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DePaul Law Review

Volume 9
Issue 1 *Fall-Winter 1959*

Article 8

Some Aspect of Pleading under the Jones Act

DePaul College of Law

mitted that the only type of movie that can be banned is one which displays obscene or pornographic *acts;* nothing else and nothing less will be censorable.[42] Innuendo, double meanings, suggestiveness, sex, ideas and nudity of and by themselves, without obscene acts, will not be susceptible of censorship.

[42] "We hold that obscenity is not within the area of constitutionally protected speech or press." Roth v. United States, 354 U.S. 476, 485 (1957).

SOME ASPECTS OF PLEADING UNDER THE JONES ACT

In the thirty-nine years since the passage of the Jones Act, a substantial amount of litigation has taken place over the problem of the meaning of the Act and its terms. Much of this litigation has involved determination of problems of pleading under the Act. It is the purpose of the writer, by an examination of these cases, to acquaint the reader with the more important aspects of pleading a case under the Jones Act today.

ORIGIN OF THE ACT

The present Jones Act was enacted in 1920 as an amended form of the 1915 Merchant Marine Act[1] known as the LaFollette Act which provided:

> In any suit to recover damages for any injury sustained on board vessel or in its service seaman having command shall not be held to be fellow-servants with those under their authority.[2]

Prior to the 1915 Act, seamen were not entitled to compensatory damages for negligent navigation or management of the ship or crew resulting in injuries to them.[3] Judging by the fact that Congress, with the enactment of the 1915 Act, had expressly disallowed the fellow servant doctrine as a defense to an action by a seaman for injuries due to negligence, it would seem that Congress had interpreted some prior decisons[4] as holding that the fellow servant doctrine was the bar to any such action and accordingly obviated that defense. Subsequent to the passage of the 1915 Act, however, it was held that the Act did not affect the rule that the negligent order of an officer or even of the master does not charge the shipowner

[1] Merchant Marine Act, 1915, 38 Stat. 1164 (1915), as amended, 46 U.S.C.A. § 688 (Supp., 1958).

[2] 38 Stat. 1185 (1915).

[3] The Osceola, 189 U.S. 158 (1903).

[4] The Supreme Court held the law to be settled: "That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew. . . ." The Osceola, 189 U.S. 158, 175 (1903).

with liability beyond maintenance and cure because this rule does not rest upon the fellow servant doctrine.[5]

Consequently in 1920 Congress re-enacted the Merchant Marine Act[6] and explicitly provided for the right of seamen to recover compensatory damages for personal injuries resulting from negligence.[7]

The Merchant Marine Act, as amended in 1920, now provides:

> 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 seaman 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.[8]

Under the Section of the Act which provides that in such personal injury actions all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury shall apply, the Federal Employers' Liability Act has been held to have been incorporated by reference.[9] The Supreme Court has stated that the incorporation of an earlier statute by reference makes it as much a part of the later act as though it had been incorporated at full length.[10] At different times, the Federal Employers' Liability Act has been amended; for example, when the Statute of Limitations provided for therein was extended from two to three years.[11] These amendments have also been held to be incorporated into the Act[12] but it should be noted that the Supreme Court has construed the meaning of the Jones Act to be that only the provisions of the Federal Employers' Liability Act which are reasonably applicable to seamen are to be considered as incorporated.[13]

[5] Chelentis v. Luckenbach, 247 U.S. 372 (1918); The Petroline, 271 Fed. 273 (C.C.A. 2d, 1921).

[6] 46 U.S.C.A. § 688 (Supp., 1958).

[7] 46 U.S.C.A. § 688 (Supp., 1958).

[8] 46 U.S.C.A. § 688 (Supp., 1958).

[9] Mondou v. New York, N.H. & H.R. Co., 223 U.S. 1 (1912); Nordguist v. U.S. Trust Co. of New York, 188 F.2d 776 (C.A.2d, 1951).

[10] In re Heath, 144 U.S. 92 (1892); Kendall v. United States, 12 Pet. (U.S.) 524 (1838).

[11] Gahling v. Colabee S.S. Co., 37 F.Supp. 759 (E.D. Pa., 1941); Royle v. Standard Fruit and Steamship Co., 52 N.Y.S.2d 407 (1944).

[12] Royle v. Standard Fruit and Steamship Co., 52 N.Y.S.2d 407 (1944).

[13] Cases cited note 9, Supra.

