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Necessary Status For Coverage Under The Jones Act.

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Recognition of the distinction between a dwelling house and a vehicle, and the lesser protection of privacy accorded the latter, should be a starting point for future attempts at a practical compromise between the protection of individual rights and the furtherance of effective law enforcement.

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NECESSARY STATUS FOR COVERAGE UNDER THE JONES ACT.

Federal law, by means of the Jones Act provides that "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law."[1] On the other hand the Longshoremen's and Harbor Workers' Compensation Act provides fixed weekly compensation payments for employees injured on navigable waters (including any dry dock) and where applicable is the exclusive remedy.[2] It explicitly eliminates from its coverage vessel's crew members.[3]

In *Taylor v. Central R.R. Co. of N.J.*, an action brought in a New York Court, a bridge carpenter was injured while removing lumber from a dock and placing it on a lighter for transportation to the other end of the dock. At no time during this trip was the lighter to lose contact with the dock and in fact, it did not even possess means of self-propulsion. It was moved along the dock by winch-operated lines. The plaintiff alleged that lack of equipment (nets) aboard rendered the vessel unseaworthy as required by the Jones Act and that this was the cause of his injury. On trial the Court submitted the question of plaintiff's status as a seaman and the issues of defendant's negligence and plaintiff's contributory negligence to the jury, but refused to charge on the question of seaworthiness. On appeal, the Appellate Division held that the plaintiff was covered by the Jones Act, or so a jury could find, and was thus entitled to a charge on the issue of seaworthiness.[4]

A shipowner's liability for unseaworthiness, to those covered by the Jones Act, is absolute and is imposed regardless of fault.[5] The doctrine is based on the need for protection of seamen who have signed articles for a voyage and are thus put under control of the ship's master. Such seamen can be compelled to do the ship's work in any weather, under any conditions, using whatever equipment may be furnished.[6] This concept of strict liability is firmly entrenched in our maritime law, appearing as early as 1789 in *Dixon v. The Cyrus* where it was stated that,

1. 38 Stat. 1185 (1915), 46 U.S.C. § 688 (1958) as amended 41 Stat. 1007 (1920).
2. 44 Stat. 1426 (1927), 33 U.S.C. §§ 905-911 (1958).
3. 44 Stat. 1426 (1927), 33 U.S.C. § 903 (1958).
4. Supreme Court, New York County not reported, reversed — A.D.2d —, 191 N.Y.S.2d 690 (1st Dep't 1959).
5. Seas Shipping Co. v. Sierachi, 328 U.S. 85 (1946); Dimas v. Lehigh Val. Ry., 234 F.2d 151 (2d Cir. 1956).
6. Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959).

". . . Notwithstanding this silence of the articles, law and reason will imply sundry engagements of the captain to the mariners. Two of which are: First, that at the commencement of a voyage, the ship be furnished with all the necessary and customary requisites for navigation or, as the term is, shall be found seaworthy. . . ."[7]

Not every employee injured through a tort arising out of the course of his employment on navigable waters can avail himself of the Jones Act.[8] This absolute duty and corresponding liability of a shipowner to furnish his seamen a seaworthy vessel has been extended to shoreworkers, but this extension is supposedly limited to instances where they are performing duties traditionally done by seamen. The rationale given is that a shipowner should not be allowed to avoid his responsibilities by hiring others to perform duties usually done by seamen.[9]

In many actions under the Jones Act and general maritime law State and Federal courts have concurrent jurisdiction, but principles of federal law apply.[10] Where the employer is the owner of the vessel, coverage has been restricted "to the members of the crew of a vessel plying in navigable waters."[11] The term vessel has been liberally interpreted as used in the Jones Act and has been held not to require motive power or sleeping quarters aboard.[12] It would appear that anything capable of carrying cargo over water will suffice. The phrase "plying in navigable waters" has also been given a liberal interpretation and seems to mean no more than that a vessel is in condition for and probably will be used within the near future for transportation on water.[13]

The phrase "member of the crew" has come to mean one who does work which is "in the ship's service," that is, work that is traditionally done by crew members.[14] What constitutes work traditionally done by crew members appears to entail an *ad hoc* determination. Carpenters who are aboard to repair equipment or workers who are aboard to fix a pump have been held by the U.S. Supreme Court to be entitled to recover under the seaworthiness

7. 7 Fed. Cas. 755 at 757 (No. 3930) (D. Penn. 1789).

8. Braen v. Pfeifer Oil Transportation Co., — U.S. —, 80 Sup. Ct. 247 (1959); Frankel v. Bethlehem-Fairfield Shipyard, 132 F.2d 634 (4th Cir. 1942).

