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ill-effects of stigmatization and the needless loss of valuable skills to the country.

WILLIAM B. CRUMPLER

Admiralty—Dockside Injuries under the Longshoremen's and Harbor Workers' Compensation Act

In *Nacirema Operating Co. v. Johnson*¹ three longshoremen had been attaching cargo from railroad cars located on piers to ships' cranes for loading onto the vessels. One longshoreman had been killed when cargo hoisted by a crane knocked him to the pier or crushed him against the side of the railroad car. The other two had been injured in the same accident.

Deputy Commissioners of the United States Department of Labor denied claims for compensation under the Longshoremen's and Harbor Workers' Compensation Act² in each case on the ground that the injuries had not occurred "upon the navigable waters of the United States," as required by the statute. The federal trial courts upheld the commissioners' decisions.³ The Court of Appeals for the Fourth Circuit in *Marine Stevedoring Corp. v. Oosting*⁴ reversed. The Supreme Court on certiorari reversed the Fourth Circuit and held that the Longshoremen's and Harbor Workers' Compensation Act did not cover longshoremen injured on docks, piers, or bridges. The basic reasons for the Court's denial of coverage to the longshoremen in *Nacirema* is best explained by the historical development of state and federal jurisdiction over maritime workers.

Although inadequate common-law remedies for injured workers led to the adoption of state workmen's compensation statutes following the industrial revolution,⁵ there was no corresponding federal development

¹ 396 U.S. 212 (1969).

² 33 U.S.C. §§ 901-50 (1964).

³ *Nacirema Operating Co. v. Johnson*, 243 F. Supp. 184 (D. Md. 1965); *Traynor v. Johnson*, 245 F. Supp. 51 (E.D. Va. 1965).

⁴ 398 F.2d 900 (4th Cir. 1968).

⁵ The statutes of Washington, Iowa, and New York were constitutionally sustained in aspects not concerning the extent of their coverage. *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *New York Cent. R.R. v. White*, 243 U.S. 188 (1917). See G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* 337 (1957).

in admiralty.⁶ Moreover, an attempt to extend state workmen's compensation to borderline maritime cases was struck down in 1917 by the Supreme Court in *South Pacific Co. v. Jensen*.⁷ In *Jensen* a longshoreman was killed while operating a truck on a gangway connecting a vessel with a pier. After New York permitted recovery under its compensation statute, the Supreme Court reversed and held that both the situs of the accident and the nature of the work being performed were maritime and that any attempt to apply a state act to such facts was an unconstitutional interference with the uniformity of federal maritime law. Congress attempted twice to circumvent the ruling in *Jensen* by legislation authorizing state compensation acts to cover such cases,⁸ but both efforts were declared unconstitutional.⁹ In *Washington v. W. C. Dawson & Co.*¹⁰ the Court suggested that Congress enact national legislation covering maritime workers whom the state could not constitutionally protect.¹¹

Meanwhile, the Court, possibly realizing the harshness of a strict application of *Jensen*, began to make exceptions to the rule. The maritime-but-local exception was created in *Western Fuel Co. v. Garcia*.¹² The Court held that state workmen's compensation and wrongful death acts could validly apply to maritime activities that were of "local," as opposed to "national," concern. The reasoning was that application of state law in such cases would "not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law as to international and interstate relations."¹³ Unfortunately, what constitutes a maritime-but-local exception is often unclear.

The second important exception to the rule in *Jensen* was developed

⁶ The United States Constitution places admiralty and maritime matters in the original federal jurisdiction. U.S. Const. art. III, § 2.

⁷ 244 U.S. 205 (1917).

⁸ Act of Oct. 6, 1917, 40 Stat. 395; Act of June 10, 1922, 42 Stat. 634.

⁹ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

¹⁰ 264 U.S. 219 (1924).

¹¹ *Id.* at 227. The Court stated:

Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general Employees' Law of general provisions for compensating injured employees, but it may not be delegated to the several states.

¹² 257 U.S. 233 (1921).

