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Admiralty- "Twilight Zone" In Workmen's Compensation - Pursuit of State Common Law Action Against Employer

James S. Leigh
University of Michigan Law School

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RECENT DECISIONS

ADMIRALTY—"TWILIGHT ZONE" IN WORKMEN'S COMPENSATION—PURSUIT OF STATE COMMON LAW ACTION AGAINST EMPLOYER—Petitioner was injured on his employer's barge moored in navigable waters while assisting in a loading operation. The employer was insured solely under the Federal Longshoremen's and Harbor Workers' Act.¹ Instead of pursuing the remedy available under the federal act, petitioner brought the common law action authorized by state workmen's compensation legislation in the state courts.² The Oregon Supreme Court affirmed judgment for the employer³ on the ground that the injury was covered exclusively by the federal act. On certiorari to the United States Supreme Court, *held*, reversed per curiam, two justices dissenting. The injury was incurred within the "twilight zone" in which the election of forum by the claimant will be judicially respected. The applicability of the state law is not determined by the scope of the employer's insurance coverage. *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959).

In *Southern Pacific Railway Co. v. Jensen*⁴ it was held that the essential uniformity of the federal maritime power barred coverage of maritime injuries by state workmen's compensation legislation. After unsuccessfully trying to permit state coverage,⁵ Congress responded to judicial suggestion⁶ and enacted the Longshoremen's Act to alleviate the plight of the maritime worker.⁷ By the terms of the act,⁸ its coverage and that which could constitutionally be afforded by state legislation are mutually exclusive.⁹ But

¹ 44 Stat. 1424 (1927), 33 U.S.C. (1952) §§901-950.

² The Oregon statute authorizes a common law action without the common law defenses where an injured employee's employer is not insured under the state act but was subject thereto. Ore. Rev. Stat. (1957) §656.024.

³ *Hahn v. Ross Island Sand & Gravel Co.*, (Ore. 1958) 320 P. (2d) 668.

⁴ 224 U.S. 205 (1917). The opposite result on the same facts was recently reached in *Noah v. Liberty Mutual Ins. Co.*, (5th Cir. 1959) 27 U.S. LAW WEEK (Gen. Sec.) 2467.

⁵ Congress twice amended the Judiciary Act of 1789 to bring workmen's compensation actions within the saving to suitors clause. Both amendments were held invalid. See 40 Stat. 395 (1917), declared unconstitutional in *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); 42 Stat. 634 (1922), declared unconstitutional in *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924). See, generally, GILMORE AND BLACK, *THE LAW OF ADMIRALTY* §§6-48 (1957); 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* §89.00 et seq. (1952); Rodes, "Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone," 68 HARV. L. REV. 637 (1955); comment, 2 STAN. L. REV. 536 (1950); Eikel, "Legal Procedure in Maritime Personal Injury Litigation," 33 TULANE L. REV. 323 (1959).

⁶ See *State of Washington v. W.C. Dawson & Co.*, note 5 supra, at 227.

⁷ Officers and members of the crew of a vessel remain covered solely by the Jones Act of 1920, 46 U.S.C. (1952) §688. Before passage of the Longshoremen's Act, shoreside workers who performed duties traditionally performed by seamen were covered by the Jones Act. *International Stevedoring Co. v. Haverty*, 272 U.S. 50 (1926). However, these two statutes are now mutually exclusive. *Swanson v. Marra Bros.*, 328 U.S. 1 (1946).

⁸ 44 Stat. 1426 (1927), 33 U.S.C. (1952) §903(a).

⁹ State compensation statutes applied where the locus of the injury was on shore. *State Industrial Comm. v. Nordenhold Corp.*, 259 U.S. 263 (1922). Where the locus of

in 1942, in *Davis v. Department of Labor*,¹⁰ the Supreme Court established a "twilight zone" within which federal or state coverage is presumed depending on the employee's choice of forum.¹¹ The probable purpose of the doctrine was to restore certainty of relief without extensive litigation, the aim of all workmen's compensation legislation. The primary question confronting courts subsequent to the *Davis* decision has been the determination of the extent of the twilight zone. Initially, the twilight zone was thought to cover only instances where the facts were not clearly within precedent.¹² But in 1948 it became clear that the twilight zone extended to any case with both land and maritime aspects where doubt existed as to which statute applied, regardless of precedent.¹³ Since then courts have allowed recovery under state acts where prior to the *Davis* case precedent clearly required exclusive federal coverage,¹⁴ or have allowed recovery under the Longshoremen's Act where prior to *Davis* the case would have fallen into a clearly established "local" exception to federal coverage.¹⁵

The principal case concedes that recovery under state law would not be

the injury was on navigable waters, but the activity in which the employee was engaged was local in character, state compensation statutes could likewise apply. *Millers' Indemnity Underwriters v. Braud*, 270 U.S. 59 (1926) (diver killed while sawing off timbers constituting a menace to navigation); *Alaska Packers Assn. v. I.A.C.*, 276 U.S. 467 (1928) (worker pushing boat into water); *Sultan R. & Timber Co. v. Dept. of Labor*, 277 U.S. 135 (1928) (working on logging boom in navigable water). But if the activity in which the employee was engaged was national in impact and the injury occurred on navigable water, the state acts could not apply. *Northern Coal & Dock Co. v. Strand*, 278 U.S. 142 (1928) (worker unloading vessel); *John Baizley Iron Works v. Span*, 281 U.S. 222 (1930) (dockyard employee painting ship).

¹⁰ 317 U.S. 249 (1942).

¹¹ The presumption of a state statute's coverage and constitutionality overrides a determination by the highest court of the state that its act cannot be validly applied. See *Baskin v. Industrial Accident Commission*, 338 U.S. 854 (1949). Similarly, a federal officer's determination that the federal act does not apply will be reversed. See *Dixie Sand & Gravel Co. v. Holland*, (6th Cir. 1958) 255 F. (2d) 304.

