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American Home Assurance Co. v. L & L Marine Service Inc. United States Court of Appeals, Eight Circuit, 6 July 1989 875 F.2d 1351

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FED. INS. v. LAKE SHORE (Cont.)

the outer limits" of due process, *Triplett v. R.M. Wade & Co.*, 261 S.C. 419 (1973)) had to be applied to determine whether the exercise of personal jurisdiction met the requirements of due process. The Court noted that, "the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum," *Burger King v. Rudzewicz*, 471 U.S. 467, 474 (1985) "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). Under the facts, the Court found that the defendant's contact with the forum state did not suggest a purposefulness, and thus personal jurisdiction could not be asserted without offending notions of due process.

The court also rejected Federal's argument that defendants were subject to South Carolina's personal jurisdiction under a stream of commerce theory. Citing *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1986), the Court noted that factors such as marketing and advertising by defendants in the forum state which might make a stream of commerce theory applicable were lacking. Moreover, in this case, defendants' products were transported into the forum by a consumer. To allow the state to use this as a means of exercising personal jurisdiction over defendants would effectively mean that, "amenability to suit would travel with the chattel." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980). Also, this case did not involve multiple deliveries of units into South Carolina over a period of years. *Asahi*, 480 U.S. at 122. Though the court did not reject out of hand a stream of commerce theory, such a theory clearly did not apply in this case.

Finally, the court rejected Federal's assertion that the nature of an ocean-going vessel (designed and manufactured) to go from port to port is such that it sustains the exercise of personal jurisdiction. Recognizing that the Supreme Court had already rejected such an argument in *World-Wide Volkswagen*, 444 U.S. at 296 n.11, the court added that all products are mobile to some extent and a product-by-product approach to personal jurisdiction would succeed only in drawing courts into an arcane and litigious search for meaningless distinctions. Thus, the question to ask in assessing whether personal jurisdiction can properly be asserted is not as to the nature of the product, but the nature of the defendants' contacts with the forum state.

Upon these findings, the Court held that it would not be reasonable for personal jurisdiction to be asserted over defendants, that this was sufficient independent grounds for dismissal. In support of this conclusion, the court noted certain factors that should be considered in determining whether the assertion of personal jurisdiction offends due process requirements. The court included among the factors; the defendant's burden in litigating in the forum, the forum state's interest, the plaintiff's interest in obtaining relief in the forum, the interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental social policies. In this case, the court found that the defendant's contacts with the state of South Carolina are insufficient to warrant the proper assertion of personal jurisdiction. Based on the foregoing, the court affirmed the district court judgment granting defendants' motion to dismiss for lack of personal jurisdiction.

Alex Barnett '91

AMERICAN HOME ASSURANCE CO. v. L & L MARINE SERVICE INC.

United States Court of Appeals, Eight Circuit, 6 July 1989
875 F.2d 1351

Negligence by the operators of a vessel does not act to supervene the owners absolute duty to provide a seaworthy vessel for the voyage intended. All the resulting damages will be allocated by the comparative degree of fault of the parties. The work by a tug of pulling the vessel off a shoal is properly classified as towage rather than salvage.

FACTS: The barge Apex Chicago and the tug Maya went aground off the coast of Massachusetts on October 19, 1981, while en-route from Carteret, New Jersey to Boston, Massachusetts. The crew of the tug were employees of L & L Marine Service (L&L), which operated the barge and tug under an agreement with Apex Towing (Apex). The National Oceanic and Atmospheric Administration (NOAA) had issued small craft advisories along the route and upgraded them to gale warnings by 6:00 PM on October 18th. Instead of heeding the warnings, the Maya left the protected waters of Long Island Sound and proceeded into the open waters of Block Island Sound and Rhode Island Sound. While in Rhode Island Sound early on the morning of October 19th, severe weather was encountered, consisting of winds up to 35 knots, squalls, zero visibility and ten foot seas. During this rough leg of the voyage, the towing cable parted. Due to the intensity of the storm, the crew did not realize that the barge had come adrift for thirty minutes. Expert testimony showed that the breaking strength of the tow cable was significantly lower than that required by industry standards. This problem was exacerbated by the fact that the crew could not let out more cable to reduce the stress. The cable could not be slacked, because the winch had an antiquated manual release mechanism that was dangerous to operate in rough weather. By the time the crew of the Maya sighted the barge Apex Chicago, she was aground on the Hen and Chicken Shoals, leaking gasoline through a gash in her hull. While attempting to pull the barge from the rocks, the tug further damaged the barge before going aground. The stranded tug and barge were freed when a U.S. Coast Guard vessel and two private tugs, the Chicopee and the Jaguar, arrived. The Jaguar pulled the Maya free with a floating hawser that had been connected by Coast Guard personnel; the Maya pulled the Apex Chicago free, and then the Jaguar and the Chicopee

