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The Twilight Zone—A New Theory of Compensation for Maritime Workers

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EMIL BITAR

Since publication of the last issue of the Washington Law Review containing notice of the death, in action, of Captain Emil Bitar, a posthumous award of the Distinguished Service Cross, the second highest of the War Department decorations, has been made to him. In the language of the Army regulations, this decoration is conferred only upon a person who, while participating in military operations against an armed enemy, performs "an act or acts of heroism so notable and involving a risk of life so extraordinary as to set him apart from his comrades."

The citation read, in part: "Captain Bitar's leadership and bravery under intense enemy fire while seriously wounded were an inspiration to the men in his command, and reflect the finest tradition of the military service."

COMMENT

THE TWILIGHT ZONE—A NEW THEORY OF COMPENSATION FOR MARITIME WORKERS

Petitioner's husband, a structural steel worker, was drowned in the Snohomish river while employed by an engineering company engaged in dismantling a drawbridge which spanned the river. The company was a contributor to the Workmen's Compensation Fund of the State of Washington.[1] A part of the task was to cut steel from the bridge and move it about 250 feet away for storage. The steel when cut from the bridge was lowered to a barge by derrick, and when loaded, the barge was to be towed by a tug, hauled by cable, or, if the current made it necessary, both towed and hauled to the storage point. Deceased had helped to cut some steel from the bridge and, at the time the accident, was working on a barge which was fastened to the bridge and which had not yet been completely loaded for its first carriage of steel to the place of storage. His duty appears to have been to examine the steel after it was lowered to the barge and, when necessary, to cut the pieces to proper lengths. From this barge he fell or was knocked into the stream in which his body was found. Can the Washington State Compensation Fund be applied to this type of work?

HELD: Petitioner may validly bring her case before the Washington Department of Labor and Industries. Although deceased was killed in navigable waters of the United States, the facts of this case bring it within the twilight zone in which either the state or the federal compensation acts might validly apply. Such being the facts, the court will presume the jurisdictional power of either the state or the federal acts and will uphold the employee's choice of jurisdiction unless the commission is clearly without power to act.[2]

The *Davis* case represents the latest attempt of the United States Supreme Court to distinguish and limit in the field of workmen's compensation laws the rule laid down in *Southern Pacific Co. v. Jensen,* denying the application of state acts to maritime workers.[3] Speaking for the majority of the court in the *Jensen* case, Mr. Justice McReynolds said that a state workmen's compensation act could not be applied to a stevedore killed on board a ship on navigable water for it would ". . . destroy the uniformity and harmony in respect to maritime matters which the Constitution was designed to establish." The final outcome of such a rule was to necessitate the federal Longshoremen's and Harborworkers' Act with the limitation that it should be applicable only if recovery ". . . through workmen's compensation proceedings may not validly be provided by state law."[4] It is this qualification which raises the problem, for although the federal act protects harbor

[1] REM. REV. STAT. § 7674 (1932).

[2] Davis v. Dept. of Labor and Industries of the State of Washington, 317 U. S. 249, 63 Sup. Ct. 225, 87 L. ed. 175, Oct. term, 1942, *rehearing denied,* Jan. 11, 1943, 317 U. S. 763, 63 Sup. Ct. 438, 87 L. ed. 405.

[3] 244 U. S. 205, 61 L. ed. 1086, 37 Sup. Ct. 524, L. R. A. 1918C 451, Ann. Cas. 1917E 900 (1916).

[4] Act of 1927, 44 STAT. AT L. 1424, 33 U. S. C. A. §§ 901-950.

workers whose jobs are clearly within the cognizance of admiralty, it expressly leaves open the jurisdictional question as to men in a factual situation similar to the *Davis* case. The majority opinion by Mr. Justice Black seemingly represents an attempt to avoid the embarrassments resulting from the rule of the *Jensen* case without overruling it. The case in effect holds that when the facts are such that either the federal or the state compensation acts might have jurisdiction, then the court will give ". . . presumptive weight to the conclusions of the appropriate federal authorities and to the state statutes themselves."

