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THE SEAMAN'S PERSONAL INJURY ACTION AND THE JURY TRIAL

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The plight of the seaman who has suffered a personal injury is one that historically has elicited the special attention of courts and legislative bodies. Such special attention has manifested itself in the form of varying remedies available to the seaman for the recovery of damages. While the forms of these remedies themselves have undergone substantial change over the past fifty years, the procedures by which the right to such remedies can be asserted have been in such a state of flux as to tax the capacities of even the most able members of the bench and bar attempting to comprehend the vagaries of the procedures involved.

Many of the questions relating to the manner in which the seaman is to seek recovery for his injuries are concerned with the problems of whether the admiralty jurisdiction or the jurisdiction in actions at law is to be invoked when the suit is brought in the United States District Courts. These questions give rise to further questions concerning the availability of trial by jury of the issues presented.

This article will attempt to set forth some of the more recent law dealing with such questions.

The right of a seaman to maintenance and cure extends to all seamen who are members of the crew of any vessel. The right can be traced to medieval times and was recognized in the United States as early as 1823.[1] Maintenance and cure awards cover all injuries and illnesses of the seaman apart from those occasioned by his gross misconduct or insubordination, and exist whether or not the injury or illness arose out of the course of employment and without regard to any negligence of the owner or crew of the vessel.[2] The award covers all living expenses and medical expenses of the injured seaman until cured, or at least until he is as well cured as he ever will be, as well as for his wages until the contractual end of his hiring.[3] The bases for the maintenance and cure award in the United States seem to be the courts' stereotype of the seaman as a careless, improvident and friendless individual, as well as a public policy of

* United States District Judge, Southern District of California; A.B., Stanford University, 1925; J.D., Stanford University, 1927.

1 Harden v. Gordon, 11 Fed. Cas. 480 (C.C.D. Me. 1823).

2 Farrell v. United States, 336 U.S. 511 (1949).

3 *Ibid.*

vigilance for the welfare of a class of citizens so vital to the commercial life and defense of the nation.[4]

A second means for recovery that might be used by the injured seaman stems from the absolute duty of a shipowner to furnish a "seaworthy" vessel for his crew. While this duty is apparently ancient in origin, it was not clearly recognized as furnishing a basis for recovery of damages in the United States until the twentieth century.[5] The practice of suing for damages caused by the unseaworthiness of the ship did not really become popular until the middle of the 1940's.[6] The right to damages for unseaworthiness, a claim maritime in nature, is not predicated on the negligence of the shipowner.[7] It is a breach of the absolute duty to provide a safe place for the seaman to work[8] that gives rise to liability.

In addition to the judicially created maritime causes of action for maintenance and cure and for unseaworthiness, the injured seaman is afforded a statutory cause of action for negligently inflicted injuries suffered in the course of employment. The statute creating this right of action, the Merchant Marine [Jones] Act, calls for an action at law at the election of the seaman and sets forth the right of trial by jury.[9]

Thus, two of the remedies available to seamen are, historically speaking, maritime in nature and within the admiralty jurisdiction of the federal courts. As maritime causes of action, suits for maintenance and cure and for damages caused by unseaworthiness would not, if tried alone, be within the purview of the guarantee of trial by jury provided by the Seventh Amendment to the Constitution of the United States.[10] On the other hand, the remedy afforded by the Jones Act may be sought in an action at law and the right to trial by jury is specifically guaranteed in the statute creating the remedy.[11]

If the injured seaman were restricted to a single cause of action to recover damages for his injuries it would not seem that any procedural problems of insurmountable character would be presented.

