaman lose his house and move elsewhere to cheaper accommodations -- while trying to recuperate -- as the result of injury? Put another way: Should the jury be allowed to decide whether or not the injured seaman's mortgage payment is reasonable? Plaintiff prayed that Judge Garrett narrow the issues pursuant to CR 56(c) and (d), by ruling that the jury should be instructed that it could consider the plaintiff's mortgage expense when setting the rate of maintenance, if it determined that the plaintiff's standard of living was reasonable.

Both lawyers were from Seattle and had to travel to Bellingham for oral argument. On May 23rd at 7:00 p.m., the evening before oral

argument was scheduled, the Interstate 5 bridge over the Skagit River collapsed. Two vehicles plunged into the river and traffic backed up for miles. This practitioner got news of the collapse early the morning of oral argument, from an e-mail sent by opposing counsel late the night before asking that the hearing be re-noted due to delays on I-5. His request was refused.

"Do you know how long it will take to get another date for oral argument, Bob?" I asked opposing counsel. "The hearing isn't until the afternoon. You need to leave early and drive around Mount Vernon like everyone else. I'm taking the train. If you can't make it, I'll ask Judge Garrett to decide the motion on the briefs without oral argument. No whining!"

Traveling north later that morning on Amtrak, just past Mount Vernon, I was startled when I looked out the window and saw a large section of the I-5 bridge lying in the Skagit River.

Opposing counsel did drive, leaving early in a bad mood, and made it to court on time.

Judge Garrett might have been new to the bench -- it could have been her first maritime case for all this practitioner knew -- but she wasn't born yesterday and could tell which way the wind was blowing. The case involved an issue of first impression and she sensed, correctly, that both sides had an agenda. For two Seattle lawyers to brave a crossing of the Skagit River and come to Whatcom County, to argue vigorously over a small amount of money, meant the loser of the motion was likely to take an appeal to Division I of the Court of Appeals. She punted, kicking the issue down the road, and wouldn't rule on the question presented. In her written order, Judge Garrett ordered that the plaintiff's motion "will be considered and determined in the context of trial." Order of 5/24/13. In oral comments from the bench, however, the judge made it quite clear that she agreed with the plaintiff's interpretation of the Hall v. Noble Drilling case. The issue for the jury, she observed, was to decide whether or not the seaman's pre-injury standard of living was 'reasonable' when setting a rate of maintenance that would or would not allow the seaman to maintain that standard of living. In other words -- she didn't actually say this but the gist was clear -- it wasn't 'reasonable' for an injured seaman to continue to live in the Taj Mahal, but it also wasn't reasonable to make the seaman give up his home the suburbs and move to a trailer park as a result of incapacitation.

After both counsel caught the drift of how the jury would be instructed, the case settled for a modest amount. Whether or not the full mortgage payment should be factored into the rate of maintenance for an injured seaman is still an open issue. Stay tuned . . .

The case is *Charles Olson v. Pacific Pursuit, LLC et al.*, No. 12-2-03386-9 (Whatcom Co. Sup. Ct.) Plaintiff was represented by John

Merriam. Defendant was represented by Robert Kehoe of the Purse Seine Vessel Owners Association.

*John Merriam is a former merchant seaman, now a sole practitioner at Seattle's Fishermen's Terminal, who limits his practice to the representation of maritime claimants for wages and injury.*