The *Jensen* decision with its denial of the benefits of state compensation acts to maritime workers, except in those instances where the matter is one of local concern only, has almost defeated ". . . the purpose of the federal act, which seeks to give 'to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation,' and the state acts such as the one before us which aims at 'sure and certain relief for workmen.' "[5] Congress, accepting the statement in the *Jensen* case that it ". . . has paramount power to fix and determine the maritime law which should prevail throughout the country . . .," attempted twice to afford maritime workers relief under the several state compensation acts by amendments to the Judiciary Act of 1789.[6] Each attempt was found unconstitutional by the Supreme Court, however, on the ground that it would disrupt the necessary uniformity in the field of admiralty.[7]

In view of the fact that the Supreme Court has insisted so tenaciously that the essential uniformity in this field would be marred by giving effect to a state compensation act, it is interesting to note the willingness of the same court to give effect to state laws affecting wrongful death, pilotage, and maritime liens for repairs and supplies in the home port. In all these situations, state statutes were allowed to modify the general maritime law.[8] The wrongful death cases before the 1920 Federal Death Act[9] show an especially broad application of state legislation to admiralty jurisdiction, and, in fact, it is through the application of the state acts in this field that Mr. Justice McReynolds himself evolved one of the most important and perplexing limitations on the rule of the *Jensen* case, the "local concern doctrine."

Because this doctrine has continually played such an important role in determining the questions in this field it might be of help to note a few cases which have had a vital part in developing the rule. Its first

[5] Davis case, *supra*, n. 2.

[6] Acts of 1917, 40 STAT. AT L. 395, chap. 97, and of 1922, 42 STAT. AT L. 634, chap. 216, 28 U. S. C. A. § 41(3), amending the savings clause of § 9 of the Judiciary Act of 1789, 28 U. S. C. A. § 41 (3).

[7] Knickerbocker Ice. Co. v. Stewart, 253 U. S. 149, 64 L. ed. 834, 40 Sup. Ct. 438, 11 A. L. R. 1145 (1920), and State of Washington v. Dawson & Co., 264 U. S. 219, 68 L. ed. 646, 44 Sup. Ct. 302 (1924). The Washington Court had also found the act unconstitutional, State of Washington v. Dawson & Co., 122 Wash. 572, 211 Pac. 724, 212 Pac. 1059, 31 A. L. R. 512 (1922).

[8] For wrongful death see: The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. ed. 264 (1907); Pilotage: Cooley v. Board of Port Wardens, 12 How. 299, 53 U. S. 299, 13 L. ed. 996 (1851); Maritime liens in the home port; The Lottawanna, 21 Wall. 558, 88 U. S. 558, 22 L. ed. 654 (1874).

[9] Act of 1920, 41 STAT. AT L. 537, 46 U. S. C. A. § 537.

application appeared in a case rising four years after the *Jensen* case.[10] A stevedore was killed while working in the hold of a ship on the navigable waters of San Francisco harbor. Here was a workman in much the same position as Jensen. The court recognized the factual situation but escaped from the reasoning of its decision in the *Jensen* case by calling the subject matter "maritime and local." This means, said Justice McReynolds, that ". . . the subject is maritime and local in character . . . and the supplement [of a state workmen's compensation act] to the rule applied in Admiralty courts . . . will not work material prejudice to the characteristic features of the general maritime law." In comparing the close factual situations of the two cases, the *Garcia* case seems irreconcilable with the *Jensen* decision, but it may be explained as an attempt by the court to comply with the long established and beneficial policy of allowing state death acts to supplement the general admiralty law. At any event, the local concern doctrine became an effective way for the court to extend state workmen's compensation acts into the field of admiralty.

The first application of this theory to state compensation acts came one year after the *Garcia* case. A workman was injured on a launched but uncompleted and uncommissioned ship standing at a finishing dock on a navigable Oregon river.[11] Following the ancient admiralty rule that a contract to construct a vessel is a non-maritime contract, the court held the Oregon compensation act was applicable for the work was merely local in character and therefore it could be controlled by a local rule.[12] A few years later, the court extended the local concern doctrine much farther to hold that a diver engaged in cutting away old pilings obstructing navigation was covered by the Texas compensation act.[13] In this case the court had before it an occupation which placed the deceased directly on navigable waters for the purpose of aiding navigation. Still it applied the local concern doctrine. Other situations to which the court has extended the rule have been the accidental shooting of a lumber checker on a barge and an injury occurring to a cannery helper while he was pushing a boat from shore.[14]

In his hornbook on admiralty, Mr. Robinson concludes from these, and the Washington cases which follow below, that the test of the local concern doctrine is not the locality of the man's injury, or of his work, but the character of the occupation.[15] If the work is clearly in the furtherance of maritime commerce and navigation the state acts

[10] Western Fuel Co. v. Garcia, 257 U. S. 233, 42 Sup. Ct. 89, 66 L. ed. 210 (1921), a case arising before the Federal Death Act of 1920.

[11] Grant Smith-Porter Co. v. Rohde, 257 U. S. 469, 42 Sup. Ct. 157, 66 L. ed. 321, 25 A. L. R. 1008 (1922).