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4 Reed v. Caufield, 20 Fed. Cas. 426 (C.C.D. Mass. 1832).
5 The Osceola, 189 U.S. 158 (1903).
6 Tefreault, *Seamen, Seaworthiness and the Rights of Harbor Workers,* 39 CORNELL L.Q. 381 (1954).
7 Mitchell v. Trawler Racer, Inc., 362 U.S. 539 (1960). Note, *The Doctrine of Unseaworthiness in the Lower Federal Courts,* 76 HARV. L. REV. 819 (1963).
8 While the owner's duty to provide a seaworthy vessel is absolute, this "is not to suggest that the owner is obligated to furnish an accident-free ship. . . . [I]t is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness . . . a vessel reasonably suitable for her intended service." *Mitchell v. Trawler Racer, Inc., supra* note 7 at 550.
9 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).
10 Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830).
11 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

Problems have arisen, however, when counsel for injured seamen exercised ingenuity and attempted to join either of the maritime causes of action for maintenance and cure or unseaworthiness with a cause of action arising under the Jones Act.

The question of whether federal courts, in the absence of diversity, had jurisdiction to hear a claim for maintenance and cure or unseaworthiness on the law side of the court was finally answered in *Romero v. International Terminal Operating Co.*[12] The argument had been made that the federal courts had jurisdiction to hear such claims by virtue of a provision of the Judiciary Act of 1875,[13] now embodied in 28 U.S.C. § 1331.[14] This section sets forth the "federal question" jurisdiction of the federal courts over "all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States."[15] The court, in *Romero*, rejected the contention that this provision was intended to grant original jurisdiction to the United States District Courts to entertain the maritime claims for maintenance and cure or unseaworthiness filed on the law side simply because the Constitution of the United States originally created the admiralty jurisdiction of the federal courts.[16] Mr. Justice Frankfurter, writing for the court, did not stop at this juncture, however, but went on to hold that where the maritime claim is joined with a claim based on the Jones Act and the suit filed on the law side, the court would have "pendent" jurisdiction over the traditional maritime claim by virtue of its jurisdiction of the Jones Act claim.[17]

While *Romero* did much to resolve uncertainty reflected in the conflicting positions previously taken by the United States Courts of Appeals for the various Circuits, not all controversy was ended. Now that the maintenance and cure claim could be asserted on the law side when joined with a Jones Act claim, would the traditional maritime claim be determined by the jury to which the claimant was entitled under the Jones Act? Mr. Justice Frankfurter was careful to note that the question of whether the "pendent" claims under the general maritime law "may" be submitted to the jury, was not yet before the Court.[18]

The question did present itself last term in *Fitzgerald v. United States Lines Co.*[19] The Supreme Court there held that, even assuming

[12] 358 U.S. 354 (1959).
[13] Act of March 3, 1875, § 1, 18 Stat. 470.
[14] 72 Stat. 415 (1958).
[15] *Ibid.*
[16] 358 U.S. at 380.
[17] *Ibid.*
[18] *Id.* at 381.
[19] 374 U.S. 16 (1963).

the parties are of non-diverse citizenship, "a maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts."[20] This holding came as no great surprise, but it resolved great confusion which had plagued the bar and the federal courts for many years. The confusion that existed, and its background, is pointed up in the decision of the United States Court of Appeals for the Second Circuit which the Supreme Court reversed.[21] In an en banc decision, four Judges held that the plaintiff was not entitled to a jury on his maintenance and cure claim.[22] Three Judges said that it was error not to submit the claim to a jury,[23] and two Judges said that the determination of whether the claim should be submitted to the jury was within the discretion of the trial court.[24] The diverse views of the Judges expressed the various positions taken by the United States Courts of Appeal.

Mr. Justice Black, who has long championed the right to jury trials, wrote the *Fitzgerald*[25] opinion. His opinion was forecast in his dissent in *Romero*[26] where he simply stated:

> I cannot feel that the issue is either complex or earth-shaking. The real core of the jurisdictional controversy is whether a few more seamen can have their suits for damages passed on by federal juries instead of judges.[27]

It should be noted that the Court, in its *Fitzgerald* opinion, refused to again be drawn into the jurisdictional controversy, stating:

> Nor do we find it necessary to reach petitioner's argument that we should reconsider that part of the holding of *Romero* . . . which concluded that claims based upon general maritime law cannot be brought in federal courts under the federal question jurisdiction of 28 U.S.C. § 1331.[28]

Thus, *Fitzgerald* adopted, at least by implication, the theory of "pendent jurisdiction."

