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# Admiralty -- Recovery Under the Jones Act for Foreign Seamen: The Demise of the Law of the Flag

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tional right to his job, he may at least assert that he cannot be fired for reasons nor in a manner that constitutes infringement by the state of his constitutional rights including the right to be free from arbitrary governmental action. The public employee may even argue that Justice Holmes's holding has been so emasculated that it should no longer be considered valid. Many courts may agree with the court in *Albaum v. Carey*:

> Whether we state the matter in traditional terms that government largess is a property right within the meaning of the fourteenth amendment . . . or whether we say that to deprive a government employee of his job for exercising Constitutionally protected rights is to deprive of the liberty guaranteed by that amendment, or whether we merely reason that all government action with respect to its employees must meet the standards imposed by the Amendment, our conclusion is the same: the Federal Constitution requires every level of government to afford nondiscriminatory and fair treatment, both substantively and procedurally, to all its employees; conditions of governmental employment may not stifle fundamental liberties.[93]

The more recent cases have one essential element in common; each recognizes that the state is always the state and no matter the capacity in which it acts, be it employer or landlord, it is constrained by the Constitution.[94] When public employers, as well as the courts, recognize this basic fact and act accordingly the public employee will truly have made significant progress in protecting himself against arbitrary dismissal.[95]

BEN F. TENNILLE

## NOTES

### Admiralty—Recovery Under the Jones Act for Foreign Seamen: The Demise of the Law of the Flag

"A vessel at sea may be a thing of beauty . . . but . . . she presents a structure full of hazards for even the most experienced mariner."[1] This

[93] 283 F. Supp. at 9-10.

[94] *See* Van Alstyne, *The Constitutional Rights of Public Employees: A Comment on the Inappropriate Uses of an Old Analogy*, 16 U.C.L.A.L. REV. 751, 752 (1969).

[95] Hopefully, the entire task of protecting the rights of public employees will not be left to the courts. *See* Rosenbloom, *The Constitution and the Civil Service, Some Recent Developments, Judicial and Political*, 18 U. KAN. L. REV. 839 (1970); Note, *Dismissal of Federal Employees—The Emerging Judicial Role*, 66 COLUM. L. REV. 719 (1966).

[1] 2 M. NORRIS, THE LAW OF SEAMEN § 612 (3d ed. 1970).

is certainly as true for the foreign seaman as the American, yet United States courts have in the past been reluctant to extend coverage under the Jones Act[2] to foreign seamen proceeding against foreign shipowners.[3]

In 1920 Congress passed the Jones Act[4] to provide injured seamen with the rights and remedies afforded railway employees under the Federal Employers' Liability Acts.[5] The practical effect of this legislation was to give to seamen a cause of action for negligence while abolishing the fellow-servant rule[6] and the defenses of assumption of risk and contributory negligence.[7]

One of the primary problems in dealing with the Jones Act has been the proper ambit of the phrase "any seaman." When a foreign seaman brings an action under the Act for personal injuries sustained aboard a foreign vessel, the court must decide whether American law may or should be applied. Conceivably, in international shipping, a number of nations may be relevantly linked to the transaction. In the landmark decision, *Lauritzen v. Larsen*,[8] the Supreme Court attempted to establish guidelines in determining whether the Jones Act may be applied to the disposition of actions involving foreign contacts.

Justice Jackson began this elaborate opinion by stressing the importance of comity and the need for respecting the laws of other sovereignties. While recognizing that technically the Jones Act "conferred an American right of action" on "any seaman,"[9] he recognized the further necessity of "reconciling our own with foreign interests and in accom-

[2] 46 U.S.C. § 688 (1964).

[3] "The Jones Act was passed for the welfare of *American* seamen." The Magdapur, 3 F. Supp. 971, 973 (S.D.N.Y. 1933) (emphasis added). *See also* The Paula, 91 F.2d 1001, 1003-04 (2d Cir. 1937), *cert. denied*, 302 U.S. 750 (1937). *But see* Arthur v. Compagnie Generale Transatlantique, 72 F.2d 662 (5th Cir. 1934).