¹² E.g., *Hammond v. Albany Garage Co.*, 267 App. Div. 647, 47 N.Y.S. (2d) 897 (1944); *Behrle v. London Guarantee & Accident Co.*, 76 R.I. 106, 68 A. (2d) 63 (1949), cert den. 339 U.S. 928 (1950).

¹³ *Moore's Case*, 323 Mass. 162 at 167, 80 N.E. (2d) 478 at 480 (1948), affd. per curiam sub nom. *Bethlehem Steel Co. v. Moore*, 335 U.S. 874 (1948). The decision assumes greater significance in the light of *Baskin v. Industrial Accident Commission*, note 11 supra, where a state court decision limiting the twilight zone's applicability to instances where precedents were not clear was summarily reversed.

¹⁴ E.g., repairman injured on navigable waters: *Emmons v. Pacific Indemnity Co.*, 146 Tex. 496, 208 S.W. (2d) 884 (1948); *Allisot v. Federal Shipbuilding & Drydock Co.*, 4 N.J. 445, 73 A. (2d) 153 (1950); *Indemnity Insurance Co. v. Marshall*, (Tex. 1957) 308 S.W. (2d) 174. Stevedores unloading vessel: *Richard v. Lake Charles Stevedores*, (La. 1957) 95 S. (2d) 830; *Noah v. Liberty Mutual Ins. Co.*, note 4 supra.

¹⁵ E.g., *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953); *Western Boat Building Co. v. O'Leary*, (9th Cir. 1952) 198 F. (2d) 409; *Dixie Sand & Gravel Co. v. Holland*, (6th Cir. 1958) 255 F. (2d) 304. See also *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941); *ROBINSON, ADMIRALTY*, c. 4, §14 (1939).

available if the injury were outside the twilight zone, implying that there still is an area in which the Longshoremen's Act is exclusive.¹⁶ But whether this implication has much meaning after the holding in the principal case seems questionable. Never before has an employee been permitted to disregard the clearly established coverage of the federal act¹⁷ in favor of a state common law remedy given him because his employer failed to participate in the state workmen's compensation program.¹⁸ By permitting him to do so, the Supreme Court now gives the maritime employer one of two equally unsatisfactory alternatives. He may continue to be covered under only one plan, thereby subjecting himself to possible unlimited common law liability, as in the principal case,¹⁹ or he must participate in, and pay for, two sets of overlapping workmen's compensation coverage.²⁰ Placing the maritime employer in this dilemma cannot be justified by reference to the legislative policy underlying the Longshoremen's Act. The act was intended to provide maritime workers with the same type and certainty of relief as was available to workers covered by state compensation acts.²¹ This policy does not require that the employee be given a choice of two remedies, one of which may involve a jury trial, where a compensation remedy is clearly available. It might be more in accord with the legislative objective, and far less burdensome on the employer, to determine the availability of the remedy in twilight zone cases by reference to the employer's compensation coverage. On the other hand, the Court's growing dissatisfaction with the *Jensen* doctrine²² suggests that the present federal compensation scheme

¹⁶ Principal case at 273. Also see *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953); *Flowers v. Travelers Ins. Co.*, (5th Cir. 1958) 258 F. (2d) 220. But see *Noah v. Liberty Mutual Ins. Co.*, note 4 supra.

¹⁷ On this point see *Chappell v. Johnson Lumber Co.*, (D.C. Ore. 1953) 112 F. Supp. 625, *revd.* on other grounds (9th Cir. 1954) 216 F. (2d) 873; *DeBardeleben Coal Co. v. Henderson*, (5th Cir. 1944) 142 F. (2d) 481; *Nogueira v. N.Y., N.H., and H.R.*, 281 U.S. 128 (1930); *Travelers Ins. Co. v. McManigal*, (4th Cir. 1944) 139 F. (2d) 949.

¹⁸ In *Davis v. Department of Labor*, note 10 supra, the Court at 255 emphasized that unless the state remedy was given, the employer would not have compensation coverage.

¹⁹ It may be that in such a common law action the employer will not be entitled to the common law defenses of contributory negligence and assumption of risk. See, e.g., *Ore. Rev. Stat.* (1957) §656.024.

²⁰ The overlapping nature of the remedies is seen in cases holding that the employee may obtain a supplementary award under the Longshoremen's Act after a successful state action for twilight zone injuries, or vice versa. See *Western Boat Building Co. v. O'Leary*, note 15 supra; *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, (4th Cir. 1951) 192 F. (2d) 968. But see *Dunleavy v. Tietjen & Lang Dry Docks*, 17 N.J. Super. 76 (1951). The problem is fully discussed in comment, 67 *YALE L.J.* 1205 at 1215 (1958).

²¹ See *S. Rep.* 973, 69th Cong., 1st sess., p. 16; *Davis v. Department of Labor*, note 10 supra, at 254.

²² See *Davis v. Department of Labor*, note 10 supra, at 255. The uniformity doctrine has never been given much vitality outside the area of workmen's compensation. It does not bar state pilotage statutes [*Cooley v. Board of Wardens of Philadelphia*, 12 How. (53 U.S.) 298 (1851)], state wrongful death statute liens enforceable in admiralty [*The Hamilton*, 207 U.S. 398 (1907)], or liens for supplies furnished in a home port [*The J.E. Rumbell*, 148 U.S. 1 (1893)].

has outlived its usefulness. Either exclusive federal coverage of all maritime injuries or recognition that the *Jensen* doctrine has outlived its usefulness and permitting state coverage of all such injuries would seem to be the logical solution to the present problem.

James S. Leigh