The same controversy over the right to a jury trial surrounded an unseaworthiness claim when such was filed on the law side and joined with a Jones Act claim, but the courts had less difficulty with this situation. It was reasoned that the maritime claim of unsea-

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[20] *Id.* at 21.
[21] Fitzgerald v. United States Lines Co., 306 F.2d 461 (2d Cir. 1962), *rev'd*, 374 U.S. 16 (1963).
[22] *Id.* at 475.
[23] *Id.* at 478.
[24] *Ibid.*
[25] Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963).
[26] Romero v. International Terminal Operating Co., 358 U.S. 354 (1959).
[27] *Id.* at 388.
[28] Fitzgerald v. United States Lines Co., 374 U.S. 16, 18 n. 3 (1963).

worthiness was so entwined with the Jones Act claim that both claims should be submitted to the jury.[29] The case which finally adopted this logic was *Bartholomew v. Universe Tankships, Inc.*[30]

For some time there has been no difficulty found in granting a jury trial of all issues when maritime issues were joined with a Jones Act claim in a case where the parties were of diverse citizenship and where the amount in controversy exceeded the jurisdictional amount set forth in the statute conferring diversity jurisdiction on the lower federal courts.[31] That no conflict existed over the question of the right to a jury trial in such cases was assumed by the Supreme Court in *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*[32]

Now that it is settled beyond doubt that a jury trial will be afforded an injured seaman who files his action on the law side of the United States District Court where he claims maintenance and cure, indemnity for unseaworthiness, together with a Jones Act claim, whether or not there is diversity of citizenship between the parties, it must also be remembered that the other side of the coin is that in such a situation the defendant can likewise demand a jury. If the defendant's right to a jury trial is not assured by Rule 38(b) of the Federal Rules of Civil Procedure, it certainly seems that the court should not deny the defendant an order for a jury trial in light of the right of the plaintiff to the same type of trial.

There is no doubt among experienced plaintiffs' and defendants' lawyers alike that many cases do not try well to a jury. Many circumstances affect the determination of the advisability of a jury suit. It is also well known that error is much more likely to creep into a case tried before a jury. And, while a jury may be more likely to award damages in a greater amount than a judge, a jury, on frequent occasions, finds in favor of the defendant on the issue of liability, where a judge would find otherwise. As a prime example of what can happen, compare the evidence set forth in *Ursich v. da Rosa*[33] where the jury found no liability, with that reviewed in *Brenha v. Svarda*,[34] where liability was found to exist after trial to the court. It, therefore, becomes of interest to determine what a plaintiff can

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29 It should be noted that the ability to join the claim for unseaworthiness with a Jones Act claim does not mean that dual recovery can be obtained. Recovery by the seaman on either claim is deemed mutually exclusive. *Pacific S.S. Co. v. Peterson*, 278 U.S. 130 (1928); GILMORE & BLACK, ADMIRALTY 289 (1957).

30 263 F.2d 437 (2d Cir. 1959), *cert. denied*, 359 U.S. 1000 (1959).

31 28 U.S.C. § 1332 (1958).

32 369 U.S. 355 (1962).

33 328 F.2d 794 (9th Cir. 1964), *cert. denied* .....U.S....., 85 S. Ct. (Nov. 23, 1964).

34 291 F.2d 188 (9th Cir. 1961).

do to avoid a jury trial now that he is assured of the right to a jury trial if he so desires.