[4] Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply . . . .

46 U.S.C. § 688 (1964).

[5] 45 U.S.C. §§ 51-60 (1964).

[6] The fellow-servant rule holds that the employer is not liable for injuries to an employee caused by the negligence of a fellow employee.

[7] Although after passage of the Jones Act contributory negligence was no bar to recovery in an action against his employer, the rule of comparative negligence was applied, and damages were reduced in proportion to the negligence of the injured seaman. 45 U.S.C. § 53 (1964).

[8] 345 U.S. 571 (1953).

[9] *Id.* at 576.

modating the reach of our own laws to those of other martime nations."[10] The Jones Act was construed "to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law."[11] This caveat was issued for consideration when a choice of law was necessary:

> [I]n dealing with international commerce we cannot be unmindful of the necessity of mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.[12]

Justice Jackson indicated that the proper way to avoid or resolve the conflicts between competing laws was to ascertain points of contact between the transaction and the governments involved and weigh the significance of these contacts. Seven factors "generally conceded to influence choice of law"[13] were set out along with the weight and significance to be accorded each. They were (1) place of the wrongful act, (2) law of the flag, (3) allegiance or domicile of the injured, (4) allegiance of the defendant shipowner, (5) place of the contract, (6) inaccessibility of foreign forum, and (7) the law of the forum.

Of these factors, it was said that "[p]erhaps the most venerable and universal rule of maritime law . . . is that which gives cardinal importance to the law of the flag."[14] Allowing the law of the ship's flag to govern torts aboard a ship which might pass through numerous jurisdictions and spend much time on the high seas added a dimension of predictability and provided a measure of uniformity. The Court re-emphasized[15] the significance of the flag by holding that the "weight given to the ensign overbears most other connecting events"[16] and it "must prevail unless some heavy counterweight appears."[17]

Despite the emphasis placed on the law of the flag, the Court recognized the prevalence of "flags of convenience":

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[10] *Id.* at 577.
[11] *Id.*
[12] *Id.* at 582.
[13] *Id.* at 583.
[14] *Id.* at 584.
[15] The law of the flag had become settled American doctrine. *See* RESTATEMENT OF CONFLICT OF LAWS §§ 405-06 (1934).
[16] 345 U.S. at 585.
[17] *Id.* at 586.

> [I]t is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted by such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them.[18]

When the flag is one of convenience, its significance as a point of contact diminishes, and there is a corresponding increase in the importance of the allegiance of the shipowner.

Recognition of the flag-of-convenience problem by the Supreme Court presaged a liberal trend in the application of the *Lauritzen* factors. It is in dealing with vessels of "convenient" foreign registry that the greatest extension in the application of the Jones Act to foreign seamen has occurred and this is perhaps the area of greatest confusion. A review of the ensuing decisions reveals the state of flux which evolved.

*Zielinski v. Empresa Hondurena de Vapores*[19] began a series of Jones Act decisions in the prolific, if not always consistent, District Court for the Southern District of New York. A foreign seaman who had been injured aboard a ship of Honduran registry owned by a Honduran company the stock of which was owned by an American company was allowed to sue under the Jones Act. In disregarding the flag of the vessel, the court expressed the belief that effect should be given to the nationality of actual control of the ship. This decision was followed by holdings that American ownership of the stock of the shipowning corporation alone was not enough to justify the application of the Jones Act.[20] *Bobolakis v. Compania Panamena Maritima San Gerassimo, S.A.*[21] then followed, with a decision by the court that "majority ownership and control by Americans of the corporate owner of the vessel represents sufficient contact with the United States to justify the application of the Jones Act,"[22] but cast doubt that the distinction between ownership and control was valid and indicated a belief that American ownership alone was sufficient for the Jones Act to apply. A retreat from this position was indicated in

[18] *Id.* at 587.

