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Assumption of Risk by Seamen

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ASSUMPTION OF RISK BY SEAMEN

IN the olden days we had ships of wood and men of iron. Then a mariner embarked with no thought of collecting from his ship any indemnity for personal injury sustained while a member of her crew. However, by Article VI of the Rules of Oleron,[1] it was provided that "if, by the master's order and commands, any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the cost and charges of the said ship." But if the sailor was injured through his own misconduct, he was obliged to bear the expense of his cure and might be discharged. Under the laws of Wisbuy,[2] if a mariner should happen to be wounded ashore in the master's or the ship's service, he was to be maintained and cured "at the charge of the ship". Similar provisions are found in Article 39 of the Laws of the Hanse Towns [3] and in the Marine Ordinances of Louis XIV, Title IV, Sections 11 and 12.[4]

In England the same protection of maintenance and cure was provided for injured or sick seamen by the Merchants' Shipping Act.[5] The shipowner first became liable to the seaman for injuries resulting from unseaworthiness of the ship in 1876 under the Merchants' Shipping Act,[6] wherein every contract of service between a shipowner and the master or any seaman employed thereon, whether express or implied, carried an implied obligation that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage.

As late as 1903 the statutes of the United States contained no provision placing liability upon the ship or owners for personal injuries sustained by a member of the crew and caused by the negligence of the master. In the earliest American case upon the subject, Mr. Justice Story held that admiralty jurisdiction existed over a claim for the expenses of

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[1] See Appendix to 30 Fed. Cas. p. 1174.
[2] See Appendix to 30 Fed. Cas. p. 1191.
[3] See Appendix to 30 Fed. Cas. p. 1200.
[4] See Appendix to 30 Fed. Cas. p. 1209.
[5] 17 & 18 VICT. c. 104, § 228(1).
[6] 39 & 40 VICT. c. 80, § 5.

cure in case of sickness, since in contemplation of law, the right to a cure was a part of the contract for wages.[7] The court followed this ruling in *The Brig George* case.[8] Then Mr. Justice Story in the case of *Reed* v. *Canfield*,[9] which, by the way, did not involve the question of indemnity, stated in his opinion, "the sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure, and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages. The question, then, in all such cases is, what expenses have been virtually incurred for the cure?"

Apparently the first American case where indemnity was sought by a member of the crew was *The City of Alexandria*.[10] This was an action *in rem* for personal injuries sustained by the cook who fell into the hold through a hatch. Judge Brown held that the claim could not be sustained as the negligence was that of a fellow servant.

A ship was first held liable by an American court to a seaman for injuries resulting from unseaworthiness in *The Edith Godden* case.[11] The cases following until *The Osceola* case [12] made the same distinction as to unseaworthiness or inadequate or defective appliances. The question first came to the Supreme Court of the United States in *The Osceola* case, where a seaman on a Great Lakes steamer claimed indemnity against the ship under a local Wisconsin statute. As the vessel approached port in a strong head wind the master ordered the forward port gangway to be hoisted by means of the derrick in order that the vessel might be ready to commence discharging cargo immediately upon arrival in her berth. As soon as the gangway was swung clear of the vessel, the front end was caught by the wind and turned outward broadside to the wind, and by the force of the wind was

[7] Harden v. Gordon, 11 Fed. Cas. 480 (1823).
[8] 10 Fed. Cas. 205 (1832).
[9] 20 Fed. Cas. 426 (1832).
[10] 17 Fed. 390 (S. D. N. Y. 1883).
[11] 23 Fed. 43 (S. D. N. Y. 1885).
[12] 189 U. S. 158, 23 Sup. Ct. 483 (1903).

forced aft and pulled the derrick over, which in falling, struck and injured the libellant. The Court found the master's order improvident and negligent but denied recovery and laid down the rules:

1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.

3. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

The law remained undisturbed until the enactment by Congress of the Merchant Marine Act, 1920, familiarly known as the Jones Act, approved June 5, 1920, except for a provision in the Seaman's Act of March 4, 1915,[13] that declared that "seamen having command shall not be held to be fellow-servants with those under their authority." This eliminated the master as a fellow-servant.

Section 33 of the Jones Act[14] amended Section 20 of the Seamen's Act to read as follows (the pertinent portion is italicized):

> "That 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;* and in case of the death of any seaman as a result of any such personal injury the personal representative of such sea-

[13] 38 STAT. 1185 (1913), 46 U. S. C. § 688 (1934).
[14] 41 STAT. 1007 (1928), 46 U. S. C. § 688 (1934).