By tradition, there is no right to trial by jury of a maritime claim filed on the admiralty side of the court. This is true whether the claim is asserted in rem, by way of a libel against the ship, or in personam, by way of a libel directed against the individual subject to liability.[35] An exception to this rule is the Great Lakes Statute,[36] where Congress has granted a right to a jury trial of unseaworthiness claims arising out of the business of commerce and navigation on and between the Great Lakes, although it has been held that this right to jury does not extend to actions for maintenance and cure.[37]

There is no doubt that a claim for unseaworthiness and maintenance and cure are maritime claims and thus can be filed on the admiralty side of the United States District Court, by way of a proceeding either in rem or in personam. It is also now the law that a Jones Act claim can be filed on the admiralty side of the court by way of a libel in rem but not in personam.[38] The latter rule is founded upon the interpretation of the Jones Act provision that the seaman "may, at his election, maintain an action for damages at law . . ."[39] to mean that the seaman had the alternative of either filing his claim in an action at law or in admiralty.[40] It has also been held that by filing a Jones Act claim on the admiralty side of the court the right to trial by jury is not waived if a motion is made to transfer the case to the law side of the court within ten days after the case is at issue, i.e., within the time to request trial by jury under the provisions of Rule 38(b) of the Federal Rules of Civil Procedure.[41] This right of the seaman to transfer, however, does not mean that the respondent in a Jones Act suit filed on the admiralty side has a corresponding right to have the suit transferred to the law side in order to obtain a jury trial.[42]

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35 5 MOORE FEDERAL PRACTICE 269 (2nd ed. 1951);
2 BENEDICT, AMERICAN ADMIRALTY § 244 (6th ed. 1940);
2 NORRIS, THE LAW OF SEAMEN § 677 (2d ed. 1962);
see also Note 10, *supra.*

36 28 U.S.C. § 1873 (1948).

37 Miller v. Standard Oil Co., 199 F.2d 457 (7th Cir. 1952), *cert. denied*, 345 U.S. 945 (1953), *rehearing denied*, 345 U.S. 971 (1953).

38 McAllister v. Magnolia Petroleum Co., 357 U.S. 221 (1958); Plamals v. Pinar Del Rio, 277 U.S. 151 (1928); McCarthy v. American Eastern Corp., 175 F.2d 724 (3d Cir. 1949), *cert. denied*, 338 U.S. 868 (1949).

39 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1952).

40 See cases cited note 38, *supra.*

41 McAfoos v. Canadian Pacific S.S. Ltd., 243 F.2d 270 (2d Cir. 1957), *cert. denied*, 355 U.S. 823 (1957); McLaughlin v. Blidberg Rothchild Co., 163 F. Supp 33 (S.D.N.Y. 1958).

42 Texas Menhaden Co. v. Palermo, 329 F.2d 579 (5th Cir. 1964).

It would thus seem clear that there is no right to try a maritime claim by a jury, and that this includes a Jones Act claim filed on and not transferred from the admiralty side of the court. Certain language in *Fitzgerald v. United States Lines*,[43] however, may detract from any unequivocal character of this conclusion. The language is as follows:

> While this Court has held that the Seventh Amendment does not require jury trials in admiralty cases, neither that Amendment nor any other provision of the Constitution forbids them. Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases. Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and, since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.[44]

At least one attorney for a plaintiff has interpreted the quoted language as allowing a jury trial of a maritime claim on the admiralty side of the court.[45] In this case the plaintiff, an alien employed as a longshoreman, brought an action on the law side of the District Court against an alien shipowner, alleging unseaworthiness and negligence, and grounding jurisdiction on a provision of the Judicial Code which confers federal jurisdiction over certain tort actions brought by an alien.[46] The court granted a motion to dismiss because there was no jurisdiction. However, the court permitted the plaintiff to transfer the case to the admiralty docket. At one point[47] it appears that the plaintiff suggested that the court permit the case to remain on the jury list. The court rejected this proposal, stating that the quoted language in *Fitzgerald*[48] "does not justify the exercise of such discretion on this record."[49] The court, however, hedged somewhat by stating:

> Particularly in view of the congested docket of this court, no persuasive reason has been advanced by plaintiff justifying this court to exercise its discretion to grant a jury trial in this case, even assuming, which the court does not decide, that the court had the power to exercise such discretion.[50]

Under the present state of the law the District Court was, without doubt, correct in its statement and did not have to add the "makeweight" statement about the congested calendar.

