St. John's Law Review

Volume 2
Number 2 *Volume 2, May 1928, Number 2*

Article 18

Negligence--Master and Servant--Ships and Shipping--Assumption of Risk (Yaconi v. Brady & Gioe, Inc., 246 N.Y. 300 (1927))

St. John's Law Review

negligence may be considered in arriving at a verdict.[10] It appears, therefore, that the plaintiff's contributory negligence would be a bar to recovery if the jury found that such negligence existed.[11]

NEGLIGENCE—MASTER AND SERVANT—SHIPS AND SHIPPING—ASSUMPTION OF RISK.—Plaintiff, a stevedore, sued his employer in a State court to recover for personal injuries. Defendant's liability was claimed to have its basis in general maritime law unaffected by statute. Plaintiff, with other men, was sent down into the hold of a vessel lying in New York harbor. He found some spots of grease or oil scattered over the floor for a space of about a yard square. He called to the gangwayman to notify the "boss" and have the condition remedied. He had previously been advised to send word in this way whenever necessary. The gangwayman told him to go ahead and that he would notify the "boss." The condition was not remedied. The plaintiff slipped upon the grease, fell and broke his leg. The jury's finding for the plaintiff was unanimously affirmed by the Appellate Division. On appeal the defendant urged that if there was any negligence, it was that of a fellow servant concerning a detail of the work and that plaintiff assumed, as a matter of law, the risks incident to his employment. *Held,* judgment reversed and complaint dismissed. The correction of the danger was not merely a detail of the work. The master owed the duty to the servant to use reasonable care in supplying a safe place to work.[1] However, the plaintiff assumed the risk. The danger was obvious. Not only obvious but the plaintiff marked and understood it. He knew that there was no pathway to his work except across the path of danger. In going on with the work he made the risk his own. Yaconi *v.* Brady & Gioe, Inc., 246 N. Y. 300 (1927).

The Court of Appeals distinguishes the principal case from an epochal decision of the United States Supreme Court,[2] bringing steve-

[10] In the principal case at page 349, Chief Judge Cardozo said: "Behavior so reckless as to indicate indifference to peril on the part of a person of normal understanding may turn out in a given instance to be only contributory negligence, as where a drunken man, unable to measure the risk, drives madly through a crowded street. We have never yet held that fault so extreme can co-exist with a right of action for damages, however absolute the nuisance. (*Cf.* Chisholm *v.* State, 141 N. Y. 246 (1894); Morrell *v.* Peck, 88 N. Y. 398 (1882); Minick *v.* City of Troy, 83 N. Y. 514 (1881); cases of unguarded openings in streets and bridges.")

[11] The distinction here made is important in the application of the Statute of Limitations, actions to recover for nuisance being maintainable within six years, while negligence actions must be commenced within three years. N. Y. Civ. Prac. Act, §§ 46, 49.

[1] Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52 (1914).

[2] International Stevedoring Co. *v.* Haverty, 272 U. S. 50 (1926).

dores within the protection of the Jones Act,[3] by pointing out that even if the Act were applicable it would have no bearing on its decision. The Jones Act makes the employer liable for the negligence of a fellow servant, and contributory negligence can be urged only in mitigation of damages. The Haverty Case gives a stevedore coming within the scope of the Jones Act the benefit of the Employers Liability Act.[4] However, the latter does not change the law of assumption of risk except where the injury is the result of a failure to comply with a specific statutory duty.[5] The remedy afforded by the Jones Act to seamen does not abrogate the right to maintain an action in admiralty.[6]

By the general maritime law, the defense of assumption of risk is unavailable when a seaman subject to the authority and discipline of the master is injured aboard ship.[7] On the other hand there is a volume of authority that it is a good defense against a stevedore.[8]

The authorities seem to agree that the use of defective ways or works with notice thereof and appreciation of the hazard is assumption of risk and not contributory negligence.[9] The principal decision is in harmony with the cases dealing with assumption of risk.[10]

The language of the Court of Appeals[11] indicates its disapproval

---

[3] Merchant Marine Act of 1920 (Jones Act), 41 Stat. 988, 1007.

[4] Employer's Liability Act of Congress, 35 Stat. 65; Second Employer's Liability Cases, 223 U. S. 1, 49 (1911).

[5] Seaboard Air Line Ry. *v.* Horton, 233 U. S. 492, 503 (1914); 239 U. S. 595, 600 (1916); Jacobs *v.* Southern Ry. Co., 241 U. S. 229 (1916).

[6] Western Front, 1927 A. M. C. 1627 (C. C. A. 3rd, 1927); Osceola, 189 U. S. 158 (1903); Allianca, 264 U. S. 375 (1924); Engel *v.* Davenport, 271 U. S. 33 (1926).

[7] Lynott *v.* Great Lakes Transit Corp., 202 App. Div. 613, *aff'd.*, 234 N. Y. 626 (1922); Crickett S.S. Co. *v.* Parry, 263 Fed. 523 (C. C. A. 2nd, 1920); *cf.* Chelentis *v.* Luckenbach S.S. Co., 247 U. S. 372 (1918).