¹³ *Id.* at 242. The Court allowed coverage of a longshoreman working on an incomplete vessel in navigable waters because of the "local" nature of his work.

in *Industrial Commission v. Nordenholt Corp.*¹⁴ and confirmed by subsequent decisions.¹⁵ In this line of cases, the Court emphasized that state workmen's compensation laws were applicable to injuries occurring on docks, piers, and similar structures permanently affixed to the shore and extending over navigable waters because they are considered extensions of the land. The Court reasoned that since admiralty jurisdiction for torts does not encompass injuries occurring on land or its extensions,¹⁶ workers injured on docks and piers could legitimately be covered by state compensation statutes. Hence, while a longshoreman was within the broader maritime jurisdiction for contracts by virtue of the status of his employment, he came within the domain of state law if the injury occurred upon the land or an extension of the land.¹⁷ Consequently, the cumulative effect of the two exceptions declared in *Garcia* and *Nordenholt* was to allow coverage under state workmen's compensation statutes if the injury occurred on a dock, pier, or similar structure permanently affixed to the land or, if the matter was sufficiently "local," on navigable waters.

In 1927, in answer to the Court's earlier suggestion, Congress passed the Longshoremen's and Harbor Workers' Compensation Act to provide a recovery under federal law for injured maritime workers. The Act provided compensation

in respect of disability or death of an employee, but only if the disability or death results from an injury occurring *upon the navigable waters* of the United States (including any dry dock) and if recovery for the disability or death through workman's compensation *may not be provided by State law.*¹⁸

Seemingly there are two prerequisites for an award under the Act: (1) that the injury occur upon the navigable waters of the United States and (2) that no compensation can be paid under state law. The interpretation of these two provisions has since been the subject of extensive litigation.¹⁹

¹⁴ 259 U.S. 263 (1922).

¹⁵ See, e.g., *Swanson v. Manor Bros.*, 328 U.S. 1 (1946); *T. Smith & Son v. Taylor*, 276 U.S. 179 (1928).

¹⁶ See *Cleveland Terminal & Valley R.R. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908).

¹⁷ The *nature* of the contract determines maritime jurisdiction over contracts, but it is the *situs* of the tort that is the test for maritime jurisdiction. See *Industrial Comm'n v. Nordenholt*, 259 U.S. 263 (1922).

¹⁸ 33 U.S.C. § 903(a) (1964) (emphasis added).

¹⁹ See, e.g., *Avondale Marine Ways, Inc. v. Henderson*, 346 U.S. 366 (1953);

It is apparent from the legislative history of the Act that Congress intended for state coverage to be as extensive as possible and for the federal statute to provide relief only in cases in which there is no state remedy.²⁰ But, as has been pointed out, it is often unclear how far state coverage extends, particularly under the maritime-but-local exception created by the Court. To alleviate the harshness that could have resulted from a mistake in the choice of forums in difficult borderline cases,²¹ the Court in *Davis v. Department of Labor and Industries*²² enunciated the "twilight-zone" doctrine. The effect of *Davis* was to grant presumptive validity to both federal and state compensation statutes in cases involving waterfront mishaps if a reasonable argument could be made that either remedy was applicable. Thus the injured harbor worker could elect either state or federal compensation in "twilight-zone" cases.²³ However, the "twilight-zone" doctrine was not considered to apply to injuries to longshoremen on piers or docks, and the injured worker could not choose the federal Act as his remedy.²⁴

In 1962, the Court went further and judicially deleted from the Longshoremen's Act the prerequisite that compensation under it is allowed only in cases in which the state may not provide an award. Ignoring the express language of the Act, the Court in *Calbeck v. Travelers Insurance Co.*²⁵ stated that

Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941); Nicholson v. Calbeck, 385 F.2d 221 (5th Cir. 1967); Houser v. O'Leary, 383 F.2d 730 (9th Cir. 1967).

²⁰ An investigation of the legislative intent underlying the statute revealed that the original version of the bill provided:

This act shall apply to any employment performed on a place within the admiralty jurisdiction of the United States except to employment of local concern and of no direct relation to navigation and commerce; but shall not apply to employment as master and member of the crew of a vessel. S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1927). The phraseology "local concern" was objected to by the chairman of the Senate Committee because "to create an exemption for 'employment of local concern' threatened to perpetuate the very uncertainties of coverage that Congress wished to avoid." *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 122-23 (1962).

²¹ Two such borderline cases are *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959) and *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941).

²² 317 U.S. 249 (1942).

