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COMMENTS

SEAMAN WITHIN THE JONES ACT

Introduction

A significant change in the law of admiralty was effected by the Jones Act of 1920.[1] It was the purpose of that act to provide greater protection to seamen injured in the course of their employment.[2] This article shall consider who is a seaman within the meaning of the act and when is he considered to be in the course of his employment.

Background of the Jones Act

The protection given to a seaman under the traditional admiralty law was summarized by the Supreme Court in a famous admiralty case, *The Osceola.*[3] The court stated the basic law governing the injured seaman in these four rules; 1) If the seaman becomes sick or is injured in the service of the ship, the owners of the ship are liable for his "maintenance and cure" and for his wages until the end of the voyage; 2) If the seaman is injured because of the unseaworthiness of the vessel or its fixtures, the owners will be liable to indemnify; 3) All the members of the crew are fellow-servants so that any injury caused by the negligence of another crew member was not the liability of the owner; 4) The seaman may not recover because of the negligence of the master or member of the crew, but may only recover maintenance and cure in such cases. The rights of the seaman if he fell ill or was injured were basically an implied condition of his employment, and his right to medical care and wages was in no way dependent on negligence.[4] In 1915 Congress attempted to broaden the injured seaman's recovery in the "Act to Promote the Welfare of American Seamen."[5] This statute removed the fellow-servant rule between officers and those under their command. In the first case arising under that act the Supreme Court rendered the act ineffectual.[6] The court held that a shipowner's liability was not based on negligence. He was liable for maintenance and cure whether he was negligent or not. The statutory removal of the defense of fellow-servant was thus held to be irrelevant. Since it made no difference whether the ship owner was negligent or not, the fellow-servant rule was a meaninglss obstacle for the act to remove. The law was thus unchanged.

The Jones Act

The Merchant Marine Act of 1920[7] amended the act of 1915 and

[1] 41 Stat. 1007 (1920), 46 U.S.C. §688 (1952).
[2] Willock, *Commentary on Maritime Workers,* 46 U.S.C.A. 240 (1944).
[3] 189 U.S. 158 (1903).
[4] The Montezuma, 19 F. 2d 355 (2nd Cir. 1927).
[5] 38 Stat. 1185 (1915), (later amended by 41 Stat. 1007 (1920), 46 U.S.C. §688 (1952).
[6] Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1917).
[7] See note 1 *supra.*

effectively opened the door to recovery for seaman injured through the negligence of the master or fellow crew-members. The amendment became known as the Jones Act and provided as follows:[8]

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The act, in conjunction with the Federal Employer's Liability Act[9] which it incorporates, gives the seaman injured in the course of his employment, an action at law with the right of a jury trial to recover damages. It is an action based on negligence, not on any contract right. The defenses of fellow-servant, assumption of risk and contributory negligence as a complete bar are removed.[10] The Jones Act is not in substitution but in addition to the traditional rights of maintenance and cure.

WHO IS A SEAMAN?

The word "seaman" has not had a constant meaning in the law. Court interpretations of the simple word frequently change the content and scope of the word. A further change has resulted from the impact of statutes. Prior to the Jones Act the accepted definition was that stated in the early case of the *Bound Brook*;[11]

> ". . . Those peresons are naturally and primarily meant who are on board her aiding her navigation."

In the case of the *Buena Ventura,*[12] the court held a wireless operator to be a seaman entitled to maintenance and cure under the following definition;

> ". . . [A] man who serves the ship as the result of a contractual engagement of any kind, and serves her in her navigation, is a member of the crew and entitled to the privileges of a seaman."[13]

The court recognized a broad range included in serving in navigation

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[8] Id.
[9] 35 Stat. 65 (1939), 45 U.S.C. §§51-59.
[10] Willock, *op. cit. supra* note 2, at 242.
[11] 146 Fed. 160, 164 (Mass. 1906).
[12] 243 Fed. 797 (Mass. 1916).
[13] Id at 800.