[8] Cunard S.S. Co. *v.* Smith, 255 Fed. 846 (1918); D. L. & W. R. R. Co. *v.* Tomasco, 256 Fed. 14 (1919); *cf.* Maleeny *v.* Standard S. Corp., 237 N. Y. 250, 255 (1923); Holmes, J., in Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149, 167 (1920).

[9] Maloney *v.* Cunard S.S. Co., 217 N. Y. 278, 282 (1916); Thomas *v.* Quartermaine L. R. [18 Q. B. D.] 685, 698 (1887); Narramore *v.* Cleveland C., C. & St. L. Ry. Co., 96 Fed. 298, 301, Taft, J., (1899); Schlemmer *v.* Buffalo, Rochester and Pittsburg Ry. Co., 220 U. S. 590 (1911); O'Maley *v.* Southern Boston Gas Light Co., 158 Mass. 135. 136 (1893); Dowd *v.* N. Y. O. & W. Ry. Co., 170 N. Y. 459, 469 (1902); Beven on Negligence [3d ed.]. 633; *cf.* Seaboard Air Line Ry. *v.* Horton, *supra,* note 5.

[10] Jacobs *v.* Southern Ry. Co., *supra,* note 5; Crown *v.* Orr, 140 N. Y. 450 (1893); Colleli *v.* Turner, 215 N. Y. 675 (1915); Larson *v.* Nassau Electric R.R. Co., 223 N. Y. 14, 20 (1918); Butler *v.* Frazee, 211 U. S. 459 (1908).

[11] Yaconi *v.* Brady & Gioe, Inc., *supra,* 305, 307. "The question has been argued whether it might properly have been tried under the * * * Jones Act * * *. The Supreme Court has held that the act puts a stevedore within the zone of its protection 'it is true that for most purposes, as the word is commonly used, stevedores are not seamen, but words are flexible.' * * * The stevedore, however styled under the Jones Act, is not a seaman under the rule of the general maritime law with its special exemptions to those subject to

of the Haverty decision. The principal case is judically and logically sound, the Haverty Case is not.[12]

Under recent Congressional legislation, which has yet to meet the test of constitutionality, a system of compensation is substituted for the pre-existing rules and counter-rules.[13]

WILLS — CONSTRUCTION — TRUSTS — PERPETUITIES. — Testator died leaving an estate of $150,000 to $200,000, and survived by his wife, a son and a foster-daughter (who had never been adopted). By his will, he gave the entire estate to a trustee in trust "from the income thereof to pay monthly to our foster-daughter, Mabel Crans, so long as she may live, the sum of fifty dollars ($50) per month for her personal use. The balance of the income of my estate is to be paid to my wife, Ida L. Gallien, as she may desire it. If my said wife should be survived by our son, Brace Goodwin Gallien, then the said balance of income or so much thereof as may be necessary is to be expended for his proper support and maintenance. * * * When the above payments shall cease by reason of the deaths of the beneficiaries mentioned, I direct my said trustee to pay the following bequests. * * *" The foster-daughter survived the testator but four days. The Surrogate and the Appellate Division (by a divided court) held the entire will void, the trust for the wife, son and foster-daughter being deemed violative of statutory prohibitions against the suspension of the power of alienation [1] and absolute ownership [2] for more than two lives in being at the time of testator's death. Upon further appeal it was *held*: that under familiar canons of construction,[3]

---

the power of the master * * *. One might as well bring within that class a laborer employed by a contractor to repair a vessel in a drydock * * *. Such a laborer is subject to the general maritime law, but not to the distinctive features of that law which apply to seamen and no others. No one would think of saying that his damages would be measured by maintenance, cure and wages * * *. 'Words,' as we are told, 'are flexible.'"

[12] See 1 St. John's L. Rev. 76. "It is manifestly unsound to construe the 'Jones Act' as applying to stevedores and longshoremen. The whole tenor of the act is for the protection of seamen and has no reference in any of its provisions to other maritime employments. It is submitted that if Congress intended to include other employments, it would not have restricted its language to 'seamen'."

[13] Longshoremen's and Harbor Workers' Compensation Act of Congress. March 4, 1927. 1927 A. M. C. 525. 556.

[1] N. Y. Real Prop. L. § 42: "* * * Every future estate shall be void in its creation, which shall suspend the absolute power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate.* * *"

[2] N. Y. Pers. Prop. L. § 11: "The absolute ownership of personal property shall not be suspended by any limitation or condition, for a longer period than during the continuance and until the termination of not more than two lives in being. * * *"

[3] Phillips *v.* Davies, 92 N. Y. 199 (1883); Roe *v.* Vingut, 117 N. Y. 204. 22 N. E. 933 (1889); Greene *v.* Greene, 125 N. Y. 506, 26 N. E. 739 (1891).