The Jones Act has been given a liberal construction generally, and throughout the case law construing it, the idea is found that since the policy of Congress, as evidenced by its legislation, has been to favor seamen,[14] the Act is to be liberally construed to carry out its full purpose in enlarging admiralty's protection to its wards, the seamen.[15] However, as common in the case law which arises under the Jones Act, this was not always so. In *The Bennington*[16] a seaman brought an action for personal injuries alleged to have been caused by the negligence of his employer for failure to exercise due care in providing him with a safe place to work. The court denied the claim, holding that the Jones Act is not an action to enforce law made for the health and safety of seamen, thus placing a narrow construction on the application of the Act. In 1932, that construction was rejected as not being in accord with the liberality Congress intended for seamen.[17]

THE JURISDICTION OF COURTS COMPETENT TO ENTERTAIN JONES ACT SUITS

One of the first cases to define the jurisdiction of courts over Jones Act suits was *Panama R. Co. v. Johnson.*[18] There, an action was brought under the Jones Act on the common law side of a district court by a seaman against his employer for injuries sustained allegedly through the negligence of the defendant. In answering the question raised of whether the Jones Act suit was properly brought on the common law side of the district court, Judge Van Devanter stated that a seaman has the choice of asserting his cause of action in the state and federal courts administering common law remedies, as on the admiralty side of the federal court.[19] Since the seaman had the right to bring his Jones Act action in any of the federal courts or state courts the problem soon arose regarding what law was to be applied. That the Jones Act was to have a uniform application throughout the country was settled at an early date and generally accepted.[20] In *Chelentis v. Luckenbach*[21] a seaman brought an action for damages in a state court. In ruling state law inapplicable, the court voiced an opinion which has pre-

[14] Robertson v. Baldwin, 165 U.S. 275 (1897).

[15] Garrett v. Moore-McCormack, 317 U.S. 239 (1942); Bainbridge v. Merchants & Miners Transportation Co., 287 U.S. 278 (1932).

[16] 10 F.2d 799 (N.D. Ohio, 1925).

[17] Bainbridge v. Merchants & Miners Transportation Co., 287 U.S. 278 (1932).

[18] 264 U.S. 375 (1924).

[19] Pacific Steamship Co. v. Peterson, 278 U.S. 130 (1928); Baltimore Steamship Co. v. Phillips, 274 U.S. 316 (1927); Engel v. Davenport, 271 U.S. 33 (1926); Panama R. Co. v. Vasquez, 271 U.S. 557 (1926).

[20] E. g., Panama R. Co. v. Johnson, 264 U.S. 375 (1924).

[21] 247 U.S. 372 (1918).

vailed throughout many years of litigation under the Jones Act: "[I]t must now be accepted as settled doctrine that . . . Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. . . ."[22]

Garrett v. Moore-McCormack[23] provides an excellent example of the thinking that the admiralty law shall dominate over the state law. This was an action in a state court by a seaman for damages allegedly due to negligence under the Jones Act. The defendant pleaded a release of his liability executed by the plaintiff. The plaintiff countered that the release was extracted from him by fraud. The Pennsylvania court held that the burden of proof of the invalidity of the release was on the plaintiff, considering this to be a mere procedural matter and therefore a matter of state law. On removal to the federal court it was stated: "Pennsylvania having opened its courts to petitioner to enforce federally created rights, the petitioner was entitled to the benefit of the full scope of these rights."[24] The federal court held that since the burden of proof was an essential point here, the Federal Rule should apply and accordingly placed the burden of proof on the defendant. It should be noted, however, that not all the courts accept the dominance of admiralty law in Jones Act actions over state law as readily as others.

An action brought under the Jones Act, whether in a state court or federal court on the common law side or in a federal court on the admiralty side, may only be brought in personam and not in rem.[25] In the case of *Plamals v. Pinar Del Rio*[26] a seaman brought an action in rem for the recovery of damages on account of personal injuries. The court in denying that the Jones Act allows actions in rem for damages stated:

> In the system from which these new rules come no lien exists to secure claims arising under them and, of course, no right to proceed *in rem*. We cannot conclude that the mere incorporation into the maritime law of the rights which they create to pursue the employer was enough to give rise to a lien against the vessel upon which the injury occurred. The section under consideration does not undertake to impose liability on the ship itself, but by positive words indicates a contrary purpose. Seamen may invoke, at their election, the relief accorded by the old rules against the ship, or that provided by the new against the employer. But they may not have the benefit of both.[27]

[22] Ibid., at 381.

[23] 317 U.S. 239 (1942).

[24] Ibid., at 249.

[25] Lindgren v. United States, 281 U.S. 38 (1930); Plamals v. S.S. Pinar Del Rio, 277 U.S. 151 (1928); Baltimore Steamship Co. v. Phillips, 274 U.S. 316 (1927); The Black Gull, 82 F.2d 758 (C.C.A. 2d 1936).

[26] 277 U.S. 151 (1928).

[27] Ibid., at 156, 157.

