Admiralty - The "Twilight Zone" - Longshoremen's Act and Louisiana Compensation Act as Concurrent Remedies

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A longshoreman, injured in the hold of a vessel moored in navigable waters, sought workmen's compensation under the Louisiana act. The Louisiana district court dismissed his suit on the ground that his exclusive remedy was the federal Longshoremen's and Harbor Workers' Compensation Act. The court of appeal held, reversed and remanded. A longshoreman injured on navigable water can seek workmen's compensation under either the Longshoremen's and Harbor Workers' Compensation Act or the Louisiana Workmen's Compensation Act. Richard v. Lake Charles Stevedores, 95 So.2d 830 (La. App. 1957), cert. denied, 78 Sup. Ct. 535 (U.S. 1958).

This century has seen a prolonged legal battle in the courts over the constitutionality of state workmen's compensation laws as they apply to longshoremen and other harbor workers. The fight began in 1917 with the case of Southern Pacific v. Jensen, in which a five-man majority of the United States Supreme Court held that a state workmen's compensation law was unconstitutional insofar as it applied to a longshoreman injured on a gangway between the ship and the dock. The rationale of the

2. It should be noted at the outset that at the present time longshoremen are not considered "seamen" within the meaning of the Jones Act, although this has not always been the case. Gilmore & Black, The Law of Admiralty 282 (1957).
3. The battle might be regarded as essentially a jurisdictional clash between the state authorities charged with administration of the state compensation acts, and the federal courts, vested with original and exclusive jurisdiction by Congress, 28 U.S.C. § 1333 (1948). However, it seems better to view the problem as a conflict between state substantive law and the substantive maritime law applied by the federal courts. See Gilmore & Black, The Law of Admiralty 43 (1957).
4. Four years earlier in The Fred E. Sander, 208 Fed. 724 (W.D. Wash. 1913), a federal district court held that a longshoreman injured on board ship had suffered a maritime tort, to which the state workmen's compensation act could not validly apply. It is interesting to speculate as to what effect this long, closely-reasoned opinion may have had on the majority in Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).
5. 244 U.S. 205 (1917).
6. The alignment of the Court should be compared to that found in Mountain Timber Co. v. State of Washington, 243 U.S. 219 (1917). That case, decided just before Jensen, was one of a group of leading cases in which the Court first considered the constitutionality per se of state workmen's compensation laws. In the Washington case four Justices dissented from the holding that the Washington
majority was this: the injury had occurred over navigable water; it was thus a "maritime tort"7 and within the original and exclusive admiralty jurisdiction of the federal courts under Article III, Section 2, of the Constitution; this constitutional grant of admiralty jurisdiction to the federal courts implied that a nationally uniform system of substantive admiralty law was necessary;8 to allow the various state compensation acts to apply to "maritime torts" would wreck the necessary "uniformity" of maritime law.9 Later the Supreme Court modified the *Jensen* rule by holding that although a tort occurred over navigable water and thus was "maritime," a state workmen's compensation law could validly apply if the employment of the injured person had been so local in nature that it had no direct relation to navigation and commerce.10 Allowing the state act to cover situations which were "maritime but local," reasoned the court, would not seriously prejudice the need for "uniformity," hallowed five years earlier in the *Jensen* case.11 The result created a problem for the harbor worker injured over navigable water.12 He could

workmen's compensation law was constitutional. These four formed most of the majority in the *Jensen* case. Four of the Justices who had held for constitutionality in the *Washington* case, including Holmes and Brandeis, became the dissenters in the *Jensen* decision.

7. Southern Pacific Co. v. Jensen, 244 U.S. 205, 217 (1917). The rule that a tort is maritime if it occurs over navigable water had been announced earlier in Atlantic Transport Co. v. Imbrovek, 234 U.S. 52 (1914). This "locality test" is still the one used to determine whether a tort is within the admiralty jurisdiction. Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935); Vancouver Steamship Co. v. Rice, 288 U.S. 445 (1933).

8. The Constitution merely extends the *judicial* power of the federal courts to admiralty cases. U.S. CONST. art. III, § 2. However, the Supreme Court had previously declared that Article III, Section 2, implied that Congress had the power to enact substantive admiralty law. Butler v. Boston & Savannah S.S. Co., 130 U.S. 527 (1889). Further, the federal courts had traditionally applied (and modified) the general maritime law as gleaned from European authorities. GILMORE & BLACK, THE LAW OF ADMIRALTY 42 (1957).

9. "And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." Southern Pacific Co. v. Jensen, 244 U.S. 205, 216 (1917).

Justice Holmes, dissenting, called the majority's fear of lack of "uniformity" in the general maritime law a "spectre." Id. at 223.


