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Torts -- Wrongful Death -- Jones Act

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where competing interests are permitted to exist contemporaneously.[13]

The instant case is unique in that the court refused the request for injunctive relief while noting that, although the competition began after[14] the "severance of their relationship with the appellant . . . *there is no dispute that planning and negotiations were under way before appellees had severed their connections.*" (Emphasis added). Other jurisdictions interpret such actions as being contrary to the fiduciary duties of directors and employees, and will impose equity restraints on the activities of the new business[15] on the basis that the "fiduciaries succeeded in carving a new business out of the old without paying for it."[16]

Both the good faith of the fiduciaries and the soundness of public policy in permitting employees the freedom to seek other opportunities[18] are the concern of the courts in dealing with this problem. These factors must be balanced against the interests of free competition to determine when injunctive relief is merited. The court in the instant case does not seem to have given the proportionate weight to these factors. By accepting the defendant's admission that the preliminary organizational work had been done while in the employ of the plaintiff, the court has seriously impaired the consideration or value to be given to the entire concept of good faith in such situations.

COLEMAN ROSENFIELD

TORTS—WRONGFUL DEATH—JONES ACT

The owner of a tug petitioned for exoneration from, or limitation of, liability when his tug was consumed by fire and a crewman was killed. The fire was caused by an open flame kerosene lamp which ignited

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13. American Inv. Co. v. Lichenstein, 134 F. Supp. 857 (Mo. 1955) (Competitive business allowed if not a violation of fiduciary relationship); Industrial Indem. Co. v. Golden State Co., 256 P. 2d 677 (Cal. 1953), where the court held there to be a difference between a "competing business" and a "similar business," permitting the latter; Regenstein v. J. Regenstein Co., 213 Ga. 157, 97 S.E. 2d 693 (1957); Jasper v. Appalachian Gas Co., 152 Ky. 68, 153 S.W. 50 (1913) stating majority opinion if corporation is insolvent and no longer functioning, directors and officers are under no obligation to refrain from engaging in the same line of business.

14. Defendant corporation was open for business within seven days after defendants left employ of plaintiff. Brief for Appellee, p. 6, Renpak, Inc. v. Oppenheimer, 104 So. 2d 642 (Fla. 1958).

15. Barden Cream & Milk Co. v. Mooney, 305 Mass. 642, 26 N.E. 2d 324 (1940); Duane Jones Co. v. Burke, 281 App. Div. 622, 121 N.Y.Supp. 2d 107, *modified and aff'd*, 117 N.E. 2d 237 (1954).

16. Hart, *Termination of the Fiduciary Duty of Business Associated Not to Compete for the Firm's Customers and Suppliers*, 4 Duke B.A.J. 16-27 (1954).

17. See cases cited note 10, *supra*.

18. Hunt v. Rossback, 128 N.J. Eq. 77, 15 A. 2d 227 (1940); Eberle & Co. v. Morgansteen, 6 La. App. 35 (1927); Texas Shop Towel Inc. v. Haire, 246 S.W. 2d 482 (Tex. Civ. App. 1952) stating in the majority opinion that employees are free to contract for themselves and a contract between an employer and his employees is not assignable to a third person without the consent of the employee.

inflammable vapors spread over the surface of a river on which the tug was navigating. The lamp was carried at a height of three feet instead of a minimum of eight feet as prescribed by a Coast Guard regulation. *Held*, recovery by the administrator was permissible under the Jones Act even though there was no negligence found on the part of the owner, and the regulation violated was not promulgated for the protection of seamen. *Kernan v. American Dredging Co.*, 355 U. S. 426 (1958).

The Jones Act,[1] which is exclusive for a wrongful death action in territorial waters,[2] incorporates all United States statutory rights under the Federal Employee's Liability Act.[3] In railroad cases under the FELA, it has been firmly established that when an injury to an employee was traceable to a violation of either the Safety Appliance Acts[4] or the Boiler Inspection Act,[5] it was not necessary to show negligence on the part of the employer.[6] Further, the liability of the railroad was not limited to those injuries, the risk of which the statutes were designed to obviate.[7] Any violation of these two laws which resulted in an injury negated the need for any reference to negligence in a subsequent action.[8] Negligence, as understood in the Jones Act,[9] is a theory to be applied in a most liberal manner.[10] A seaman's action is not to be narrowed even by limitations

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1. Merchant Marine Act (Jones Act), 41 Stat. 1007 (1920); 46 U.S.C. § 688 (1952).