[12] People's Ferry Co. v. Beers, 20 How. 393, 15 L. ed. 961 (1857); Iroquois Transportation Co. v. DeLacey Forge & Iron Co., 205 U. S. 354, 27 Sup. Ct. 509, 51 L. ed. 836 (1907).

[13] Millers Indemnity Co. v. Braud, 270 U. S. 59, 46 Sup. Ct. 194, 70 L. ed. 470 (1926).

[14] Rosengrant v. Harvard, 273 U. S. 664, 47 Sup. Ct. 454, 71 L. ed. 829 (1927); Alaska Packers Association v. Industrial Accident Commission, 276 U. S. 467, 48 Sup. Ct. 346, 72 L. ed. 656 (1928); see also for a summary of the United States Supreme Court cases: La Casse v. Great Lakes Engineering Works, 242 Mich. 454, 219 N. W. 730 (1928), noted, 27 MICH. LAW REV. 191 (1928).

[15] Robinson, ADMIRALTY (1939), pp. 101-109, 121-123.

cannot apply, but if the work is principally local in nature and only incidentally related to admiralty then the state acts may apply.

Several Washington cases are cited by the author as examples of his conclusions on the local concern doctrine. The first came soon after the *Jensen* case was decided and involved men working on a dredging barge on Puget Sound. The Washington court found the workmen to be outside the jurisdiction of the state compensation act.[16] This decision was reaffirmed in a fairly recent case involving the same employer and a similar state of facts. The court held that twenty-six years of state and federal litigation on the subject had not changed the rule that the local concern doctrine failed to apply to this set of facts.[17]

The theory has been applied by the Washington court, however, to men rafting logs on navigable waters preparatory to towing them, and to workmen in the opposite end of the operation—those handling the logs after the towing and breaking up of the raft.[18] In both of these instances, the United States Supreme Court upheld the Washington court.[19] One other factual situation has been found by the court to be within the local concern doctrine, that is, driving piles for fish nets on Puget Sound.[20] The test used by the Washington court in determining whether workmen come under the state or federal jurisdiction is well summed up in the second *Puget Sound Bridge and Dredging Co.* case in which it is said that the deciding factor is the place where the injury occurs with the qualification that even if the employee is hurt while engaged in work on a navigable water, the state compensation act will apply if the enterprise is purely local in nature and not concerned with general maritime commerce or navigation. Although the court stresses locality in its test, the nature of the man's work is also of the utmost importance for the court recognizes the local concern theory and says that admiralty will not have jurisdiction if the facts are such that the doctrine may be applied.

Inasmuch as the character of the work is the distinguishing feature of these cases, it would seem safe to assume that a workman on board a ship aiding in the loading and discharging of cargo is within admiralty jurisdiction. And so the United States Supreme Court has continuously held.[21] Following the same reasoning, the Washington court recently decided that a workman whose duties took him on board a vessel on Puget Sound to assist a steam shovel in discharging gravel was outside

[16] Puget Sound Bridge and Dredging Co. v. State Industrial Insurance Commission, 105 Wash. 272, 177 Pac. 788 (1919).

[17] Puget Sound Bridge and Dredging Co. v. Department of Labor and Industries, 185 Wash. 349, 54 P. (2d) 1003 (1936).

[18] Eclipse Mill Co. v. Department of Labor and Industries, 141 Wash. 172, 251 Pac. 130 (1926); Sulton Ry. and Timber Co. v. Department of Labor and Industries, 277 U. S. 135, 48 Sup. Ct. 505, 72 L. Ed. 825 (1928).

[19] Sultan Ry. & Timber Co. case, *supra*, n. 18.

[20] Dewey Fish Co. v. Department of Labor and Industries, 181 Wash. 95, 41 P. (2d) 1099 (1935), noted, 10 WASH. LAW REV. 165 (1935).

[21] Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 58 L. ed. 1208, 34 Sup. Ct. 733 (1914); Southern Pacific Co. v. Jensen, *supra*, n. 3; Nogueira v. New York, N. H. & H. R. Co., 281 U. S. 128, 74 L. ed. 754, 50 Sup. Ct. 303 (1930); Employer's Liability Assurance Corp. v. Cook, 281 U. S. 233, 74 L. ed. 823, 50 Sup. Ct. 308 (1930).

the state jurisdiction for injuries sustained in this work.[22] It seems logical, therefore, that the Washington court decided the *Davis* case on the same ground, holding that the workman was acting in the capacity of a stevedore in assisting in the loading of steel on a barge on a navigable river.[23] The court relied heavily on the *Comar* case,[24] and *Employer's Liability Assurance Corp. v. Cook*,[25] in which the United States Supreme Court overruled the Circuit Court of Appeals and held that a workman even though only occasionally employed as a stevedore on board ship was still within admiralty jurisdiction.