²³ See, e.g., *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959). The Court said that as to cases within this "twilight-zone," *Davis*, in effect, gave "an injured waterfront employee an election to recover compensation under either the Longshoremen's Act or the Workmen's Compensation law of the State in which the injury occurred." *Id.* at 273.

²⁴ See 2 LARSON, *THE LAW OF WORKMEN'S COMPENSATION* 410 (1952). Injuries on docks or piers were considered clearly within state jurisdiction and not borderline cases to which the "twilight-zone" doctrine could apply.

²⁵ 370 U.S. 114 (1962).

our conclusion is that Congress invoked its constitutional power so as to provide compensation for *all injuries* sustained by employees on navigable waters *whether or not* a particular injury might also have been within the constitutional reach of a state workmen's compensation law.²⁶

The claimants in *Calbeck* had been injured while working on incomplete vessels lying in navigable waters, but they were allowed recovery under the Act. Previously, workers injured while engaged in such work were allowed compensation only under state laws because such employment was considered clearly maritime but local in nature.²⁷ The result of *Calbeck* was to extend the area of overlapping federal and state coverage and increase the occasions when a claimant had a choice between federal and state compensation remedies.

Just as the earlier exceptions to *Jensen* left open the question of how far *seaward* state workmen's compensation could extend, *Calbeck* failed to answer how far toward *land* the federal remedy extended. Cases following *Calbeck* generally interpreted the Longshoremen's Act to require that the injury occur on the navigable waters of the United States. Thus injuries suffered on docks and piers were not generally thought to give rise to federal compensation.²⁸ Then in 1968 the Fourth Circuit became the first court of appeals to extend coverage of the Longshoremen's Act to injuries consummated on a pier when it decided *Oosting*.

The issue confronting the Fourth Circuit was stated by Judge Sobeloff, the author of the majority opinion in *Oosting*, to be "whether an injury on a pier falls within the coverage of the Act."²⁹ In a three-pronged opinion the majority held that (1) the Longshoremen's Act is status and not situs oriented and covers all longshoremen working under the same contract regardless of where the injury occurs; (2) the Admiralty Extension Act,³⁰ which extends admiralty jurisdiction over torts to cover

²⁶ *Id.* at 117 (emphasis added).

²⁷ The factual situation in *Calbeck* was the same as that in *Grant Porter-Smith Ship Co. v. Rhode*, 257 U.S. 469 (1922), in which the maritime-but-local doctrine was applied.

²⁸ *Nicholson v. Calbeck*, 385 F.2d 221 (5th Cir. 1967); *Houser v. O'Leary*, 383 F.2d 730 (9th Cir. 1967); *Travelers Ins. Co. v. Shea*, 382 F.2d 344 (5th Cir. 1967). *But see Michigan Mutual Liab. Co. v. Arrien*, 233 F. Supp. 496 (S.D.N.Y. 1964).

²⁹ 398 F.2d at 902. See Note, *Dockside Injuries Under the Longshoremen's and Harbor Workers' Compensation Act*, 3 GA. L. REV. 622 (1969) (approving the court's holding); Note, *The Ambiguous, Amphibious Employee: The Relationship Between the Longshoremen's Act and State Compensation Legislation*, 18 HAST. L.J. 891 (1967) (disapproving the court's holding).

³⁰ 46 U.S.C. § 742 (1964).

injuries occurring on the land that are caused by a vessel on navigable waters, impliedly extends coverage of the Longshoremen's Act to the same degree, and (3) an injury occurring on a pier extending over navigable waters is an injury occurring "upon navigable waters" and thus is within the coverage of the Longshoremen's Act.

The majority's first contention was that the Longshoremen's Act, irrespective of the situs of the injury, was intended by Congress to cover injuries to longshoremen by virtue of their employment. Judge Sobeloff found support for this position in the Supreme Court's holding in *Calbeck* that "Congress intended the compensation act to have a coverage co-extensive with the limits of its authority."³¹ Moreover, interpreting the coverage of the Longshoremen's Act to extend to the broad jurisdiction of admiralty over workers' contracts would seem to comply with the Supreme Court's mandate in *Reed v. The Yaka*³² that the statute should be liberally construed to avoid harsh and incongruous results. Indeed, it would seem to be "harsh and incongruous" to permit recovery to a longshoreman on a ship and to deny it to his fellow worker on a nearby pier when both were injured by the same crane.³³