and cites examples of cooks, surgeons, bartenders and a cooper.[14] However, these were all pre-Jones act actions for maintenance and cure. After the Jones Act the concept of "seaman" was broadened. In the case of *Haverty v. International Stevedoring Co.*,[15] the court held a stevedore was a seaman under the theory that the stevedore was engaged in maritime work formerly rendered by the ship's crew. The door seemingly opened to longshoremen, stevedores and harbor workers was closed shortly thereafter by the Longshoremen's and Harbor Worker's Compensation Act.[16] This act is based on industrial insurance and covers those who are injured on navigable waters, including drydocks, but expressly excluding the master and members of the crew of any vessel. In this manner the Jones Act coverage was limited only to those who were either a master or a member of a crew. But was a seaman the same as a member of the crew? The case of *South Chicago Coal & Dock Co. v. Bassett*[17] held that a coal loader was not a member of the crew, and therefore not excluded from the protection of the Longshoremen's Act. However, the court held he was nevertheless a seaman within the meaning of the *Haverty* case.[18] The court overlapped the coverage of the Jones Act and the Longshoremen's Act. The unlikely result of double compensation has been precluded by subsequent case clarification. The broad meaning of seaman in the Haverty case has been held to be limited by the Longshoremen's Act. It is now clear that the Jones Act and the Longshoremen's Act are mutually exclusive in their coverage. In the recent case of *Weiss v. Central R.R. Co. of N.J.* the court stated;[19]

> "If an employee is a seaman . . . he is by the same token a master or member of the crew within the meaning of the Longshoremen's Act . . . and is excluded from the coverage of that act."

The words of exclusion in the Longshoremen's Act became a necessary inclusion in the definition of a seaman under the Jones Act. Many cases weighed the particular facts in determining whether one was a seaman under the Jones Act or a harbor worker under the Longshoremen's Act. Typical of these cases is *De Wald v. Baltimore & Ohio R.R. Co.*,[20] where the court held that a barge man was not a member of the crew and that he was not therefore excluded from the Long-

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[14] Bean v. Stupart, 1 Doug. 11, 99 Eng. Rep. 9 (K.B. 1778) (cook and surgeon); Allen v. Hallet, 1 Fed. Cas. 472 No. 223 (S.D.N.Y. 1849) (cook); Disbrow v. Walsh Bros., 36 F. 607 (S.D.N.Y. 1888) (barge employee); U.S. v. Thompson, 28 Fed. Cas. 102 No. 16492 (C.C.D. Mass. 1832) (cooper); The J. S. Warden, 175 F. 314 (S.D.N.Y. 1910) (bartender).

[15] 134 Wash. 235, 238 P. 581 (1925).

[16] 44 Stat. 1424 (1927), 33 U.S.C. §901 (1952).

[17] 309 U.S. 251 (1939).

[18] See note 14 *supra.*

[19] 235 F. 2d 309, 311 (2nd Cir. 1956).

[20] 71 F. 2nd 810 (4th Cir. 1934), *cert. denied,* 293 U.S. 581 (1934).

shoremens' Act. In making its decision the court considered the following factors: his chief work was in connection with loading cargo on the barge; the fastening of tow and tie-up lines was only incidental; he did not live on the barge; barges are not navigated under their own power; the "crew" exclusion of the Longshoremen's Act was directed at seafaring men; he was the only man on the barge, whereas "crew" is a collective noun signifying a company of men. On these considerations, the court based its holding that he was more than harbor worker type and therefore not a member of the crew or seaman.[21] The test applied in determining whether one was a seaman or crew member was the "primary duty" test. It was stated in the case of *Moore Dry Dock Co. v. Pillsbury*:[22]

> "A stevedore or longshoreman has no contract with the ship. He has not bound himself to its service. He does not serve as a member of its crew, but performs for an independent contractor a duty that formerly was done by the crew, not upon the high sea but at the ship's destination minus the perils of the voyage."

