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Recent Developments: Dockworker's Remedy

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concurring in part and dissenting in part). A consent that is "induced by misrepresentation is not consent." 301 Md. at 350, 483 A.2d at 35 (Eldridge, J., concurring in part and dissenting in part). The misrepresentation in *Thomas* was that the defendant's counsel believed that the psychiatrist that evaluated the defendant was a neutral expert from Clifton T. Perkins and not the prosecution's paid expert.

The dissenter then dissected the majority's reasoning. He stated that the burden of proof differences between *Thomas* and *Estelle*, as well as the psychiatrist's warnings to the defendant that any information which he revealed could be used at a subsequent capital sentencing hearing, were "utterly irrelevant to the Sixth Amendment right to counsel issue." 301 Md. at 352, 483 A.2d at 36 (Eldridge, J., concurring in part and dissenting in part). Furthermore, Judge Eldridge argued that although the defendant's counsel consented to the psychiatrist's examination, as in *Estelle*, his consent was based on a misrepresentation by the prosecution concerning the neutrality of the psychiatrist. Therefore, citing *Estelle* as controlling, the dissenter concluded that "[b]ecause of the prosecution's misleading action in this case, the defendant Thomas was deprived of the assistance of counsel in deciding whether or not to submit to ... [the psychiatrist's] examination in connection with the capital sentencing hearing." 301 Md. at 352,483 A.2d at 36 (Eldridge, J., concurring in part and dissenting in part).

The *Thomas* court appears to have restricted the defendant's right to assistance of counsel under the sixth amendment. By allowing the post-trial psychiatric examination of the defendant for a determination on the imposition of the death penalty without the knowledgeable consent of the defendant's counsel, it has gutted the sixth amendment's protections promulgated in *Estelle*. The court is opening the door for the prosecution's use of trickery and misrepresentation in order to gain a defendant's counsel's consent and to deny a defendant the assistance of counsel guaranteed him under the sixth amendment. Without such assistance of counsel, poorly educated and fearful defendants will be wittingly or unwittingly denied the full protection of the law by the prosecution.

— by Sam Piazza

DOCKWORKER'S REMEDY

The issue of whether a dockworker's exclusive remedy for an occupational injury is under the Longshoremen's and Harbor Workers' Compensation Act ("Act" or "LHWCA"), 33 U.S.C. §901 et seq., where a portion of the injury preceded the Act's coverage, was subject to review by the Maryland Court of Appeals during its September, 1984 term. A decision in *Stanley v. Western Maryland Railway Company*, 301 Md. 204 482 A.2d 881 (1984), was reached on October 24, 1984 and is one which will have substantial impact in the area of workers' compensation benefits. In order to understand the ramifications of *Stanley*, however, one must first have a basic understanding of the principles underlying the system of workers' compensation.

Benefits for employees injured while on the job were first a product of state common law and statutes. Although the fifty states vary greatly as to the substantive legal principles which guide particular workers' compensation schemes, all systems share the same underlying principles: to compensate an employee as quickly and efficiently as possible for work-related injuries, regardless of an employee's contributory negligence, and to limit the ultimate liability of the employer for any such injuries.

Prior to 1927, there was not a uniform scheme of compensation law applied by the states to injuries sustained by maritime workers. Congress, therefore, saw the need for a uniform federal system and the LHWCA "was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters and to avoid uncertainty as to the source, state or federal, of that remedy." *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114, 124 (1962).

Apparently, this federal system of workers' compensation benefits for maritime employees provided sufficient benefits to injured workers for a number of years. However, a problem arose in that a maritime employee was only covered under the Act for certain activities (usually only those performed on navigable waters) and would not, in a majority of cases, receive any compensation benefits under LHWCA for injuries sustained on land. Congress amended the Act in 1972 "to extend coverage to additional workers in an attempt to avoid anomalies inherent in a system that drew lines at the water's edge by allowing compensation under the Act only to workers injured on the seaward side of a pier." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977).

In the instant case, James Stanley had been an employee of the Western Maryland Railway Company since 1942. In approximately 1955 or 1956 Stanley was assigned to operate a crane used to unload cargo from ships. The crane was extremely noisy and caused a gradual auditory impairment in Stanley's ears. He first became aware of his permanent hearing loss in 1977 and, in 1979, filed a negligence action against his employer under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51 et seq.

The Federal Employers' Liability Act, enacted by Congress in 1908, permitted a claimant to sue the railroad company, his employer, for injuries resulting from the company's negligence. Stanley contended that the majority of his long term exposure occurred prior to 1972, at a time when he, as a dockworker, was not covered by the LHWCA. Stanley, therefore, sought to apportion his hearing loss claim between the two distinct Acts, FELA and LHWCA. In apportioning his disability between the two Acts, however, Stanley made a

valiant attempt to sue his employer *twice* for the same occupational injury, thus, defeating the principle behind the system of workers' compensation of limiting an employers' liability.