9. United New York and New Jersey S.H.P. Assoc. v. Halechi, 358 U.S. 613 (1959); Daniel v. The M/S Lisholt, 257 F.2d 538 (2d Cir. 1958); Carbon v. Stochard S.S. Corp., 173 F. Supp. 845 (E.D. La. 1959); Latus v. United States, 170 F. Supp. 837 (E.D.N.Y. 1959).

10. Lindgren v. United States, 281 U.S. 38 (1930); Engle v. Davenport, 271 U.S. 33 (1926); Hill v. Upper Miss. Towing Corp., 252 Minn. 165, 89 N.W.2d 654 (1958).

11. Swanson v. Marra Bros. Inc., 328 U.S. 1, 7 (1945).

12. Summerlin v. Massman Constr. Co., 199 F.2d 715 (4th Cir. 1952); Hardt v. Cunningham, 136 N.J.L. 137, 54 A.2d 782 (1947).

13. Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1951); McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953); see West v. United States, — U.S. —, 80 Sup. Ct. 189 (1959), where it was held that a ship in the "moth ball fleet" for several years, while being activated, is not in maritime service and thus the owner is not subject to the liability of the seaworthy doctrine.

14. United N.Y. & N.J. S.H.P. Assoc. v. Halechi, supra note 9; Seas Shipping Co. v. Sierachi, supra note 5; Daniel v. The Lisholt, supra note 9.

doctrine.[15] However, a person aboard to spray generators has been held not to be so covered.[16] The line of demarcation seems to be determined by the size of the repair, the feasibility of doing it while in navigation and the requirement of special equipment and skills which a seaman would or would not possess. The doctrine as it presently stands covers those engaged in loading, unloading and related similar functions in preparing a ship for a voyage.[17] There have been several auxiliary tests used to determine if someone is a seaman or member of the crew, e.g., whether he is permanently connected with the vessel,[18] whether he sleeps and eats aboard,[19] how he is paid,[20] whether he is aboard primarily to aid in navigation of the vessel,[21] whether he actually sails with the ship,[22] and whether he has signed articles and is subject to the ship's discipline.[23] While various court decisions have turned on one or a collection of the above factors, the U.S. Supreme Court now appears to take the view that the controlling factor is the type of work involved and whether it is traditionally the work of crew members.[24]

The Court in the instant case appears to have pushed the fiction employed in the extension of coverage under the seaworthiness doctrine to its outer limits.[25] The vessel here involved had no power of self-propulsion, no Coast Guard certificate, and no electrical or navigation lights. Although similar means of conveyance have been held sufficient to constitute a vessel for coverage under the Jones Act,[26] in this case several other factors were present which give a cumulative picture indicating that the doctrine will be employed wherever it can be made to fit, no matter how far removed the fact situation may be from what Congress had originally planned to protect.[27]

The "plying in navigable waters" requirement was deemed satisfied in the instant case, although the so-called vessel was going no farther than to the other end of the dock and would be at all times tied to it. The hazards

15. The Tungus v. Skovgaard, 358 U.S. 588 (1959) (repairing a pump); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) (carpenter).
16. United N.Y. & N.J. S.H.P. Assoc. v. Halechi, supra note 9 (5-4 decision).
17. Seas Shipping Co. v. Sierachi, supra note 5.
18. Gahagan Constr. Corp. v. Armao, 165 F.2d 301 (1st Cir. 1948); Carumbo v. Cape Cod S.S. Co., 123 F.2d 991 (1st Cir. 1941).
19. Taylor v. Central R.R. of New Jersey, supra note 4, at 695 (dictum).
20. Eats v. Persohn, 44 So. 2d 202 (1950), reheard and rev'd on other grounds, 47 So. 2d 64 (La. Ct. App. 1950).
21. C.J.S. Seaman § 191 C. (1) (1952); also supra note 18.
22. Carvalho v. Frigate, 42 F. Supp. 404 (D. Mass. 1941).
23. Larson v. Lewis-Simas-Jones Co., 29 Cal. App. 2d 83, 84 P.2d 296 (1939).
24. Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423 (1959); United N.Y. & N.J. S.H.P. Assoc. v. Halechi, supra note 9; Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959) (by implication); Pope & Talbot, Inc. v. Hawn, supra note 15; Seas Shipping Co. v. Sierachi, supra note 5.
25. Supra note 4.
26. Gahagan Constr. Corp. v. Armao, supra note 18; Hardt v. Cunningham, supra note 12; Brown v. L.A. Wells Constr. Co., 143 Ohio St. 580, 56 N.E.2d 451 (1944); Pfister v. Badgett Constr. Co., 65 S.W.2d 137 (Mo. App. 1933).
27. Raidy v. United States, 153 F. Supp. 777 (D. Md., Adm. 1957) at 781, a good discussion of historical reasons for opposing extension.