It is more directly stated in the case of *Merritt-Chapman & Scott Corp. v .Willard.*[23] In that case the claimant was a deckhand on a barge. He had duties placing slings on the cargo, cleaning, painting and handling lines. At page 792, the court, in holding he was not a member of the crew, stated:

> "[The claimant's] primary duties had to do with cargo and were such as are ordinarily performed by harbor workers. The Bassett case . . . apparently makes primary duties the test."

The test of primary duty was often difficult to apply. In the case of *Norton v. Warner Co.*,[24] the claimant was a bargeman. The barge had no motive power of its own. His duties were general and included loading of the barge, handling the tow lines and fastening the tie-up lines, minor repairs and responding to tug whistles and signal lights. The court held the bargeman to be a member of the crew.[25]

> "But navigation is not limited to putting over the helm. It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can hand reef and steer. . . ."

But in the case of *Wm. Spencer & Son Corp. v. Lowe*,[26] the court held that a bargeman who had duties in checking the cargo, handling the

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[21] In the later case of *Diomede v. Lowe*, 87 F. 2d 296 (2nd Cir. 1937), *cert. denied*, 301 U.S. 682 (1937), the court rejected the theory that a man with similar duties as De Wald's, being the only man, could be considered a "master".
[22] 100 F. 2d 245, 247 (9th Cir. 1938).
[23] 189 F. 2d 791 (Cir. 1951).
[24] 321 U.S. 565 (1943).
[25] Id. at 572.
[26] 125 F. 2d 847 (2nd Cir. 1945).

lines and in making minor repairs was not a member of the crew. The facts in this case and in the *Norton* case are as startlingly similar as the decisions are opposite. But the *Norton* case is distinguished by the court in *Spencer* in that Norton had greater duties in connection with navigation. He responded to tug whistles and hung out navigation lights. It appears that the "primary duty" test was no test at all, but depended on the court's vague ideas of what a seaman's duties were. The "primary duty" test was rejected in the case of *Wilkes v. Mississippi River Sand and Gravel Co.*,[27] and it appears to be replaced by the new tests announced there. Wilkes was employed on a barge dredging the Mississippi River. His duties on the barge consisted in shoveling dirt dredged from the river bottom so that there would be an even distribution of the load, thereby preventing listing of the barge. Wilkes drowned. His widow brought suit under the Jones Act. The district court held that Wilkes was not a seaman because his duties were not primarily in aid of navigation, but were those of a laborer. It was a decision aparently consistent with the prior cases. But the circuit court rejected this approach.

> "We think that this [primary duty] was not the test to be applied in determining the status of the decedent in an action brought under the Jones Act. It would seem that the several tests under the Jones Act should be . . .
> 1) that the vessel be in navigation;
> 2) that there be a more or less permanent connection with the vessel; and
> 3) that the worker be aboard primarily to aid in navigation."[28]

The court held that under this aproach Wilkes was a seaman.

Vessel in Navigation

The requirements of the new tests had to take shape and meaning from the court's interpretations. The first requirement, that the ship be in navigation, does not mean that a vessel must actually be moving in the water.[29]

> "Plying in navigable waters does not mean that the vessel must, at the very moment of the injury, have been actually in motion on navigable waters."[30]

It appears that the employment must be in connection with a vessel which either is moving on the water, or is docked for some purpose

[27] 202 F. 2d 283 (6th Cir. 1953).
[28] Id. at 387, 388.
[29] The Jones Act applies to all the navigable waters of the United States, which includes the high seas, the coastal waters, sounds and bays, the Great Lakes and the inland rivers and lakes. If these waters are in fact navigable or capable of transporting commerce they are navigable. Escanaba Co. v. Chicago, 107 U.S. 678, at 682 (1882). Gilmore and Black, Admiralty, 28, 29 (1957); Benedict, Admiralty, 104 (6th ed. 1940).
[30] McKie v. Diamond Marine Co., 204 F. 2d 132, 134 (5th Cir. 1953).

