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ARGENTINE REPUBLIC v. AMERADA HESS
—— U.S. ——, 109 S.Ct. 683, 102 L.Ed 2d 818
23 January 1989

A federal court does not have jurisdiction over a foreign sovereign that attacks a neutral ship in international waters unless the claim is within the exceptions enumerated by the Foreign Sovereign Immunities Act.

FACTS: United Carriers, Inc. (United), a Liberian corporation, chartered the oil tanker Hercules to Amerada Hess Shipping Corporation (Hess), also a Liberian corporation, to transport crude oil from the Trans-Alaska Pipeline in Alaska to the Hess Refinery in the United States Virgin Islands.

On May 25, 1982, after completing delivery to the Virgin Islands, Hercules began the return voyage to Alaska, her tanks empty except for her fuel. At this time, Great Britain and Argentina were at war over the Falkland Islands.

To insure the safety of neutral shipping, the United States, on June 3, 1982, informed the two hostile nations of the location of all United States vessels and Liberian tankers owned by United States interests and traveling in the South Atlantic including the position of Hercules. Five days later, while in international waters, the Hercules was attacked by Argentine aircraft 600 nautical miles from Argentina and 500 miles from the Falklands, well outside the war zone designated by both countries.

The damaged Hercules headed toward Rio DeJaniero under her own power, where, upon arrival, the Brazilian Navy determined that an undetonated bomb remained lodged in the ship and, concluding it was too dangerous to remove it, scuttled the ship 250 miles off the coast of Brazil.

United brought suit in the United States District Court for the Southern District of New York seeking damages of $10 million dollars due to the loss of the ship. Hess sought damages of $1.9 million dollars for its fuel. Jurisdiction was premised upon violation of the Alien Tort Statute (ATS), 28 U.S.C. §1350, which grants original jurisdiction to the district courts for tort actions by aliens who violate a treaty of the United States or the "law of nations", as well as the general admiralty and maritime jurisdiction of 28 U.S.C. §1333, and the "principle of universal jurisdiction" under international law.

The district court held that both complaints were barred by the Federal Sovereign Immunities Act (FSIA) and thereafter dismissed them for lack of subject matter jurisdiction. 683 F.Supp. 73 (S.D.N.Y. 1976). The Second Circuit reversed, 830 F.2d 421 (2d Cir. 1987), ruling that the lower court has jurisdiction under the ATS because the action sounded in tort (ship bombed without justification) and violated international law (unjustified and unprovoked in international waters). The United States Supreme Court granted certiorari and reversed.

ISSUE: Whether the ATS, the general maritime jurisdiction of §1333 or the universal jurisdiction of international law grants jurisdiction over a foreign sovereign who attacks a neutral ship traveling in international waters engaged in United States domestic trade?

ANALYSIS: The Federal Sovereign Immunities Act, 28 U.S.C. §1604 is the sole basis for granting jurisdiction over a foreign sovereign under the above circumstances. The ATS is no longer applicable to jurisdiction. The text and structure of the FSIA demonstrates Congress' intention that a foreign state shall be immune from the jurisdiction of the courts in the United States except as provided in §§1605-1607 of the Act. The FSIA "must be applied by the district court[s] in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).

The Second Circuit acknowledged the "general rule" that the Act governs the immunity of foreign states in federal court, 830 F.2d at 426, but reasoned that the FSIA's commercial focus combined with Congress' failure to repeal the ATS indicated that Congress intended to allow federal courts to continue to exercise jurisdiction over foreign states in suits alleging violations of international law outside the confines of FSIA.

The Supreme Court noted that the lack of *pro tanto* repeal by Congress of the ATS when the FSIA was passed in 1976 may be explained by the uncertainty as to whether the ATS conferred jurisdiction in suits against foreign states. Furthermore, the language of §1602 clearly states that "claims of foreign states to immunity should henceforth be decided by courts of the United States in conformity with the principals set forth in this chapter" (emphasis added). A reflection of Congress' intent, this language precludes jurisdiction premised on the ATS in the instant suit. The Court also noted that the FSIA statutory scheme is comprehensive;

(Continued ...)

Argentine Republic v. Amerada Hess *(Cont.)*
the Court doubted that "even the most meticulous draftsman would have concluded that Congress also needed to amend *pro tanto* the Alien Tort Statute and presumably such other grants of subject matter jurisdiction in Title 28. . . ."

Congress provided for admiralty jurisdiction in federal court when it enacted the FSIA. Contained within the statute are exceptions to immunity, which include waiver, §1605 (a); commercial activities occurring within or directly affecting the United States, §1605 (a)(2); property expropriated in violation of international law §1605 (a)(3); certain property within the United States §1605 (a)(4); non-commercial torts occurring in the United States §1605 (a)(5); and maritime liens against vessels and/or cargo §1605 (b). But, due to the statute's comprehensive and preemptive nature, unless the case falls within one of the exceptions listed, the statute does not authorize the bringing of an action. The Court agreed with the district court that none of the exceptions applied.

The Court's ruling establishes that the FSIA provides the sole basis for granting jurisdiction over a foreign state in United States courts and the district court correctly dismissed the action because the FSIA did not authorize jurisdiction over Argentina under the facts of this case.