[19] 113 F. Supp. 93 (S.D.N.Y. 1953).

[20] Mproumeriotis v. Seacrest Shipping Co., 149 F. Supp. 265 (S.D.N.Y. 1957); Argyros v. Polar Compania De Navegacion, Ltda., 146 F. Supp. 624 (S.D.N.Y. 1956).

[21] 168 F. Supp. 236 (S.D.N.Y. 1958).

[22] *Id.* at 238.

*Moutzouris v. National Shipping & Trading Co.*[23] in which the court held that American stock ownership of the shipowning corporation, without more, was insufficient for application of the Jones Act.

The Court of Appeals for the Second Circuit had earlier attempted to inject a measure of stability into the application of the *Lauritzen* factors in *Bartholomew v. Universe Tankships, Inc.*[24] Citing the "inherent vagueness" of the *Lauritzen* test, Judge Medina attempted a "restatement of the method of approach and the principles to be applied."[25] He concluded that the test was one of "substantial contacts," and held as substantial, contacts that included remote United States ownership.[26]

The Supreme Court addressed itself to the application of *Lauritzen* in two noteworthy cases. In refusing to apply the Jones Act in *Romero v. International Terminal Operating Co.*,[27] it stressed again the need for respect of the interests of foreign nations and advised the use of "circumspection" when "adjudicating issues inevitably entangled in the conduct of our international relations."[28] Although *McCulloch v. Sociedad Nacional de Marineros de Honduras*[29] did not concern the Jones Act, the issue was whether American law extended to crews on foreign flag vessels that were beneficially owned by a United States corporation. The National Labor Relations Board, using a test relying on the relative weight of American as compared with foreign contacts, had found that the operations involved substantial United States contacts so as to require application of American law. The Court rejected this "balancing of contacts" theory, saying its use could "raise considerable disturbance not only in the field of maritime law but in our international relations as well."[30] Even though the Court pierced the corporate veil and found American owners, application of American law was not allowed. In a footnote, the

[23] 194 F. Supp. 468 (S.D.N.Y. 1961).

[24] 263 F.2d 437 (2d Cir. 1959), *cert. denied*, 359 U.S. 1000 (1959).

[25] *Id.* at 439.

[26] The defendant was a Liberian corporation the stock of which was held by a Panamanian corporation, and citizens of the United States owned all the stock of the Panamanian corporation. In addition, all the officers of the Liberian shipowning corporation were American citizens and the company's principal place of business was in New York City.

[27] 358 U.S. 354 (1959). The *Romero* decision has major significance in areas of admiralty other than choice of law. For a more complete discussion of the case see H. BAER, ADMIRALTY LAW OF THE SUPREME COURT § 5-1, at 104-11 (2d ed. 1969) and Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1 (1959).

[28] 358 U.S. at 383.

[29] 372 U.S. 10 (1963).

[30] *Id.* at 19.

Court again stressed the importance of the law of the flag in determining the applicability of the Jones Act.[31] Prompted by this decision, the Second Circuit Court of Appeals in *Tjonaman v. A/S Glittre*[32] reconsidered the "substantial contacts" test it had announced in *Bartholomew*[33] and, noting that this test had been interpreted as limiting the dominating importance of the law of the flag, recognized *McCulloch* as restoring that importance.