2. Lindgren v. United States, 281 U.S. 38 (1930); Gill v. United States, 184 F.2d 49, 57 (2d Cir. 1950) (Hand J. dissenting), where the rule is criticized, but accepted.

3. "[T]he personal representative of such seaman may maintain an action at law for damages . . . and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable." 46 U.S.C. § 688 (1952).

4. 27 Stat. 531 (1903), 45 U.S.C. §§ 1-16 (1952).

5. 36 Stat. 913 (1924), 45 U.S.C. §§ 22-34 (1952).

6. Lilly v. Grand Trunk Western R.R., 317 U.S. (1943); Minneapolis & St. Louis Pass. R.R. v. Gotschall, 244 U.S. 67 (1917); San Antonio & Aransas Pass. R.R. vs. Wagner, 241 U.S. 476 (1916); St. Louis, Iron Mountain & Southern R.R. v. Taylor, 210 U.S. 281 (1908); 159 A.L.R. 870 (1945).

7. Brady v. Terminal R. Ass'n., 303 U.S. 10 (1938); Swinson v. Chicago, St. Paul, Minneapolis & Omaha R.R., 294 U.S. 529 (1935); Davis v. Wolfe, 263 U.S. 239 (1923); Louisville & Nashville R.R. v. Layton, 243 U.S. 617 (1917).

8. Urie v. Thompson, 337 U.S. 167 (1949).

9. In Escandon v. Pan American Foreign Corp., 88 F.2d 276, 277 (5th Cir. 1937), the court allowed much latitude for future definition in deciding an action for injuries under the Jones Act when it said: "The statute does not undertake to define negligence, but leaves its significance to be determined by the common law as announced by the federal courts." In Gonsalves v. Coito, 144 Cal. App. 2d 138, 300 P.2d 742, 744 (1956). the definition was even less specific when the court said: "'Negligence' under the Jones Act is the absence of care according to the circumstances."

10. Justice Cardozo prescribed an attitude for decision in stating: "We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that "the ancient characterization of seamen as 'wards of admiralty' is even more accurate now than it was formerly." . . . Out of the relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.

The act for the protection of railroad employees does not define negligence. It leaves that definition to be filled in by the general rules of law applicable to the conditions in which a casualty occurs." Cortes v. Baltimore Insular Line, 287 U.S. 367, 377 (1932).

found in FELA decisions,[11] and the Jones Act must be considered to have a welfare purpose.[12]

The Jones Act was intended to add a remedy previously not available under Maritime Law; that is, for injuries resulting from operating negligence.[13] The Act itself says nothing about negligence, but by giving reference to the FELA, it incorporates its negligence provision.[14] The courts have recognized that negligence as interpreted under the Jones Act has been modified and is viewed in a more liberal light.[15] This did not abrogate the common law doctrine of negligence, and foreseeability is still to be considered.[16] In general, for negligence to have been imputed to a statutory violation, it was necessary that the statute was designed to prevent a particular risk and that any injury resulting was caused proximatly by

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"The common law rules respecting proof of employer's negligence should not be visited too rigorously upon seamen and hence a higher degree of car is required of employers of seamen than is required of employers of servants for work ashore." Armit v. Loveland, 115 F.2d 308, 311 (5th Cir. 1940).

11. In Arizona v. Anelich, 398 U.S. 110 (1936), and Beadle v. Spencer, 298 U.S. 124 (1936), companion cases, the Court rejected an attempt to limit a seaman's action by introducing an assumption of risk doctrine preserved in the FELA.

12. "The Jones Act . . . As welfare legislation . . . is entitled to a liberal construction to accomplish its beneficial purposes." This statement originated in Cosmopolitan Co. v. McAllister, 337 U.S. 783, 790 (1949). In cox v. Roth, 348 U.S. 207, 210 (1954), it was quoted and its import served as a major determinant in the decision. "[S]eamen are wards of admiralty, and as such the courts of admiralty vigilantly guard against any encroachment upon their rights." Putnam v. Lower, 236 F.2d 561, 569 (9th Cir. 1956). "Legislation for benefit of seamen is to be construed liberally in their favor." Kinman v. United States, 139 F. Supp. 925, 928 (N.D. Cal. 1956).