The majority also relied heavily on the language in *Michigan Mutual Liability Co. v. Arrien*³⁴ "that 'upon navigable waters' [as used in the Longshoremen's Act] is to be equated with 'admiralty jurisdiction.'"³⁵ But this decision was not based on the theory of the worker's status; on the contrary, the court found that "upon navigable waters" was impliedly expanded by the Admiralty Extension Act of 1948.³⁶ It should also be noted that the Supreme Court in *Calbeck* implicitly accepted the validity of applying the test of the situs of the injury to determine whether an employee is covered by the Longshoremen's Act.³⁷

The second approach taken by the majority in *Oosting* was that the Admiralty Extension Act of 1948, by extending the jurisdiction of admiralty over torts to include all injuries caused by a vessel that were consummated on land, also impliedly expanded coverage of the Longshoremen's Act. But the trial court in *Johnson v. Traynor*³⁸ had exhaustively

³¹ *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 130 (1962).

³² 373 U.S. 410, 415 (1963).

³³ 398 F.2d at 903.

³⁴ 233 F. Supp. 496 (S.D.N.Y. 1964). This decision also had permitted recovery under the Longshoremen's Act for injuries suffered on a pier.

³⁵ *Id.* at 501.

³⁶ *Id.* at 502.

³⁷ See *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 115-17, 124-27 (1962).

³⁸ 243 F. Supp. 184 (D. Md. 1965).

studied this possibility and concluded that the legislative history of both statutes, the express coverage of the Extension Act, and the administrative interpretations of the compensation statute clearly negate an implied extension of coverage of the Longshoremen's Act. Moreover, a House report made in 1958 concluded that longshoremen are protected by "state safety standards when performing work on docks and in other shore areas."³⁹ Hence it is not surprising that most courts confronted with this issue have agreed with the opinion in *Johnson* that the Extension Act cannot be construed to extend the coverage of the Longshoremen's Act.⁴⁰

In the third prong of his opinion in *Oosting*, Judge Sobeloff reasoned that by virtue of *D'Aleman v. Pan American Airways*⁴¹ the scope of the phrase "upon navigable waters" used in the Longshoremen's Act extends to injuries occurring *above* such waters.⁴² *D'Aleman*, however, involved interpretation of the phrase "on the high seas" used in the Death on the High Seas Act.⁴³ While the Second Circuit in *D'Aleman* did expand the phrase "on the high seas" to cover a cause of action arising in a plane flying above the ocean, the value of the case as precedent for Judge Sobeloff's position is at best dubious.

Chief Judge Haynesworth, dissenting in *Oosting*, rejected all three of the majority's arguments.⁴⁴ He admitted the "incongruity" of a remedy that depends on where a worker who frequently passes between a ship and the dock happens to be when injured, but proposed that the dock's edge is at least a clear and convenient place to draw a line between application of state and federal compensation remedies. Even under the approach of the majority in *Oosting*, incongruities are easy to anticipate. For example, a longshoreman can be injured several miles from shore on an errand for his employer unconnected with maritime work. "If the line is moved shoreward of the dock's edge, short of inclusion of every longshoreman wherever he may be and however he may be injured, it is bound to be vague and fuzzy and a fruitful source of contention and litigation. . . ."⁴⁵

³⁹ H.R. Rep. No. 2287, 85th Cong., 2d Sess. 16 (1958).

⁴⁰ *E.g.*, *Houser v. O'Leary*, 383 F.2d 730 (9th Cir. 1967); *Atlantic Stevedoring Co. v. O'Keefe*, 220 F. Supp. 881 (S.D. Ga. 1963); *Revel v. American Export Lines, Inc.*, 162 F. Supp. 279 (E.D. Va. 1958).

⁴¹ 259 F.2d 493 (2d Cir. 1958).

⁴² 398 F.2d at 908.

⁴³ 46 U.S.C. §§ 761-67 (1964).

⁴⁴ *Id.* at 909-14 (dissenting opinion).

⁴⁵ *Id.* at 912-13 (dissenting opinion).