11. "[N]either [plaintiff's] general employment, nor his activities at the time had any direct relation to navigation or commerce .... Under such circumstances regulation of the rights, obligations, and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations." Id. at 476. This "maritime but local" exception to *Jensen* had been worked out earlier in another context. Western Fuel Co. v. Garcia, 257 U.S. 253 (1921) (wrongful death action brought in admiralty court under state wrongful death statute).

12. "It must be remembered that under the *Jensen* hypothesis, basic conditions
not get an award under the state compensation act unless his occupation fit within the "maritime but local" exception to Jensen and there was no way to determine this with certainty except by fighting up through the appellate hierarchy. If it were finally decided that his situation was within the exclusive ambit of the general maritime law applied by the federal courts, he was without a right to workmen's compensation of any sort, since the general maritime law provided none. In 1927 Congress sought to provide workmen's compensation in such a case by enacting the Longshoremen's and Harbor Workers' Compensation Act. By providing that it covered workers hurt over navigable water only if the state compensation acts "may not validly apply,"
Congress seemingly excluded from coverage those workers whom the federal courts had placed under the state acts through the "maritime but local" doctrine. For the next fifteen years the courts continued to use the "maritime but local" formula to classify new waterfront situations either under the state acts on the one hand, or the Longshoremen's Act on the other.

In 1941 the Supreme Court handed down a decision which did not seem to fit this pattern. An award to a widow made under the Longshoremen's Act was allowed to stand, even though the deceased had been killed while demonstrating an outboard motor, a task which certainly seemed "local" within the "maritime but local" doctrine of death of an employee, but only if the disability or death results from an injury occurring upon navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Longshoremen's and Harbor Workers' Compensation Act, § 3(a), 44 Stat. 1424 (1927), 33 U.S.C. § 903(a) (1952).

20. Sultan Ry. & Timber Co. v. Department of Labor & Indus. of the State of Washington, 277 U.S. 135 (1928) (unloading sawlogs for use in mill); Alaska Packers Ass'n v. Industrial Acc. Comm'n, 276 U.S. 467 (1928) (cannery workman pushing boat into water); Rosengrant v. Havard, 273 U.S. 664 (1926) (tallyman for lumber company shot while over navigable water); Millers' Indem. Underwriters v. Braud, 270 U.S. 59 (1926) (diver sawing off timbers from abandoned set of marine ways); Alaska Packers Ass'n v. Marshall, 95 F.2d 279 (9th Cir. 1938) (loading fish into a schooner for packing company); New Amsterdam Cas. Co. v. McManigal, 87 F.2d 322 (2d Cir. 1937) (building lighthouse over navigable water); Jeffers v. Foundation Co., 85 F.2d 24 (2d Cir. 1936) (building vessel over navigable water); Sunny Point Packing Co. v. Faigh, 63 F.2d 921 (9th Cir. 1933) (watchman on floating fishtrap); United States Cas. Co. v. Taylor, 64 F.2d 521 (4th Cir. 1933), cert. denied, 290 U.S. 689 (1933) (workman on launched ship only 96% completed); United Dredging Co. v. Lindberg, 18 F.2d 443 (5th Cir. 1927), cert. denied, 274 U.S. 759 (1926) (decendant fell behind dredge digging canal across land); Massman Constr. Co. v. Bassett, 1940 A.M.C. 310 (E.D. Mo. 1940) (inside dry cofferdam); Hawkins v. Raynor, 261 App. Div. 1011, 25 N.Y.S.2d 876 (1941) (garage worker drowned protecting employer's boat during storm); William Hebert's Case, 283 Mass. 348, 186 N.E. 554 (1933) (sweeper on garbage scow); accord: P. J. Curlin Constr. Co. v. Heaney, 299 U.S. 41 (1936) (ferryboat operator).

If it were decided that a workman fell within the "maritime but local" doctrine and thus state compensation could validly apply to him, he was denied compensation under the Longshoremen's Act even though the state had no compensation act. United States Cas. Co. v. Taylor, 64 F.2d 521 (4th Cir. 1933).