Patricia M. D'Orazio '90

ANDREW G. BLACK v. RED STAR TOWING & TRANSPORTATION CO., INC. v. MOBIL OIL CORP.

United States Court of Appeals, Second Circuit, 17 October 1988
860 F.2d 30 (en banc)

After 60 years, "The Federal No. 2" has little salvage value. A claim against a third party for a proportionate share of maintenance and cure is nothing more than a claim for contribution under well-settled admiralty principles.

FACTS: On February 27, 1985, plaintiff, Andrew G. Black (Black) a marine engineer employed by Red Star Towing and Transportation Co., Inc. (Red Star) was responsible for arranging to purchase oil and transfer it to Red Star's tug Crudaser. While the tug was tied to a dock owned by Mobil Oil Corporation (Mobil), a deckhand placed a wooden ladder on the tug's deck to facilitate access from the tug's deck to the pier above. Black, in the course of his employment, and discharging his responsibilities, ascended and descended the ladder on several occasions. At the jury trial, Black testified that "the ladder . . . seem[ed] to be wobbly" because of high winds and choppy seas.

Due to Black's concern with the wooden ladder, he began to use a steel ladder which was affixed to Mobil's dock. On Black's second descent, the left side of the ladder's rungs gave way causing Black to drop onto the broken rung, resulting in the broken rung becoming imbedded in his buttocks. Black sustained various injuries, including severe contusions of the sciatic nerve.

The parties stipulated to the amount of damages, and only the issues of liability and apportionment were presented to the jury in the trial court. The jury found Black 90% liable, Mobil 10% liable and 0% liability against Red Star.

In the post-trial motion, Red Star sought indemnity from Mobil for the maintenance and cure paid to Black, plus attorney's fees in the defense of this action. The district court denied Red Star's motion recognizing the 60 year old doctrine of *The Federal No. 2*, 21 F.2d 313 (2d Cir. 1927) that "a shipowner is not entitled to indemnity for maintenance and cure from a negligent third party." With respect to that part of the motion for attorney's fees, the district court denied Red Star's application upon the failure to show any "vexatious, wanton or oppressive conduct on the part of Mobil." In a summary order filed on December 4, 1987 by the United States Court of Appeals, Second Circuit, the district court's order was affirmed, and Red Star's alternate argument, based on a breach of the implied warranty of workmanlike performance, was likewise rejected for lack of a substantial relationship between the parties. Red Star made application for a rehearing *en banc* for reconsideration.

ISSUE: Does a shipowner have a right of indemnity against a third-party tortfeasor for maintenance and cure paid to an injured seaman?

ANALYSIS: In the United States Court of Appeals decision overruling *The Federal No. 2*, the court reviewed the analysis between the social conditions which give rise for a parent to recover monetary damages for expenses incurred in connection with injuries sustained to her children, and the like doctrine for spousal recovery under similar circumstances, to that of a seaman's rights to maintenance and cure which arise under a contractual relationship between an employer and employee. Following this rationale, the court in *The Federal No. 2* had denied recovery by a shipowner for expenses voluntarily paid to an injured seaman for maintenance and cure. This policy has been followed to insure the unqualified right of an injured seaman, to the prompt payment of maintenance and cure, without delay of third-party actions. See *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730 (1943). This benefit did not preclude a seaman from recovering directly from the primary third-party tortfeasor for injuries sustained. However, when the seaman sued both the third-party and the shipowner jointly, the shipowner remained responsible for maintenance and cure to the extent of the third-party's failure to pay. See *Seely v. City of New York*, 24 F.2d 412 (2d Cir. 1930).

In reviewing the handling of this issue in other circuits, this court examined the Third Circuit's application of state common law in favor of the doctrine of indemnification and/or contribution by third parties under the theory that a seaman-shipowner relationship does give rise to a "social condition" deserving of the right of contribution. See *Jones v. Waterman Steamship Corp. Inc.*, 155 F.2d 992 (3d Cir. 1946). The Fifth Circuit rejected the holding of *The Federal No. 2*, and held that an innocent shipowner was entitled to indemnification from a third-party tort-feasor for expenses incurred in the payment of maintenance and cure. See *Savoie v. LaFourche Boat Rentals Inc.*, 627 F.2d 722, 723 (5th Cir. 1980).

The Ninth Circuit allowed third-party actions for indemnification based on the contractual relationship that existed between the shipowner and the third-party which gives rise to the implied warranty of workmanlike performance. See *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956). In the instant matter, however, the court found that this single transaction did not give rise to a contractual relationship and therefore, Red Star's theory of a breach of the implied warranties did not apply.

In reviewing the equity of an innocent shipowner bearing the full burden of maintenance and cure, the United States Court of Appeals concluded that a claim by a shipowner against a third-party tortfeasor was little more than a "claim for contribution under well-settled admiralty principles." See *Adams v. Texaco, Inc.*, 640 F.2d 618, 621 (5th Cir. 1981). In balancing the equities, this court held that such claim for reimbursement could be brought by an independent action, a third-party action, or a cross-claim, but only to the extent of that third-party's proportionate share of the damages. The court reversed and remanded this matter to the district court, with instruction to enter judgment in favor of Red Star in an amount equal to Mobil's proportionate share of the maintenance and cure paid by Red Star.

Dorothy Phillips-Geller '91