towed the two vessels to port where the cargo was lightered. In the aftermath of the accident, American Home Assurance Co. (American) paid several sizable claims to, or on behalf of, Apex Oil Company (Apex Oil). These claims included one by the Jaguar for "salvage" of the Maya. As a subrogee of Apex Oil, American brought an action against L&L to recover the damages resulting from the accident, which American alleges were proximately caused by the negligent operation of the Maya by L&L's crew. The United States District Court for the Eastern District of Missouri, awarded judgment to American for one half of the sum of provable damages based on the comparative degree of fault of the parties. American appealed the decision.

ISSUES: 1) Is the duty to provide a seaworthy vessel qualified by an assumption that the crew will navigate the vessel out of harm's way?

2) Was the allocation of damages according to the comparative degree of fault proper?

3) Was the Jaguar's pulling of the Maya off the shoals properly classified as "salvage" or "towage"?

ANALYSIS: The Court of Appeals, for the Eight Circuit, affirming in part and vacating in part, held that the duty of the owner to provide a seaworthy vessel is absolute. This absolute duty is not qualified by an assumption that the crew will navigate the vessel out of harm's way and is defined by the vessel's intended voyage, the hazards likely to be encountered and the vessel's ability to withstand these hazards. The measure of a vessel's seaworthiness is not a function of her crew's skill and foresight in navigation. The behavior of L&L's crew was negligent, but the substantially understrength cable and obsolete stern winch

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AMER. HOME v. L & L MARINE (Cont.)

contributed equally to the accident and the weather encountered was not so unusual as to be unforeseeable.

The resulting damages were properly allocated among the parties proportionally according to the comparative degree of their fault. L&L had neither a vessel interest nor a cargo interest and could not be considered a contributing participant in a common nautical venture. L&L was sued merely as a tortfeasor and the concept of general-average adjustment, as used by the other parties to adjust the damages among themselves, does not apply. While the district court's allocation of damages was

proper, it did not include the costs of hull repair and cargo lightering. For this reason the damage award is vacated and remanded for reconsideration.

The work done by the tug Jaguar was properly classified as towage. It was the Cost Guard vessel on the scene that actually performed the crucial act of rescue by attaching the floating hawser to the Maya, and the Jaguar then merely pulled the Maya off the Shoal. The finding of the district court that this work would properly be classified as towage rather than salvage was affirmed.

Stephen W. Beyer '92

CALIFORNIA HOME BRANDS, INC. v. FERREIRA
United States Court of Appeals, Ninth Circuit, 28 March 1989
871 F.2d 830

Shipowner cannot sue seaman, whose negligence allegedly caused injury to co-seaman, for indemnification or contribution based upon shipowner's Jones Act liability to said co-seaman.

FACTS: In January 1985, Manuel Rebelo, a crewmember of the M/V Pan Pacific, sustained personal injuries on board the vessel. Rebelo filed a claim for maintenance and cure. In response to Rebelo's claim, the shipowners, California Home Brands Inc. (CHB), commenced an action for declaratory relief, denying responsibility for maintenance and cure. Rebelo counterclaimed for negligence under the Jones Act, unseaworthiness, and maintenance and cure.

CHB commenced a separate action against Danny Ferreira, a co-seaman, for contribution and/or indemnification, claiming Ferreira's purported negligence contributed to Rebelo's injuries. Ferreira moved to dismiss CHB's complaint and after a hearing, the trial court held that CHB's suit against its own employee for indemnity and contribution was barred as a matter of law.