This was the development of the law preceding a direct conflict between the Second and Fifth Circuit Courts of Appeals which ultimately led to action by the Supreme Court in *Hellenic Lines Ltd. v. Rhoditis*.[34] *Tsakonites v. Transpacific Carriers Corp.*[35] came before the second circuit in 1966. Following its interpretation of *McCulloch* and its reasoning in *Tjonaman* the court determined that, although the great majority of the stock of the corporation that owned the vessel was owned by a permanent resident alien of the United States who substantially controlled the ship from New York, the flag was not a flag of convenience and its law should prevail. Primary consideration was given to comity and it was noted that "[t]he Supreme Court has given no indication that the law of the flag (when not a flag of convenience) is still not to be considered of paramount importance."[36] Judge Waterman dissented, noting that United States courts do not hesitate to pierce the corporate veil to apply United States law to Americans who have sought to circumvent their responsibility by incorporating and registering their vessels abroad. It was his contention that resident aliens were accorded the same constitutional protections as citizens and enjoyed the considerable benefits of resident alien status and should therefore have imposed upon them the same duties and obligations as citizens.

The facts in *Hellenic Lines Ltd. v. Rhoditis*[37] closely parallel those in *Tsakonites*. The Greek flag vessel on which the injury occurred was owned by a Panamanian corporation[38] that was in turn owned by a Greek corporation operating from a base in New York.[39] Ninety-five per cent

[31] *Id.* n.9.
[32] 340 F.2d 290, 292 (2d Cir. 1965), *cert. denied,* 381 U.S. 925 (1965).
[33] *See* p. 324 *supra.*
[34] 398 U.S. 306 (1970).
[35] 368 F.2d 426 (2d Cir. 1966), *cert. denied,* 386 U.S. 1007 (1967).
[36] *Id.* at 429.
[37] 398 U.S. 306 (1970).
[38] The Panamanian corporation was in reality a holding company with no operational responsibilities in connection with the ship. Hellenic Lines Ltd. v. Rhoditis, 412 F.2d 919, 921 (5th Cir. 1969).
[39] The company's principal office, employing seventy-five, was in New York. An office of fifteen employees was located in New Orleans. *Id.* n.5.

of the stock of the operating corporation was owned by a Greek citizen who had resided in the United States since 1945.[40]

The injured seaman, a Greek citizen, brought an action in the district court and sought recovery under the Jones Act.[41] The court found the American contacts "quite substantial"[42] and held the Jones Act applicable, awarding damages of six thousand dollars.[43] The Fifth Circuit Court of Appeals agreed, finding the flag of the vessel "more symbolic than real."[44] The court recognized that in *Tsakonites* the second circuit "reached a contrary result on identical factors,"[45] but favored the reasoned dissent of Judge Waterman, rejecting outright the majority position.

In light of the developments in the application of the *Lauritzen* test to foreign vessels flying flags of convenience, culminating in the *Tsakonites-Rhoditis* split, the Supreme Court granted Hellenic Lines' petition for certiorari.[46] In a five-to-three[47] decision, the application of the Jones Act by the fifth circuit was affirmed.

Justice Douglas began the opinion by recognizing that the majority of the *Lauritzen* factors operated against Jones Act jurisdiction, but countered by stating that the test was not meant to be mechanical nor the factors exhaustive. The test of "substantial contacts" formulated by the

[40] The owner had become a lawful permanent resident alien in 1952. 398 U.S. at 309.

[41] The suit originated as a libel (complaint) *in rem* against the ship and in personam against Universal Cargo Carriers and Hellenic Lines. After discovering the defendants' substantial United States contacts, Rhoditis successfully moved to have the Jones Act applied. 412 F.2d at 920 n.4. Under the Jones Act, the suit is in personam against the shipowner, and not against the ship itself. Plamals v. S.S. "Pinar Del Rio," 277 U.S. 151 (1928).

[42] In addition to the fact that the controlling corporation was based in New York and owned by a permanent resident alien of the United States, the injury occurred in a United States port and the entire income of the vessel was generated by cargo either originating or terminating in the United States. On the other hand, both the controlling corporation and its owner were in fact Greek, the vessel was registered in Greece, the injured seaman was a citizen of Greece, the contract of employment was signed in Greece and specifically provided that the Greek legal system should be used in settling any claims arising out of the contract, and relief was apparently available in a Greek forum.