in this situation seem quite far removed from the hazards a seaman would encounter on the high seas. There he could be forced to work despite adverse weather, equipment, etc. It was the original interest of Congress to protect him because of this fact. The plaintiff here had the choice of whether to work or not on any given day. If he didn't want to be exposed to the hazards of certain equipment or functions he could quit, an opportunity not afforded to seamen while at sea. To many, this may not appear to be much of a choice, but still it is an opportunity which is not generally afforded a seaman at sea. Lacking such an opportunity a seaman (nautical type) needs and should be provided the extra coverage of the seaworthiness doctrine. A seaman should be given the assurance that when he signs onto a ship the equipment is in good order so that afterwards when he is without choice, he will be protected. Even imposing an absolute duty on shipowners appears justified, for if a piece of equipment breaks on the high sea and the crew are forced to live with it for the rest of the voyage it could quite possibly endanger the lives of those aboard more than a similar mishap on shore. This enhancement of the danger to human life justifies the added liability on the shipowner, if for no other purpose than to motivate him to provide seaworthy equipment.

The aforementioned protectable interest does not appear to exist in this case. In fact it appears that the unseaworthiness of which the plaintiff was complaining (lack of nets aboard) was brought about through his own neglect. He was the foreman of a work crew and one of his duties was to report any defects in equipment. The rationale of Congress' imposing an absolute duty on a shipowner to have a vessel in seaworthy condition when fitted for a voyage is commendable. To attach this same duty to one who has a barge tied to a dock seems stringent and out of line with the legislative intent. This in effect imposes a higher duty of care on the defendant involved solely because a piece of his equipment floats.

In regard to the requirement that to be entitled to coverage you have to be a member of the crew,[28] the plaintiff here neither slept nor ate aboard, wasn't subject to maritime discipline, and wasn't aboard primarily to aid in navigation. He was a carpenter, not a seaman by trade and was not engaged in repair work upon the vessel itself, which activity is now held by the U.S. Supreme Court to constitute work traditionally done by seamen.[29] In fact, the actual navigation here was negligible in that the vessel never left the dock nor was it intended to. All of these factors indicate that it requires considerable stretching of the original and still existent concept of a seaman or member of the crew to include this plaintiff.

This Court and others appear by means of various subterfuges to be circumventing the intent of Congress and affording employees the right to sue at law where the Longshoremen's and Harbor Workers' Compensation Act

28. Supra note 11.
29. Pope & Talbot, Inc. v. Hawn, supra note 15.

would seem to be the appropriate remedy. The latter remedy, being exclusive where appropriate, would limit them to compensation payments.[30] In fact it has been said,

> "Longshoremen and harbor workers have already been given a greater variety of rights and choice of remedies than any other group of workers on land or sea. They have (1) the right to compensation from their employer under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., (2) the right to sue a shipowner for unseaworthiness, and (3) the right to sue a shipowner for negligence, (4) the right to recover from a shipowner for an injury resulting from unseaworthy equipment provided by their own employer."[31]

Thus, plaintiffs like the one in the present case can elect to sue at law for a lump sum settlement,[32] taking advantage of the maritime doctrine of comparative negligence[33] and/or the absolute duty of seaworthiness imposed by the Jones Act and general maritime law,[34] or they can collect compensation. A double recovery is, of course, not permitted.[35]

The fact that these workers are given protections and remedies not afforded by a literal interpretation of the statutes does not *per se* constitute an evil. Moreover, it is true that the courts by adopting the argument that a shipowner should not be allowed to avoid his responsibilities by hiring others to perform duties usually done by seamen, appear to be staying within their assigned realm. However, when the courts, as has been done in the instant case, extend the duties which were traditionally performed by seamen to include functions like repairing a dock, they are in effect so extending the coverage under the act as to constitute, in this writer's opinion, an invasion of the legislature's domain. This, coupled with the factor that the workers involved in this area have an existing and adequate remedy under the Longshoremen's and Harbor Workers' Compensation Act, would seem to negate any compelling sociological motive or other apparent rational basis for justifying this invasion.

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30. 44 Stat. 1426 (1927), 33 U.S.C. § 905 (1958).
31. Blankenship v. Ellerman's Wilson Line, New York, 159 F. Supp. 479 at 483 (D. Md. 1958).
32. Supra note 1.
33. Grimberg v. Admiral Oriental S.S. Line, 300 F. 619 (D. Wash. 1924); In re Edwards, 148 F. Supp. 285 (D. La. 1957); Wood Towing Corp. v. West, 181 Va. 151, 23 S.E.2d 789 (1943); Boles v. Munson S.S. Line, Inc., 235 App. Div. 175, 256 N.Y. Supp. 709 (2d Dep't 1932), these cases also point out that contributory negligence is not a bar to a recovery based on unseaworthiness.
34. Sawyer v. California Tanker Co., 147 F. Supp. 324 (D.N.J. 1957).
35. Southern Pac. Co. v. Locke, 1 F. Supp. 992 (S.D.N.Y. 1932).