> man may maintain an action for damages at law with the right of trial by jury, *and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable.* Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The "statutes * * * modifying or extending the common-law right or remedy in cases of personal injury to railway employees" relate to the federal Employers' Liability Act [15] of 1908. Section 51 of that Act provides:

> "Every common carrier by railroad * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such (interstate) commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

This provision abrogated the fellow-servant rule in such action. Section 53 of the same Act provides:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Chapter * * * *the fact that the employee may have been guilty of contributory negligence shall not bar a recovery,* but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

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[15] 35 STAT. 65 (1908), 45 U. S. C. § 51 *et seq.* (1934).

Thus, the complete defense of contributory negligence at common law became a thing of the past in these cases.

Section 54 then went on to limit the defense of assumption of risk in this language:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, *such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed* to the injury or death of such employee." (Italics ours.)

But such employees still assumed certain risks of negligence of the officers, agents or employees of such carrier.

And the Supreme Court held time and again that railway employees assumed the risks of negligence—other than unsafe appliances or an unsafe place in which to work—when known to them.

In the leading case of *Seaboard Air Line Railway* v. *Horton*,[16] which was a suit at law, a locomotive engineer was injured by the breaking of the water glass on the boiler which was not provided with a heavy guard glass. Mr. Justice Pitney, speaking for the Court, said:[17]

> "The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employers is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. (Citing cases.) * * *.
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> "On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the em-

[16] 233 U. S. 492, 34 Sup. Ct. 635 (1914).

[17] *Id.* at 501, 504.

ployé. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some employments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employé is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless the defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them. These distinctions have been recognized and applied in numerous decisions of this court. (Citing cases.)

"When the employé does know of the defect and appreciates the risk that is attributed to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arises out of the master's breach of duty. If, however, there be a promise of reparation, then during such time as may be reasonably required for its performance, the employé relying upon the promise does not assume the risk unless at least the danger be so imminent that no ordinarily prudent man under the circumstances would rely upon such promise."

This case came up again [18] and Mr. Justice Pitney again wrote the opinion, wherein he said: [19]

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[18] 239 U. S. 595, 36 Sup. Ct. 180 (1915).

[19] *Id.* at 601.

> "The distinction (between contributory negligence and assumption of risk) which was of little consequence when assumption of risk and contributory negligence led to the same result, becomes important in actions founded upon the Federal Employers' Liability Act, which in ordinary cases recognizes assumption of risk as a complete bar to the action, while contributory negligence merely mitigates the damages, as was pointed out when the case was here before. *Seaboard Air Line* v. *Horton,* 233 U. S. 492, 503."

In 1920 Judge Ward, writing for the Circuit Court of Appeals for the Second Circuit, said in *Storgard* v. *France & Canada S.S. Corp.,*[20] an action at law, where a sailor on a schooner had had the fingers of one hand jammed between a ring on a bolt and the tips of the hand around the mast which were connected by the bolt:[21]

> "Contributory negligence, as distinguished from willful misconduct, does not defeat the seaman's rights to wages, care and maintenance to the end of the voyage and a reasonable time thereafter. Nor does it defeat their rights to indemnity, if otherwise entitled to it, though it is an element which may be considered in determining what the amount of indemnity should be."

It must be remembered that causes of admiralty and maritime jurisdiction may be brought *in personam* at law under the Judicial Code[22] which saves "to suitors in all cases the right of a common law remedy where the common law is competent to give it."

The Jones Act amendment to the Seamen's Act first came before the Supreme Court of the United States in the case of *Panama Railroad Company* v. *Johnson,*[23] upon a writ of error. In that case a seaman suffered personal injuries at sea and charged that they resulted, among other things, from

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[20] 263 Fed. 545 (C. C. A. 2d, 1920).
[21] *Id.* at 546.
[22] 42 STAT. 635 (1922), 28 U. S. C. § 371(2) (1934).
[23] 264 U. S. 375, 44 Sup. Ct. 39 (1923).

the negligence of the employer in providing an inadequate ladder from the deck to the bridge. The case was tried by a jury on the law side of the District Court and resulted in a verdict for the plaintiff. The Supreme Court affirmed. Mr. Justice Van Devanter said in the opinion: [24]

> "Without question this is a matter which falls within the recognized sphere of the maritime law, and in respect of which the maritime rules have differed materially from those of the common law applicable to injuries sustained by employees in non-maritime service. But, as Congress is empowered by the constitutional provision to alter, qualify or supplement the maritime rules, there is no reason why it may not bring them into relative conformity to the common-law rules or some modification of the latter, if the change be country-wide and uniform in operation. * * * It (the statute) brings into that (maritime) law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules. The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."