directly connected with navigation, such as the taking on of cargo or supplies or undergoing repairs. A consideration of several cases will point up the difficulties that may factually arise under this requirement. In *Carumbo v. Cape Cod S.S. Co.*,[31] the claimant was an oiler on an excursion boat. The season was over but a skeleton crew was maintained because negotiations were in progress with the government to take over the vessel. The claimant was injured in helping to dismantle and repair the engines. The court held he was a seaman entitled to recover under the Jones Act, stating that he could not recover if the court did not consider the ship to be in navigation. But in the case of *Desper v. Starved Rock Ferry Co.*,[32] no recovery was allowed. Desper was cleaning and painting life preservers for use on excursion boats which he would operate, as he had in previous years, as soon as the season opened. The accident happened on a moored barge that served as a ticket-office, workroom and warehouse. The court stated:

> "The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death. . . . [The Jones Act] doesn't apply to expectant seamen."[33]

In the case of *Frankel v. Bethlehem-Fairfield*,[34] the claimant was injured while installing dynamos in the engine room of a vessel that was launched but still incomplete. The court in denying recovery under the Jones Act stated:

> "Furthermore, an incompleted vessel has yet to take her place in commerce and navigation; whereas a vessel which has been commissioned and taken into navigation and commerce remains in that status even when coming into dock and undergoing repairs."[35]

When a vessel is laid up for the winter or indefinitely withdrawn from operation it is clearly no longer in navigation.[36]

Permanent Connection With the Vessel

Substantial and permanent connection of the seaman to the vessel was often a difficult question of fact. The following facts were strong and determining evidence that no permanent connection existed: the person did not sleep on board, but slept dockside or at home; he did not eat his meals on board, or he was furnished none by the galley; he was paid an hourly rate rather than an amount per voyage; he worked an eight hour day; he worked on more than one vessel. On the basis of these considerations they decided that one was not a seaman because

[31] 123 F. 2d 991 (1st Cir. 1941).
[32] 342 U.S. 187 (1951).
[33] Id. at 191.
[34] 132 F. 2d 634 (4th Cir. 1942), *cert. denied*, 319 U.S. 746 (1942).
[35] Id. at 635; see also U.S. Casualty Co. v. Taylor, 290 U.S. 639 (1933).
[36] Seneca Washed Gravel Corp. v. McManigal, 65 F. 2d 779 (2nd Cir. 1933); Antus v. Interocean S.S. Co., 108 F. 2d 185 (6th Cir. 1939).

his connection with the vessel was not permanent and he had not, therefore, subjected himself to the perils of a seaman.[37] But these factors will no longer constitute a bar.

> "The facts that plaintiff-libellant did not live aboard the dredge, ate his morning and evening meals at home, signed no ship's articles, worked an eight hour day, received overtime pay and was not required to and did not have seaman's papers do not conclusively bar him from status as a member of the crew."[38]

The recent case of *Weiss v. Central R.R. Co. of N.J.*[39] is a clear example of how tenuous a connection will satisfy this second requirement. In that case the claimant worked for a ferry boat line that operated between New York and New Jersey. He worked for the company for less than a month on an "extra-man" basis subject to call. He worked a total of seven days on three different boats. The majority of the time he worked on the dock as a doorman and ticket-taker. The court nevertheless found he was a seaman. The court concluded that merely because the trips are short and he sleeps ashore and "his lot is more pleasant than that of his brethren"[40] is no reason to deny him the status of a seaman. It appears that the requirement of a "more or less permanent connection" may be less in the extreme.