[43] Rhoditis v. Hellenic Lines, Ltd., 273 F. Supp. 248 (S.D. Ala. 1967).

[44] Hellenic Lines, Ltd. v. Rhoditis, 412 F.2d 919, 923 (5th Cir. 1969).

[45] *Id.* The resident alien shipowner was the same man in both *Tsakonites* and *Rhoditis*, but the facts of the cases were not completely identical. The variations were minor, however, and apparently of no consequence. *See* Note, *Admiralty—Choice of Law—Jones Act Held Applicable in Action Against Resident Alien Shipowner*, 44 TUL. L. REV. 347, 353 n.34 (1970).

[46] 396 U.S. 1000 (1970).

[47] Chief Justice Burger and Justices Harlan and Stewart dissented, with Justice Harlan authoring the opinion. Justice Douglas wrote for the majority.

second circuit in *Bartholomew*[48] and the addition of "base of operations" as a factor of importance by the court in *Pavlou v. Ocean Traders Marine Corp.*,[49] were cited favorably. The Court's unwillingness to allow the owner a competitive advantage "by allowing him to escape the obligations and responsibility"[50] of the Jones Act echoed Judge Waterman's dissent in *Tsakonites.*

Justice Harlan's dissent expressed a belief that the premises on which *Lauritzen* was founded had been misconstrued by courts "that have taken the phenomenon of 'convenient' foreign registry as a wedge for displacing the law of the flag."[51] The purpose of *Lauritzen* "was to reconcile the all-embracing language of the Jones Act with . . . principles of comity . . . ."[52] It was said that "contacts . . . simply serve as an adequate nexus between this country and defendant to assert jurisdiction in a case where Congressional policy is otherwise furthered," and "have no bearing in themselves on whether Jones Act recovery is appropriate" no matter how "substantial or numerous."[53] Justice Harlan noted that only recently in *McCulloch* the Court had declined to override the law of the flag where there were substantial United States contacts including beneficial ownership of the vessel by a United States company, and that perhaps the courts have become "mesmerized by contacts."[54]

Although the Supreme Court in *Lauritzen* had accorded paramount importance to the law of the flag in determining the applicability of the Jones Act, tacit approval was given to the practice of looking beyond the flag when the foreign registration of the vessel was "more or less nominal."[55] Implementation of this decision has resulted in an increasingly liberal trend in the determination of whether a flag is one of "convenience," and the lack of specific guidelines in making this determinaiton has resulted in confusion in the case law. The need for clarification of what exactly constitutes a "flag of convenience" and positive standards to apply once this determination has been made was obviously indicated by the *Tsakonites-Rhoditis* conflict. The Supreme Court in *Rhoditis* failed to respond to these needs.

Beginning with *Lauritzen,* the Court's repeated emphasis on the law

[48] *See* pp. 324-25 *supra.*
[49] 211 F. Supp. 320, 325 (S.D.N.Y. 1962).
[50] 398 U.S. at 310.
[51] *Id.* at 315.
[52] *Id.* at 318.
[53] *Id.* at 315.
[54] *Id.* at 318.
[55] *See* text accompanying note 18 *supra.*

of the flag established a position heavily relied on by the courts. The treatment in *Rhoditis*, whereby the flag was summarily relegated to a position of insignificance, with no consideration of whether it was real or illusory, undercuts this position. A reassessment of the significance to be accorded this "most venerable"[56] factor was indicated. "Base of operations" was approved as a factor due consideration, but there was no prescription for its application. The Court's inconsistency and failure to respond adequately to the needs revealed by the confused application of *Lauritzen* will do little to order the confusion.