ISSUE: Is a shipowner-employer who may be liable to an injured seaman-employee under the Jones Act entitled to such indemnity and contribution from a co-seaman whose negligence allegedly caused the injury?

ANALYSIS: In its affirmation of the district court's decision, the Ninth Circuit Court of Appeals rendered judgement for Ferreira despite numerous arguments by CHB for indemnification and contribution.

The Court explicitly declined to recognize conventional land-based tort liability theories regarding indemnity or contribution from fellow employees, continuing to be guided by rules specifically developed in the context of maritime employment.

Traditional maritime law recognized only two claims by a seaman injured in the course of employment - a seaman injured while on board a vessel was entitled to "maintenance and cure" (which included wages until the end of the voyage), and recovery of damages for injuries sustained due to the unseaworthiness of the ship *The Osceola*, 189 U.S. 158 (1903). A vessel owner's duty to provide such "maintenance and cure" is implied as part of the employment contract, and this duty is not subject to abrogation by the parties. Similarly, the owner's duty to provide a seaworthy ship is absolute; once a seaman proved that his injuries were caused by the unseaworthy condition of the vessel or its equipment, the shipowner was liable regardless of fault. *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255 (1912). The common law concept of negligence as a basis for tort liability was not extended to employment injuries at sea until passage of the Jones Act, 46 U.S.C. §688 (1920), which created a negligence right of action for seamen against their employers. CHB argued that if Congress had intended to protect seamen from personal liability, the Jones Act would have included an express immunizing provision. The Court refused to accept this rationale, stating that the purpose of the Act was to benefit and protect seamen by enlarging the remedies available to them. The Court concluded that to interpret the statute to allow lawsuits against seamen would

frustrate the beneficial purpose of the Act.

CHB attempted to further advance its cause of action against Ferreira under principles of maritime indemnity and contribution established under two prior U.S. Supreme Court decisions. See *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp.*, 342 U.S. 482 (1952) and *Cooper Stevedoring Corp. Inc. v. Fritz Kople Inc.*, 417 U.S. 106 (1974). In *Halcyon*, a shipowner was sued by a longshoreman for injuries sustained on board a vessel. The shipowner sought to implead the longshoreman's employer, who was otherwise exempted by statute, as a third party defendant. The Supreme Court held that no right of contribution existed in such non-collision maritime cases. In *Cooper*, an injured longshoreman sued the vessel owner, who later impleaded the non employer, stevedoring company as a third party defendant. The Supreme Court held that the vessel owner was entitled to implead such stevedoring company as a joint tortfeasor. CHB's attempt to wed these holdings to the facts of the case at bar was held to be too sweeping. The Court indicated that unless a direct cause of action exists by one seaman against another for shipboard injuries, the employer can have no right of indemnification or contribution from the employee.

Similarly, the Ninth Circuit upheld the district court's holding that before any statutory rights were created, a seaman could not sue his co-employee for negligence. The Court in interpreting the Jones Act concluded that Ferreira could not be directly liable to Rebelo and therefore, no basis existed for CHB's claim for indemnity against Ferreira. See, *C.H.B. Foods, Inc. v. Rebelo*, 662 F.Supp. 1359 (S.D.CAL.1987).

CHB also argued that it had a right to indemnity from Ferreira on an implied contractual basis, citing the "primary duty rule" adopted in *Reinhart v. United States*, 475 F.2d 151 (9th Cir. 1972). (Seaman-employee may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employment.) The Court held that *Reinhart* had no application in this case because the primary duty rule works only to bar a plaintiff's suit for damages when his injury resulted from his own breach. It does not create any rights against third parties. Given the conditions of maritime employment, the implication of a covenant of workmanlike performance running from the seaman to his employer and entitling the latter to indemnity is not a reasonable one. See *Flunker v. United States*, 528 F.2d 239 (9th Cir. 1975).

Finally, the policy arguments advanced by CHB for indemnity and contribution were rejected by the Court as not in keeping with the history and purpose of the Jones Act. The Court concluded that to subject a seaman to the costs of defending a lawsuit by his employer and the threat of ultimate liability would place an intolerable burden on what is already considered a difficult occupation. See *Socony-Vacume Co. v. Smith*, 305 U.S. 424 (1939).

Alfonso C. Pistone '91