Aid in Navigation

The requirement that the employee be aboard primarily to aid in navigation appears to be a restatement of the "primary duty" test. But the approach and the results of the two tests are entirely different. The major consideration of the "primary duty" test was: is the activity such as is usually and properly performed by harbor workers or by seamen? The courts looked for a maritime flavor. The question in the third requirement is whether the activity in any way furthers the interest or enterprise of the vessel. The duties of a seaman may now include a wide range of activity as necessitated by the great variation in the types of vessels.[41] A bargeman acting as a watchman or handling lines and who would not qualify under the old "primary duty"[42] test as a seaman would qualify under the requirement "aiding in navigation."

> "[I]t is apparent that aiding in the navigation of a vessel means assisting in some way in the forwarding of its enterprise, whether it be carrying passengers or freight, or dredging, and that one who has a more or less permanent connection with the

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[37] De Wald v. Baltimore & Ohio R.R. Co., 71 F. 2d 810 (4th Cir. 1934); Moore Dry Dock v. Pillsbury, 100 F. 2d 245 (9th Cir. 1938); South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940); Merritt-Chapman & Scott Corp. v. Willard, 189 F. 2d 791 (2nd Cir. 1951).

[38] Early v. American Dredging Co., 101 F. Supp. 393 (E.D. Penn. 1950).

[39] See note 18 *supra*.

[40] Id. at 313.

[41] Norton v. Warner Co., 321 U.S. 565 (1943).

[42] Wm. Spencer & Son Corp. v. Lowe, 152 F. 2d 847 (2nd Cir. 1945).

> vessel may be a member of the crew whether he is a helmsman, bartender or dredge worker."[43]

An example of aiding in the navigation of a vessel in a "non-maritime" manner is the case of the sea going cook. The case of *A. L. Mechling Barge Line v. Bassett*[44] held that a cook was a member of the crew and aided in navigation just as the sailor, or the engineer or fireman. The nature of the work is not determinative so long as it contributes to the overall welfare of the vessel. It seems that one is a seaman aiding in navigation on the same considerations that one was a seaman for maintenance and cure under the old admiralty law.[45]

Course of Employment

For twenty years the courts had limited the application of the Jones Act to maritime torts, that is, to injuries that occured on navigable waters. The moment the seaman stepped on the dock he was no longer protected by the Act.

> "It [Jones Act] relates wholly to personal injuries, and it is fully settled that such injuries which are inflicted on shipboard are under the admiralty jurisdiction, but those occuring on land, though to maritime employees and at the ship's side, are under the law of the land."[46]

No regard was given to the fact that the seaman was in the service of the ship as in the maintenance and cure cases. Regardless of the purpose for which the seaman went ashore the Jones Act did not apply.[47] The Supreme Court in the case of *O'Donnell v. Great Lakes Dredge & Dock Co.*[48] completely changed the seemingly inflexible law on this point. In that case, O'Donnell, a member of the crew of a sand hauling vessel, was ordered to go ashore and assist in the repair of a pipe used in the unloading. He was injured while ashore. The court held that he could recover under the Jones Act, notwithstanding that he was injured ashore, because the jurisdiction of admiralty is not dependent on the place where the injury is inflicted, but on the nature of the service and its relationship to the operation of the vessel. The Jones Act "course of employment" is the same as the admiralty test of "service to the ship" used in maintenance and cure cases.[49]

When the seaman is aboard ship, the scope of his employment is very broad because of the nature of his employment.

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[43] See note 35 *supra*, at 395.
[44] 119 F. 2d 995 (Cir. 1941).
[45] See note 13 *supra*.
[46] Esteves v. Lykes Bros. S.S. Co., 74 F. 2d 364 (5th Cir. 1934).
[47] Soper v. Hammond Lumber Co., 4 F. 2d 872 (N.D. Cal. 1925); Jeffers v. Foundation Co., 85 F. 2d 24 (2d Cir. 1936); Seifort v. Keansburg Steamboat Co., 20 F. Supp. 542 (S.D.N.Y. 1937); Lindh v. Booth Fisheries, 2 F. Supp. 19 (W.D. Wash. 1932); Whalgren v. Standard Oil Co., N.J., 42 F. Supp. 992 (S.D.N.Y. 1941); Oliver v. Calmar S.S. Co., 33 F. Supp. 356 (E.D. Penn. 1940).
[48] 318 U.S. 36 (1942).
[49] Gilmore and Black, Admiralty, 284 (1957).