13. Panama R. Co. v. Johnson, 264 U.S. 375 (1923); De Zon v. American President Lines, 129 F.2d 404 (9th Cir. 1942); GILMORE & BLACK, THE LAW OF ADMIRALTY 309, § 6-34.

14. 35 Stat. 65 (1908); 36 Stat. 291 (1910); 53 Stat. 1404 (1939); 45 U.S.C. § 51 (1952). "Every common carrier . . . shall be liable for . . . injury or death resulting in whole or in part from the *negligence* of any of the officers agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its *negligence* in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (Emphasis added.) However in Socony Vacuum Co. v. Smith, 305 U.S. 424 (1939) and De Zon v. American President Lines, 129 F.2d 404 (9th Cir. 1942), this was interpreted to mean that assumption of risk and contributory negligence would not be valid defense against seamen as in railroad workers' cases. See also Arizona v. Anelich, 398 U.S. 110 (1936), and Beadle v. Spencer, 298 U.S. 124 (1936).

See also Wilkerson v. McCarthy, 336 U.S. 53, 61 (1949); Sundberg v. Washington Fish & Oyster Co., 138 F.2d 801 (9th Cir. 1943); Armit v. Loveland, 115 F.2d 308, 311 (5th Cir. 1940).

15. In Armit v. Loveland, at 311, *supra* note 14, negligence was defined as "any conduct, except conduct recklessly disregardful of the interest of others, which falls below the standard established by law for the protection of others against unreasonable risk of harm." Cases cited as notes 9 and 10 *supra*.

16. In Harris v. Whiteman, 243 F.2d 563, 565 (5th Cir. 1957), the following words are found: "We think it important again to point out that recovery under the Jones Act is dependent upon proof of negligence having a casual effect on the injury suffered by a seaman. It is not in the nature of a workmen's compensation act providing compensation without reference to negligence." In Gwinett v. Albatross S.S. Co., 243 F.2d 8, 9 (2d Cir. 1957), the court said: "The foreseeability of harm is still a pertinent test in negligence cases under the Jones Act."

the violation.[17] Both the Safety Appliance Acts[18] and the Boiler Inspection Act[19] were enacted to facilitate recovery by the employee.[20] The Supreme Court of the United States interpreted the intent of the legislature in passing these two acts. This interpretation was that a violation of either act with a consequential injury therefrom, imposed strict liability.[21] Both of these acts are prefaced by words expressly indicating that the safety of employees was to be promoted,[22] while the safety of seamen was obviously intentionally omitted in the Coast Guard regulation violated.[23] This is also true of the parent statutes.[24] In congressional debate concerning the amendment of these statutes, it was expressly stated that the liability of the vessel would remain unaffected by this legislation.[25]

In the instant case, the court answered a question never before it in a Jones Act setting by applying reasoning developed in FELA cases. This reasoning was that if an employee was injured and the proximate cause of his injury was the violation of a statute, negligence per se or absolute liability would be incurred by the employer.[26] The dissent aptly called attention to the fact that the statutes[27] germane to FELA decisions were designed to promote safety for employees.[28] The majority decided this was immaterial, but did add dignity to the position of the minority by noting

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17. The Eugene F. Moran, 212 U.S. 466, 476 (1909); Gorris v. Scott, L.R. 9 Ex. 125, 128 (1874); Boronkay v. Robinson, 247 N.Y. 365 (1928), 160 N.E. 400; RESTATEMENT, TORTS § 286, comment c., illustration 5 (1934); PROSSER, TORTS § 34 at 161 (2d ed. 1955); LOWNDES, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 372-377 (1931); SEAVEY, *Principles of Torts*, 56 HARV. L. REV. 72, 90-92 (1942).

18. See statute cited note 4 *supra*.

19. See statute cited note 5 *supra*.

20. "In this view the Safety Appliance Acts, together with the Boiler Inspection Act, are substantively if not in form amendments to the FELA. . . . They cannot be regarded as statutes wholly separate from and independent of the FELA. They are rather supplemental to it having the purpose and effect of facilitating employee recovery . . . " Urie v. Thompson, 337 U.S. 167, 189 (1949).