During this period other situations were classed under the state acts, not because they were "maritime but local," but because they were not maritime at all, since they did not occur over navigable water. For example, an injury to a longshoreman on land was not a maritime tort. Colonna's Shipyard v. Lowe, 22 F.2d 843 (E.D. Va. 1927); Small's Atlantic Coast Shipping Co., 261 Fed. 928 (E.D. Va. 1919). Neither was an injury to a longshoreman on a dock, since the dock was considered an extension of the land. T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928) (longshoreman struck on dock, from which he fell into navigable water and drowned); State Industrial Comm'n of New York v. Nordenholt Corp., 259 U.S. 263 (1922); Netherlands American Steam Nav. Co. v. Gallagher, 252 Fed. 171 (2d Cir. 1922); Swayne & Hoyt v. Barsch, 226 Fed. 581 (9th Cir. 1915). Of Seifort v. Keansburg Steamboat Co., 20 F. Supp. 542 (S.D.N.Y. 1937) (watchman hurt on dock not within coverage of Jones Act).
local” rule and thus presumptively within the exclusive coverage of the state act. Language in the decision indicated that perhaps the court had given up the “maritime but local” exception entirely and returned to the unqualified preemption of the Jensen case. However, the following year the Court revealed what had been behind the decision by creating the now-famous “twilight zone,” an area of situations wherein the injured worker could recover under either the federal or state act. What comprised the “twilight zone” was by no means clear, but apparently the Court meant to include within it at least all the possible waterfront situations which had not already been before the courts and thereby become classified either under the Longshoremen's Act or the state acts. The “twilight zone” was indeed “theoretic


23. Ibid. For earlier cases classifying situations as “maritime but local,” see note 20 supra.

24. To the argument that the situation in the case was within the “maritime but local” doctrine, the Supreme Court, through Justice Black, replied that “the decision of this Court in Southern Pacific Co. v. Jensen, 244 U.S. 205, however, severs a link in this chain of reasoning. For under the holding of that case, even in the absence of any Congressional action, federal jurisdiction is exclusive and state action forbidden in an area which, although of shadowy limits, doubtless embraces the case before us.” Id. at 247. “While the proviso of § 3(a) appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide.” Id. at 249.

25. Davis v. Department of Labor and Indus. of Washington, 317 U.S. 249 (1942). The federal commissioner’s “conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error.” Id. at 256. However, if the state has taken jurisdiction, the Court will rely “heavily on the presumption of constitutionality in favor of the state statute.” Id. at 257.

26. “There is, in the light of the cases referred to, clearly a twilight zone in which the employees must have their rights determined case by case, and in which
illogic" in that it caused the federal and state acts to overlap in doubtful cases, even though the federal act by its own terms cannot apply where state acts may validly apply. However, the next two Supreme Court cases on the subject apparently made the "twilight zone" even broader. There the employees had been injured while repairing completed vessels on navigable water. Even though this situation had often been litigated and was invariably classed as outside the scope of the state compensation acts, the workmen chose to sue under state acts. In both cases the Supreme Court upheld the workman's choice.
The decision in the present case hinged on the court's analysis of these last two cases. In those cases the employees, who would have been clearly within the coverage of the Longshoremen's Act under the pre-"twilight zone" decisions, were allowed compensation under the state acts. The court in the present decision reasoned that the "twilight zone" had been extended by the Supreme Court to include all waterfront injuries. Thus, although the plaintiff in the instant case, a longshoreman hurt on navigable water, would formerly have been placed under the federal act, he had brought his suit under the state act, and so his choice should be upheld.

According to the Court's analysis of the Supreme Court cases, the Longshoremen's Act and the state acts are now concurrent remedies. Although the Court's conclusion has been expressly

waterfront cases involving aspects pertaining both to the land and to the sea where a reasonable argument can be made either way, even though a careful examination of previous decisions might disclose an apparent weight of authority one way or the other." Moores' Case, 323 Mass. 162, 167, 80 N.E.2d 475, 480 (1948).

34. See note 31 supra.


39. The court referred to the present state of the law as amounting to a "concurrent jurisdiction exercised by both State and federal tribunals, each jurisdiction deciding for itself whether it shall apply its own law, such determination being relatively final." Id. at 831.

However, there may be a difference in the "finality" of a state authority's decision on whether to take jurisdiction of a case and that of the federal commissioner. The Supreme Court has indicated that it will accord nearly absolute finality to the findings of the federal commissioner regarding jurisdiction. Avondale Marine Ways v. Henderson, 346 U.S. 366 (1953); Davis v. Department of Labor and Indus. of Washington, 317 U.S. 249 (1942). The Commissioner will probably be upheld whether he accepts jurisdiction over a case or refuses to do so. Gilmore & Black, The Law of Admiralty 333 (1957). On the other hand, the Davis and Baskin cases clearly show that a state authority's refusal to take jurisdiction over a case can be reversed by the federal court. Ibid.

However, it would appear that once a state authority has taken jurisdiction of a case, it will not be reversed by the Supreme Court, since the state compensation act would be presumed constitutional under the doctrine of the Davis case. Comment, 33 Wash. L. Rev. 312, 323 (1958); Gilmore & Black, The Law of Admiralty 354 (1957) (inherently). Contrary, 2 Larson, The Law of Workmen's Compensation 418-19 (1952), wherein it is argued that the problem in this area is still one of federal preemption, and a federal court can always decide that a state authority has invalidly taken jurisdiction over a case.