The Court of Appeals affirmed the decision of both the Court of Special Appeals and the trial court and adamantly refused to apportion the claimant's injury between the two Acts. In fact, in the area of workers' compensation, the courts are generally quite reluctant to apportion in such a manner. *See Newport News Shipbuilding & Drydock Co. v. Fishel*, 694 F.2d 327 (4th Cir. 1982) (single employer liable for the claimant's hearing loss although it was fully documented that the claimant worked for numerous employers). Apportionment between state and federal systems is also not permitted. *See McCabe v. Sun Shipbuilding & Dry Dock, Inc.*, Ben.Rev.Bd.Serv. (MB) 509 (1975), *rev'd. on other grounds*, 593 F.2d 234 (3d Cir. 1979). In *Stanley*, the court determined that since the LHWCA applied to a portion of the claimant's injury, then the Act would provide coverage for the *entire* injury.

The only case cited by Stanley as providing authority for his position is *Verderane v. Jacksonville Shipyards, Inc.*, 14 Ben.Rev.Bd.Serv. (MB) 220.15, BRB No. 76-244 (Aug. 13, 1981). At issue in that case was whether the claimant was a covered employee under the Act during his long history of employment, and the Benefits Review Board ("Board") stated, "[W]e have concluded that in determining jurisdiction we must apply pre-amendment law to the period of exposure prior to 1972 when the Act became effective, and post-amendment law thereafter;" 14 Ben.Rev.Bd. Serv. (MB) at 223. This statement, however, was limited to the issue of determining jurisdiction and was not applied by the Board to determine the issue of apportionment. Under this line of reasoning, the Board found that Verderane was covered under the pre-amendment Act, although not covered after 1972. This fact, however, did not deter the Board from holding that the entire claim was compensable under the LHWCA. "However, our conclusion that claimant may have been exposed to additional excessive noise during the period when his employment was outside the coverage of the Act does not affect our determination that his vertigo is compensable based on the earlier exposure." *Id.* at 225.

The *Stanley* decision is in accord with the public policy considerations which are an essential part of the workers' compensation system. To allow this type of apportionment would clearly defeat the Congressional intent of limiting an employer's liability for a maritime worker's occupational injury. Such apportionment between acts would be in obvious conflict with the LHWCA, 33 U.S.C. §905 (a) which provides that "[t]he liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liablility of such employer to the employee... ." *Stanley*, therefore, manifests the intent of Congress regarding the exclusiveness of liability under the LHWCA and, presumably, any possible apportionment between Acts is an issue for the Congress and not the courts to ultimately determine.

— by Cathleen A. Quigg

IMPERFECT SELF DEFENSE

In *State v. Faulkner*, 301 Md. 482, 483 A.2d 759 (1984), the Court of Appeals of Maryland recognized that imperfect self defense can be used by a defendant as a defense to mitigate a conviction entered against him. To prevail upon such a defense, the defendant must show the jury that his actions were based on a subjectively honest but objectively unreasonable belief that he had to resort to deadly force to prevent his own serious bodily injury or death.

Faulkner had been involved in an argument outside of a Baltimore City bar. This argument escalated into a fist fight and then into a non-fatal shooting. Subsequently, Faulkner was charged with assault with intent to murder and related offenses. At his trial in the Criminal Court of Baltimore, the court instructed the jury as to the defenses of justification. Faulkner's request for a jury instruction on imperfect self defense was refused by the judge. The jury subsequently found Faulkner guilty of assault with intent to murder. On appeal, the court of special appeals, in a split decision, agreed with Faulkner, and held that he was entitled to the instruction of imperfect self defense because he had produced enough evidence to generate a jury issue regarding his belief at the time of the shooting. The court of appeals agreed, and went on to hold that the defense of imperfect self defense applies to the offense of assault with intent to murder.

The mitigating defense of imperfect self defense operates to negate malice, which is the mental state that the state must prove to establish the crime of murder. The court began its opinion by noting that the difference between murder and manslaughter is the absence of malice. Self defense operates as a complete defense to either murder or manslaughter. A proper claim of self defense will justify the homicide and result in a judgment of acquittal. On the other hand, imperfect self defense is not a complete defense to a crime, but rather, is merely a mitigating defense which operates to negate malice, thereby reducing murder to manslaughter.

Similar to imperfect self defense are the heat of passion defenses of mutual combat, assault and battery and discovering a spouse in the act of sexual intercourse with another, which can also be used by a defendant to mitigate a conviction entered against him. The key