Perhaps the most telling point in the dissenting opinion was made in an analysis of congressional intent in passing the Longshoremen's Act. Quoted was a Senate report in which it was stated that "injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States."⁴⁶

When the case was taken on appeal, the logic of the dissent in *Oosting* was accepted by a majority of the Supreme Court in its decision in *Nacirema*. Rejecting all three prongs of Judge Sobeloff's opinion, the Court asserted that

construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion which previously existed on the seaward side.⁴⁷

The decision in *Nacirema* approving Chief Judge Haynesworth's rationale is laudable in that it provides a definite line beyond which the federal compensation remedy will not extend shoreward to overlap state coverage of longshoremen and harbor workers.

Remaining after *Nacirema* is concurrent federal and state jurisdiction over navigable waters in cases in which a worker's injury stems from a transaction that is maritime but local in nature. It is now desirable to eliminate this overlap. After all, the exception allowing state coverage to extend beyond the shoreline to encompass transactions on navigable waters was justified mainly on the ground that there was no federal remedy when the maritime-but-local doctrine was created. The federal remedy under the Longshoremen's Act is clearly available after the Supreme Court's decision in *Calbeck* to a longshoreman or harbor worker injured on navigable waters as a result of his employment. The line drawn in *Nacirema* should now be applied by the Court to limit the coverage of both the *state* and *federal* remedies. Under such an application of *Nacirema*, the state remedy would be available only for injuries suffered on shore or on structures that can be considered an extension of the land. The federal remedy under the Longshoremen's Act would be applied only to provide compensation for injuries suffered on maritime waters.

⁴⁶ S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1927). See note 20, *supra* for a general discussion of the legislative history of the Longshoremen's Act.

⁴⁷ 396 U.S. at 223. (The three dissenting justices agreed with Judge Sobeloff.)

Such a result would provide a definite line to enable lawyers and judges to determine with certainty whether an injured longshoreman is covered under the federal or the state act.

GEORGE HACKNEY EATMAN

Attorneys—Admission to the Bar—Consideration of the Constitutionality of Bar Examiners' Inquiries into Political Associations and Beliefs

Bar examiners for years have considered the "subversive applicant" an inherent danger to the legal profession¹ and have all but avowed a duty to deny him the privilege to practice.² Although most, if not all, states have a requirement of a finding of "good moral character" and some form of constitutional oath prior to admission,³ some states have made demanding inquiries into the loyalty of applicants in bar-examination character questionnaires.⁴ Bar-admission committees face increasing numbers of applicants whose interests in law reform, civil rights, and other "causes" present sharply divergent political views from those of the traditionally conservative bar.⁵

¹ Remarks of Samuel J. Kanner, Chairman of the Florida Board of Bar Examiners in 54 BRIEF 154-55 (1959) (tracing the downfall of many constitutional governments to "subversive elements" infiltrating the bar) [hereinafter cited as Kanner Remarks]; Address of George T. Cronin, Secretary of the National Conference of Bar Examiners in 32 BAR EXAMINER 84-85 (1963) [hereinafter cited as Cronin Address].

² "The right to deny the privilege to practice to such an applicant appears to be fundamental." Cronin Address at 85.

In this great democracy of ours, we, as bar examiners, are, therefore, intrusted with what might well prove to be the key to the preservation of what we know as a "way of life." . . . If we, as bar examiners, can successfully eliminate the subversive applicant . . . we will have prevented the infection of the bar. . . . This is our responsibility and task.
Kanner Remarks at 154-55.

³ 7 C.J.S. *Attorney and Client* §§ 7(b), 12 (1937); Brown and Fassett, *Loyalty Tests for Admission to the Bar*, 20 U. CHI. L. REV. 480 & n.1 (1953) [hereinafter cited as Brown and Fassett]. See also *Konigsberg v. State Bar of California*, 366 U.S. 36, 40 & n.4 (1961).

⁴ "Twenty-eight states report a character examination procedure that usually includes a personal appearance." SURVEY OF THE LEGAL PROFESSION, BAR EXAMINATIONS AND REQUIREMENTS FOR ADMISSION TO THE BAR 257 (1952). See generally Brown and Fassett at 483-87.

⁵ Note, *Constitutional Limitations on the Process of Admission to the Bar*, N.Y.U. INTRA. L. REV. 135, 152 (1969). See generally Larson, *The Lawyer as Conservative*, 40 CORNELL L.Q. 183 (1955).