21. "If the Safety Appliance Acts is violated, the question of negligence in the general sense is immaterial. . . . The two statutes, Safety Appliance Act and FELA, are *in pari materia* and where the FELA refers to 'any defect or insufficiency, due to its negligence in its cars, engines, appliances,' etc., it clearly is legislative intent to treat a violation of the safety appliance acts as 'negligence' . . ." San Antonio v. Aransas Pass. Ry. v. Wagner, 241 U.S. 476, 484 (1916).

22. 27 Stat. 531 (1903), 45 U.S.C. § 1 (1952).

23. 33 C.F.R. § 80.16 (h) (1949).

24. 30 Stat. 102 (1951) 33 U.S.C. § 157 (1952) which indicates the purpose of the Coast Guard regulation was to prevent collision. See also 30 Stat. 102 (1948), 33 U.S.C. § 158 (1952), which provides a penalty for violation of regulations and prescribes liability to *passengers* on the part of the pilot, engineer, mate or master. (Emphasis added.)

25. CONG. REC. 1465 (1897) (remarks of Representative Payne).

26. Brady v. Terminal R.R. Ass'n. 303 U.S. 10 (1938); Patton v. Baltimore & Ohio R.R., 197 F.2d 732 (3d Cir. 1952); Missouri-K.-T. R.R. of Texas v. Ridgeway, 191 F.2d 363 (8th Cir. 1951); Pennell v. Baltimore & Ohio R.R., 13 Ill. App. 2d 433, 142 N.E. 2d 497 (1957).

27. See statutes cited notes 4 and 5 *supra*.

28. See note 20 *supra*.

that the *word* "safety" was also included in the Coast Guard regulation.[29] Liability was imputed for the violation of a statute in a Jones Act case,[30] however, this statute contemplated safety of seamen and foreseeability. The main contention of the majority in the instant case was "the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved."[31] This reasoning was prognosticated when the Supreme Court of the United States referred to the Jones Act as welfare legislation.[32]

This decision, like many of the decisions under the Jones Act, lightens the burden for future plaintiff litigants. Because of the vague statutory construction, it seems that the court often enters into the field of legislation. The thin line between statutory interpretation and actual creation of a new substantive right is indeterminable. If the present trend in government towards socialization is accepted, no criticism can be made of the altruistic purposes such decisions pursue. However, certainty in the law can never be achieved by obvious stretching of legal terms and theories to reach a decision.

H. T. MALONEY

CIVIL PROCEDURE—DISCOVERY—INSURANCE

Plaintiff, in a negligence action, sought discovery of the policy limits of defendant's automobile liability insurance. *Held,* policy limits are not proper matters of discovery under the Florida Rules of Civil Procedure. *Brooks v. Owens,* 97 So.2d 693 (Fla. 1957).

Since the adoption of the Federal Rules of Civil Procedure[1] and similar or identical rules by the several states, the interpretation of the scope of information obtainable by discovery has been in question. The general rule, as laid down in the leading federal case of *Hickman v. Taylor,*[2] is that discovery is not a "matter of unqualified right" but will be granted for "good cause shown" of all "relevant" matters. The purpose of discovery

29. 30 Stat. 102 (1951), 33 U.S.C. § 157 (1952), "The Commandant is empowered to establish rules as to the lights to be carried . . . as he . . . may deem necessary for safety . . ."

30. Fegan v. Lykes Bros. S.S. Co., 198 La. 312, 3 So.2d 632 (1941). Here, a U.S. Department of Commerce regulation was violated and because of the violation, liability was imposed. However, the court in interpreting the statute said that adherence to the statute was mandatory, that safety of the employee was intended, and that foreseeability was present.

31. Kernan v. American Dredging Co., 355 U.S. 426, 438 (1958). The Court used these words in stating that this is the reason magnifications have been made to aid employees in FELA case. Since the FELA reasoning was being applied the purpose of the reasoning was also applicable.

32. See cases cited at note 12 *supra.*

1. 335 U.S. 919 (1948); 329 U.S. 837 (1946); 308 U.S. 645 (1938).
2. 329 U.S. 495 (1947).
3. Balazs v. Anderson, 77 F. Supp. 612 (N.D. Ohio 1948).