> "His employment requires him to spend his entire time on the vessel while it is at sea. His time is never wholly his own. On his hours off he is subject to call to duty in an emergency. Necesary incidents of life, therefore, such as sleeping, eating, washing, etc. are contemplated to be within the scope of employment."[50]

Course of employment aboard a ship has been held to include the accidental shooting of one crew member by another during their leisure hours on deck.[51]

The course of employment includes coming to and leaving the vessel. On the rationale of the O'Donnell case one is in the service of the ship when coming or going to the ship. In the case of *Marceau v. Great Lakes Transit Corp.*,[52] the ship's cook was returning to the vessel to prepare the night lunch when he slipped on the dock. The court stated:

> "Consequently at the time of the accident he was not only acting in the course of his employment but suffered his injuries while on the property in the possession and under the control of the defendant."[53]

In the case of *Monteiro v. Paco Tankers,*[54] the seaman was beaten by one of the ship's officers at the dock gate. The court held that the seaman was still in the course of his employment and would be until he was "on his own" on a public way. In *Wheeler v. West India S.S. Co.*,[55] the seaman was struck by a train on an unlighted viaduct leading to the ship's mooring. The court held that he was in the course of his employment returning to the ship. But the court found no negligence on the part of the master. It must be remembered that negligence is the essential element of every Jones Act suit.[56]

Course of employment also includes the seaman's shore leave. In *Nowery v. Smith,*[57] the court reached the amazing conclusion that a seaman beaten in a fight in a barroom at Antilla, Cuba, was injured in the course of employment. It appears that the court is giving very comprehensive coverage to every facet of the legendary life of the seaman.

> "[T]he seaman should also be considered in the shipowner's business while he is actually enjoying his shore leave. And if for the purpose of determining the ship owner's liability for main-

[50] Adams v. American President Lines Ltd., 23 Cal. 2d 681, 146 P. 2d 1 (1944).
[51] Sundberg v. Washington Fish & Oyster Co., 138 F. 2d 801 (9th Cir. 1943); see also McCall v. Inter Harbor Navigation Co., 154 Ore. 252, 59 P. 2d 697 (1936); Curtis Bay Towing Co. v. Dean, 174 Md. 498, 199 A. 521 (1938).
[52] 146 F. 2d 416 (2nd Cir. 1945).
[53] Id. at 418.
[54] 93 F. Supp. 93 (E.D. Penn. 1950).
[55] 103 F. Supp. 631 (S.D.N.Y. 1951).
[56] See Thompson v. Eargle, 182 F. 2d 717 (4th Cir. 1950); Wong Bar v. Suburban Petroleum Transport, Inc., 119 F. 2d 745 (2d Cir. 1941).
[57] 67 F. Supp. 755 (E.D. Penn. 1946). The court allowed recovery in this case. The shipowner's negligence was based on the fact that he hired one with the vicious propensities of the assailant.

> tenance and cure, the seaman is said to be on the shipowner's business while on shore leave, I can see no valid reason why for the purpose of determining the ship owner's liability under the Jones Act, the seaman should not be said to be in the course of his employment at the same time."[58]

The rationale for including shore leave in the course of employment appears in the case of *Aguilar v. Standard Oil Co. of N.J.*[59] That court said that shore leave is not entirely in the personal interests of the seaman, but is necessary for the morale, efficiency and discipline aboard ship.

CONCLUSION

The definition of a seaman under the Jones Act has been a very difficult concept to chart in the treacherous maze of case law. The new tests have simplified the requirements and are liberally inclusive. The course of employment of a seaman now includes almost every activity that has some bearing or effect in serving the ship.

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[58] Id. at 757.
[59] 318 U.S. 724 (1943).