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[43] 374 U.S. 16 (1963).
[44] *Id.* at 20.
[45] Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963).
[46] 28 U.S.C. § 1350 (1948).
[47] 225 F. Supp. at 297 n. 30.
[48] 374 U.S. 16, 20.
[49] 225 F. Supp. at 297 n. 30.
[50] *Ibid.*

In addition to the advisability of a jury trial, one other factor should be considered by counsel for the injured seaman before he determines whether to try his suit on the law side or whether to choose the admiralty side of the District Court; that is the award of prejudgment interest. The common law rule, of course, is that prejudgment interest on an unliquidated tort claim is not allowed. On the admiralty side of the court, however, the rule may be different. From earlier cases developing the practice of awarding prejudgment interest on awards for property damage in collision cases,[51] the application of *restitutio in integrum* was extended to awards resulting from deaths of crew members who died in maritime accidents.[52] The final extension of the practice has taken place in cases awarding damages for personal injury of seamen where death has not resulted.[53] The rationale behind the award of prejudgment interest is that the defendant's liability arises at the time of injury rather than at the time of the later award of damages by the court and also that the plaintiff's loss is immediate and thus he is damaged by a delay in the award of compensation for such loss. These equitable considerations have led some District Courts exercising their admiralty jurisdiction, and thus applying principles of equity, to include an award of interest on elements of present loss suffered by the injured seamen to compensate for the delay between injury and judgment.[54]

The harbor worker, unless he can be classified as a seaman, has no Jones Act remedy and therefore he cannot invoke the concept of "pendent jurisdiction."[55] Thus, absent parties of diverse citizenship, his action cannot be filed on the law side of the District Court. There is, however, no question that a harbor worker's claim against a shipowner for unseaworthiness and negligence can be filed on the admiralty side of the court.[56]

Of course, any maritime claim involving seamen or harbor workers can be filed in a State court under the statute conferring exclusive jurisdiction over civil cases of admiralty jurisdiction, "saving to suitors in all cases all other remedies to which they are otherwise entitled."[57] It must be remembered, however, that federal statutes

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51 Standard Oil Co. v. So. Pacific Co., 268 U.S. 146 (1925); The President Madison, 91 F.2d 835, 845 (9th Cir. 1937).
52 National Airlines, Inc. v. Stiles, 268 F.2d 400 (5th Cir. 1959).
53 Petition of City of New York, 332 F.2d 1006 (2d Cir. 1964), *cert. denied*,.....U.S....., 85 S. Ct. (Nov. 23, 1964).
54 *Ibid.*
55 Poole v. Lykes Bros. S.S. Co., 273 F.2d 423 (5th Cir. 1960).
56 *Id.* at 424.
57 28 U.S.C. § 1333 (1949); Knapp, Stout & Co. v. McCaffrey, 177 U.S. 638, 646 (1900).

and federal maritime substantive law must be applied to actions brought in State courts.[58]

In the action brought in the federal court the injured seaman, but not a harbor worker, may file suit without payment of fees or surety for costs and no jury fees are exacted.[59] This fact will, of course, color the choice of forum. In addition, the State court verdict is reached when a 9-member majority of the jury agrees. In the federal court the verdict must be unanimous. Like the question of the right to a jury, this coin also has two sides.

The foregoing material illustrates that while the advisability of a jury trial of the claims of the injured seaman is at least questionable, his right to have such a trial in an action at law has recently been made clear. Many questions remain unanswered and the answers to those presently settled are certainly subject to change as Congress and the courts continue to regard the seaman as an individual requiring their special attention.

[58] Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953).
[59] 28 U.S.C. § 1916 (1948).