A related question is whether there can be awards under both the federal and
disapproved by the Federal Court of Appeals for the Fifth Circuit,\textsuperscript{40} it appears to the writer to be correct. In every case since 1941, including the 1959 decision of \textit{Hahn v. Ross Island Sand & Gravel Co.},\textsuperscript{41} the Supreme Court has refused to upset a harbor worker's choice.\textsuperscript{42} Admittedly, there is "theoretic illogic" in saying the federal act is concurrent with the state acts, when the federal act expressly states that it cannot apply where state acts may validly apply.\textsuperscript{43} However, the practical result simplifies the problem for the injured harbor worker.\textsuperscript{44} If the Longshore-

state acts. It would appear that an employee can get a supplemental award under the Longshoremen's Act after he has received an award under a state act. Western Boat Bldg. Co. v. O'Leary, 198 F.2d 400 (9th Cir. 1952) ; Newport News Shipbuilding & Dry Dock Co. v. O'Hare, 192 F.2d 968 (4th Cir. 1951) ; 2 Larson, \textit{The Law of Workmen's Compensation} 418 (1952) ; Gilmore & Black, \textit{The Law of Admiralty} 354 (1957). Larson contends that federal supremacy in this area precludes a state's making an award once an award has been made by the federal commissioner. 2 Larson, \textit{loc. cit. supra}. However, it would appear that any such federal "supremacy" disappeared with the advent of the "twilight zone," and therefore a state may validly make a supplemental award to one already made under the Longshoremen's Act. Gilmore, & Black, \textit{loc. cit. supra}. However, it would appear that an employee can get a supplemental award under the Longshoremen's Act after he has received an award under a state act. Western Boat Bldg. Co. v. O'Leary, 198 F.2d 400 (9th Cir. 1952) ; Newport News Shipbuilding & Dry Dock Co. v. O'Hare, 192 F.2d 968 (4th Cir. 1951) ; 2 Larson, \textit{The Law of Workmen's Compensation} 418 (1952) ; Gilmore & Black, \textit{The Law of Admiralty} 354 (1957). Larson contends that federal supremacy in this area precludes a state's making an award once an award has been made by the federal commissioner. 2 Larson, \textit{loc. cit. supra}. However, it would appear that any such federal "supremacy" disappeared with the advent of the "twilight zone," and therefore a state may validly make a supplemental award to one already made under the Longshoremen's Act. Gilmore, & Black, \textit{loc. cit. supra}.
men's Act is concurrent with the state compensation act, he need not pursue a costly appeal merely to find out which act applies to him, but can simply choose between the two without fear of having made the wrong choice.45

C. Jerre Lloyd

CRIMINAL LAW — CONSTITUTIONALITY OF STATUTE PROHIBITING POSSESSION OF HYPODERMIC NEEDLE WITHOUT CRIMINAL INTENT

Defendant was convicted under a Louisiana statute1 making it a crime to possess a hypodermic needle. The statute, with certain exceptions,2 imposed criminal liability for mere possession with no consideration given to the intended use of the needle. In the original trial3 the state introduced evidence of the presence of a barbiturate in the box where the needle was found. Defendant offered evidence to prove that he had never used the needle for the administration of narcotics. The state's objection of irrelevancy to this offer was sustained in the district court on the grounds that the defendant was being prosecuted for possession alone, and intent was therefore irrelevant. On appeal, the case was remanded by the Supreme Court on the grounds that evidence tending to show an illegal intent and evidence tending toward disproving this intent are both relevant in all criminal prosecutions.4 On retrial, the defendant was again convicted, with the evidentiary matter apparently never again becoming an issue. On appeal of the second conviction, the de-

4. See note 16 infra.

1. LA. R.S. 40:962(B) (1950): “It is unlawful for any person, except a dealer in surgical instruments, apothecary, dentist, veterinarian or nurse, attendant or intern of a hospital, sanatorium or institution in which persons are treated for disability or disease, at any time to have or possess a hypodermic syringe or needle unless such possession be authorized by the prescription or certificate of a physician issued within the period of one year prior thereto. Provided that this sub-section shall not be held to apply to syringes or needles for the treatment of fowl or livestock.” The term “physician” is defined to mean a person authorized to practice medicine in the State of Louisiana.

2. Ibid.


45. A comparison of the benefits under the Louisiana Workmen's Compensation Act with those under the Longshoremen's Act can be found in MALONE, LOUISIANA WORKMEN'S COMPENSATION LAW AND PRACTICE 606-12 (1951). For a short discussion of the possibility of obtaining awards under both the Louisiana act and the federal act, see note 39 supra.