From a purely theoretical standpoint, the Washington court may have been correct in its decision. But when the case reached the highest court in the land, that court decided to "bring some order out of the judicial chaos" and provide a surer remedy for these workmen. The stumbling block to be removed was the rule of the *Jensen* case but the majority of the court refused to follow the Chief Justice and directly overrule their former decision. Instead, the majority, speaking through Mr. Justice Black, chose the "twilight zone" approach and decided that the *Davis* case and others similar to it, coming somewhere in an indistinct zone between state and federal jurisdiction, should be determined on the facts and circumstances of each case. If the case is decided by the federal authorities, their jurisdiction will be presumed unless substantial facts to the contrary are shown.[26] If the state commission determines the case, full weight will be given to the presumption of the constitutionality of the state statute.[27]

The theoretical illogic of the majority decision is pointed out in both the concurring opinion of Mr. Justice Frankfurter and in the dissent by Chief Justice Stone. Mr. Justice Frankfurter concurred on the theory that the *Jensen* case could not be overruled since both the state and federal acts are based on its rule that state acts may apply in every case except where admiralty has jurisdiction.[28] It is his conclusion, therefore, that the majority decision is the only means to a desirable end until Congress sees fit to attempt a comprehensive solution to the whole problem. The Chief Justice, however, believes that either the *Jensen* case should be specifically overruled, as was long contended by Justices Holmes and Brandeis, or the rules which the case and decisions following it laid down should be maintained. He

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[22] Comar v. Department of Labor and Industries, 187 Wash. 99, 59 P. (2d) 1113 (1936).

[23] Davis v. Department of Labor and Industries, 12 Wn. (2d) 349, 121 P. (2d) 365 (1942).

[24] *Supra*, n. 22.

[25] *Id.*, n. 21.

[26] See, Parker v. Motor Boat Sales, 314 U. S. 244, 86 L. ed. 184, 62 Sup. Ct. 221 (1941), and 33 U. S. C. A. § 920, which provides that in proceedings under the act, jurisdiction is to be ". . . presumed in the absence of substantial evidence to the contrary."

[27] See, South Carolina Highway Dept. v. Barnwell Bros., 303 U. S. 177, 82 L. ed. 734, 58 Sup. Ct. 510 (1937).

[28] See § 3 of the Longshoremen's and Harborworkers' Act, 1927, chap. 509, § 3, 44 STAT. AT L. 1426, 33 U. S. C. A. § 903, which authorizes payment of compensation "only . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law," and REM. REV. STAT. § 7693a, which covers maritime employees ". . . for whom no right or obligation exists under the maritime laws."

cites *Parker v. Motor Boat Sales*[29] in which the court clearly states that the rule of the *Jensen* case is the measuring stick for determining the applicability of the federal compensation act and he points out that the facts of the *Davis* case would clearly bring it under the federal jurisdiction.

Although a fair solution may have been reached in the *Davis* case, the majority decision still leaves several important problems yet to be solved. The result of the case seems to be a definite aid to the employee in that the presumptions are all in favor of the jurisdiction which accepts his case. But the employer is placed in the unenviable position of being responsible under either act and perhaps liable under both. As a practical solution, he must either take the risk of subscribing to one fund and hoping he is correct, or use the certain but costly method of contributing to both funds. In the principal case, however, the majority opinion emphasized the position of the employer as one of the reasons for their decision and pointed out that if the case were affirmed the employer would not only lose the benefit of the state insurance to which he has been compelled to contribute, but he would be liable under the federal act for additional payments and a possible fine for not having secured payment for the employee under the act.[30] Thus the court implies that it will keep the position of the employer in mind in determining the particular facts and circumstances of each case. Another possible difficulty is pointed out by the Chief Justice in that the court may find itself in an embarrassing position if both the federal and state commissions were to deny jurisdiction and the court was compelled to presume that both were correct.[31] It is submitted that until the Congress or the court can adopt a more definite standard to follow in these cases such a nebulous rule as the twilight zone will be of little help in ending the existing confusion.

FRANK C. LATCHAM.

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[29] *Supra*, n. 26.

[30] REM. REV. STATS. §§ 7674, 7676, and 30 U. S. C. A. §§ 932, 938.

[31] See 41 MICH. LAW REV. 1190-3 (1943), for a comment on the *Davis* case.