Later on, in 1928, the Supreme Court held in the case of *Plamals* v. *The Pinar del Rio* [25] that the seaman had no right of action *in rem* against his ship for personal injuries under Section 33 of the Jones Act since that Act created no maritime lien. And the same year, in the case of *Pacific Steamship Company* v. *Peterson,*[26] the Supreme Court held that the right to maintenance and cure was cumulative with the recovery for indemnity under the Jones Act.

A line of cases became established which held that when a seaman had the choice of two methods of performing his work, one dangerous and the other safe, even though the dangerous way resulted from the negligence of his employer or

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[24] *Id.* at 388.

[25] 277 U. S. 151, 48 Sup. Ct. 457 (1928).

[26] 278 U. S. 130, 49 Sup. Ct. 75 (1928).

of the officers or crew, nevertheless, he assumed the risk of injury if he voluntarily chose the more dangerous one. This choice did not include a situation where a defective appliance was involved. The rule was concisely stated by Judge Learned Hand in the Second Circuit in the case of *Hardie* v. *New York Harbor Drydock Corp.*:[27]

> "If there be two ways, one safe and the other dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him."

This rule was first weakened by the Supreme Court in the case of *Socony-Vacuum Oil Company* v. *Smith*,[28] in which an oiler claimed to have been injured when he stood upon a step plate to feel the temperature of a bearing on the engine and fell because of an alleged loose bracket on the step. The shipowner claimed he could have felt the bearing from the floor plates. The jury, however, gave the plaintiff a verdict and the Circuit Court of Appeals for the Second Circuit affirmed upon the theory that, in the absence of instructions, a seaman cannot be expected to weigh alternatives when doing his work. The Supreme Court on *certiorari* held the step was a defective appliance and affirmed, but went further and cast a suspicion of disapproval upon the rule followed in the line of cases exemplified by the *Hardie* case.

Shortly after the *Smith* case was decided the question was squarely presented to the same Circuit Court of Appeals in the case of *Desrochers* v. *United States*.[29] In that case a ship's carpenter was signed on the *Independence Hall*, a government merchant vessel. He was blind in one eye but did not disclose his disability to the ship's officers. Five days later, while carrying a saw in one hand, he descended a temporary wooden ladder to a narrow passageway separating two tanks in the 'tween deck. Arriving at the foot, instead of using a safety hand line rigged along the passageway, he carelessly stepped off the ladder to the left, on his blind side, where there was no hand line and fell into the tank. He had

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[27] 9 F. (2d) 545 (C. C. A. 2d, 1925).
[28] 305 U. S. 424, 59 Sup. Ct. 262 (1939).
[29] 105 F. (2d) 919 (C. C. A. 2d, 1939).

used the route several times that day and also knew of another and safe route to his work provided by the ship. Suit was brought in admiralty against the Government as permitted by the Suits in Admiralty Act [30] and the libellant elected to proceed *in rem.* He was met by the *Plamals* case, *supra,* but the Circuit Court in an opinion by Judge Augustus N. Hand held that the libel stated a cause of negligence under Section 33 of the Jones Act and affirmed a decree by the District Court which held the libellant but 40% contributorily negligent. The court thought the carpenter should have been told *not to use the ladder.* The defense of assumption of risk was interposed. The alleged negligence upon which the decree was based was the absence of a second hand line along the passage. If that was negligence, it was that of the first officer and the alleged negligent condition was fully known to the libellant who used the route deliberately.

The decision in the *Desrochers* case was handed down on July 10, 1939. On August 11, 1939, about thirty days later, Congress amended Section 54 of the Employees' Liability Act. The amended section follows with the modification indicated in italics:

> "In any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where *such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees, of such carrier;* and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

It seems quite apparent that the court "beat the gun" even if Section 33 of the Jones Act shall, later on, be construed to

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[30] 41 STAT. 525–528 (1920), 46 U. S. C. §§ 741–752 (1934).

incorporate a subsequent amendment of the Employees' Liability Act which was not in contemplation at the time the Jones Act was passed.

A number of attempts have been made from time to time to persuade Congress to enact an Employees' Compensation Act for seamen but all such efforts have been unsuccessful. However, since seamen have retained their ancient right to maintenance and cure—a right that does not exist at common law—and have made such substantial gains over the past twenty years in the way of indemnification for injuries, both by statutory enactments and judicial interpretation thereof, it is somewhat difficult to perceive what additional benefits would accrue to them through the passage of a federal seamen's compensation law.

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