The reasoning that led to the Court's emphasis on respect for the relevant interests of foreign nations and concern that our law should be interpreted consistent with principles of international law in *Lauritzen*, *Romero*, and *McCulloch* is as valid today as when dictated. The decision in *Rhoditis* portends a broadening of the circumstances under which the courts of the United States will permit utilization of the Jones Act by aliens injured in the service of foreign vessels—a trend which could lead to unwarranted consequences. It has been suggested that the "retaliations" by foreign countries warned of in *Lauritzen*[57] are not a threat where the alien shipowner is a resident of the United States,[58] but the court in *Tsakonites* found significant Greek contacts,[59] which Greece has a recognized interest in protecting. Application of American law with its attendant bountiful recoveries could effectively encumber foreign shipping, and the threat of retaliations becomes more than a remote possibility.[60] The United States would look askance at the efforts of any foreign power to impose its law—and thus burden our shipping industry—for the purpose of adjudicating rights between American citizens created by American law.

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[56] *See* text accompanying note 14 *supra*.

[57] *See* text accompanying note 12 *supra*.

[58] Note, *Admiralty—Conflict of Laws—Provisions of Jones Act Applicable So As To Allow Recovery To Alien Seamen Injured In A United States Port On A Foreign Flag Vessel Owned And Controlled By United States Alien Domiciliaries*, 1 ST. MARY'S L.J. 247, 253-54 (1969); Note, 44 TUL. L. REV. 347, *supra* note 45, at 354, suggest that Greece has no interest to protect where the defendant shipowner, though technically a citizen of Greece, is a resident of the United States.

[59] In addition to the fact that the ship was registered in and flew the flag of Greece and the injured plaintiff was a Greek citizen who had signed a contract in Greece limiting his rights to those arising under Greek law, the court noted, *inter alia*, that all the officers and directors as well as all the shareholders of Hellenic Lines were Greek, the company maintained an office in Greece, and the crew and officers of the ship were almost entirely Greek. 368 F.2d at 427-28.

[60] The Royal Greek Government filed a brief in the Supreme Court as Amicus Curiae urging reversal of the fifth circuit's application of the Jones Act.

In the face of the Court's apparent disregard of the law of the flag, extension of the reasoning applied in *Rhoditis* would leave virtually no contact insufficient for the application of American law. Maintenance of a United States office could be the critical factor rendering a legitimate foreign shipper liable under the Jones Act. Foreign shipowners are encouraged to locate their "base of operations" elsewhere, lest they are forced to shoulder a burden they would not otherwise encounter.

Another necessary consequence of this decision is the additional burden the already overcrowded United States courts can look forward to in the way of unnecessary, unwarranted, and ill-advised litigation by foreign seamen attempting to take advantage of the liberal provisions of the Jones Act rather than proceeding in the appropriate foreign jurisdiction. The Supreme Court has held that the Jones Act is "welfare legislation . . . entitled to a liberal construction to accomplish its beneficent purposes."[61] This pronouncement is in line with a trend in admiralty law manifested most recently by the decision in *Rhoditis*. Despite the humanitarianism of this action, reasoned, logical, consistent development of the law is perhaps more to be desired. An examination by the Court, not only of the direction of their decisions in this area, but of the motivating forces behind them might well be in order.[62]

JOHN E. HODGE, JR.

## Admiralty—Wrongful Death Action Under General Maritime Law

In *Moragne v. States Marine Lines, Inc.*[1] the Supreme Court of the United States held for the first time that an action will lie under general maritime law for death caused by a violation of maritime duties. In so holding, the court specifically overruled an 1886 decision[2] and took a giant stride toward clearing up what had become a legal morass of anomalies and inequities.

The plaintiff in *Moragne*, alleging both negligence and unseaworthiness, sued in a Florida state court seeking to recover damages from a shipowner for the wrongful death of her husband, a longshoreman, aboard a vessel on navigable waters within the state of Florida. The suit was

[61] *E.g.*, Cosmopolitan Shipping Co. v. McCallister, 337 U.S. 783, 790 (1949).
[62] *See* H. BAER, *supra* note 27, at 192.

[1] 398 U.S. 375 (1970).
[2] The Harrisburg, 119 U.S. 199 (1886).