The Jones Act has a particular phrasing of words, "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" which purports at least on their face to be a jurisdictional limitation on the Act. But this phrase has been construed to be a mere venue provision.[28] The jurisdictional provision applies only to Jones Act suits on the law side of the federal district court and not to suits in a state court nor to suits on the admiralty side of the federal court.[29]

Brown v. Mallory[30] illustrates the rationale just mentioned. An action was brought by a seaman in admiralty against an employer in a district in which the employer did not reside and did not have his principal office. It was noted in the decision that prior to the Jones Act, a seaman might maintain such an action in admiralty by attaching the property of the employer found within the district.[31] The court examined Justice Van Devanter's opinion in *Panama R. Co. v. Johnson*,[32] to the effect that the Jones Act merely added new relief to the old rules, and concluded that in personam jurisdiction can still be obtained under the Jones Act in the same way: "An action in personam in admiralty begun by foreign attachment does not become an action in rem when property is seized."[33]

In *Bainbridge v. Merchants & Miners Transportation Company*[34] the same situation existed as described in the *Brown* case except that the action was in a state court. The defendant contended that because his residence and office were in another state, the suit was in the wrong "district" and, therefore, the court lacked jurisdiction. It was held that the clause was limited to federal courts.[35]

Where venue is laid in the wrong district in an admiralty case, the general statute applicable to all civil cases[36] for sending the case to the court of proper venue is applicable.[37] The venue requirement of the Jones Act

[28] Bainbridge v. Merchants & Miners Transportation Co., 287 U.S. 278 (1932); Panama R. Co. v. Johnson, 264 U.S. 375 (1924).

[29] Bainbridge v. Merchants & Miners Transportation Co., 287 U.S. 278 (1932); Engel v. Davenport, 271 U.S. 33 (1926); Panama R. Co. v. Vasquez, 271 U.S. 557 (1926); McKola v. McCormick Steamship Co., 24 F. Supp. 378 (N.D. Cal., 1938).

[30] 122 F.2d 98 (C.C.A. 3rd, 1941).

[31] Atkins v. Disintegrating Co., 18 Wall. (U.S.) 272 (1873).

[32] 264 U.S. 375 (1924).

[33] Brown v. Mallory, 122 F.2d 98, 104 (C.C.A. 3rd, 1941).

[34] 287 U.S. 278 (1932).

[35] Cf. Lynott v. Great Lakes Transit Corp., 195 N.Y.S. 13 (1922); Patrone v. Howlett, 237 N.Y. 394, 143 N.E. 232 (1924).

[36] 28 U.S.C.A. § 1404(a) (1948).

[37] Orr v. United States, 174 F.2d 577 (C.A. 2d, 1949).

does not dictate the only forum where an action may be brought but merely confers upon the defendant a personal privilege, which may be waived.[38] Thus, what appears to be a jurisdictional limitation in the Jones Act is merely a venue provision applying only to actions on the law side of the federal court and it may be waived.

The Jones Act is remarkable in that it was the first admiralty statute which provided for a jury trial. In *O'Brien v. U.S. Tank Ship*[39] the libelant brought an action in personam on the admiralty side of the district court demanding a jury trial. The court, in granting respondents request to vacate, quoted Chief Justice Marshall: "In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled . . . that the trial is to be by the court."[40] In actions under the Jones Act, it is now settled that a suitor is entitled to a jury trial in all actions at law in the federal or state courts while in an action on the admiralty side of the federal court he is not.[41]

The Jones Act provides:

> 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 . . . shall apply. . . .[42]

In *Pate v. Standard Dredging Corp.*[43] a seaman brought an action in the District Court of Harris County, Texas, under the Jones Act. The action was removed to the United States District Court on grounds of diversity of citizenship and requisite jurisdictional amount in controversy. The court, holding that the removal was improper, cited the provision of the Federal Employers' Liability Act which prohibits such removals:

> That the jurisdiction of courts of the United States in such actions should be concurrent with that of the courts of the several states and that no case arising under the Act and brought in any State court of competent jurisdiction should be removed to a federal court.[44]

[38] Case cited note 20, supra; Hill v. Upper Mississippi Towing Corp., 141 F. Supp. 692 (Minn., 1956).

[39] 16 F. Supp. 478 (S.D.N.Y., 1936).

[40] Ibid., at 479; The Sarah, 8 Wheat. (U.S.) 390, 394 (1823).

[41] Arizona v. Anelich, 298 U.S. 110 (1936); Pacific Steamship Co. v. Peterson, 278 U.S. 130 (1928); Engel v. Davenport 271 U.S. 33 (1926); Panama R. Co. v. Johnson, 264 U.S. 375 (1924).

[42] 46 U.S.C.A. § 688 (Supp., 1958).

[43] 193 F.2d 498 (C.A. 5th, 1952).

[44] Ibid., at 500.

It was stated that this provision was incorporated by reference in the Jones Act and that it follows that actions brought by seamen in the state courts are not removable to the federal courts.[45]

PARTIES ENTITLED TO SUE UNDER THE JONES ACT

Under the Act, any seaman may recover for personal injuries suffered in the course of his employment. Consistent with other litigation under the Jones Act, problems arose as to just who is a "seaman." A factor to be kept in mind in examining the history of this word is the ancient solicitude of Courts of Admiralty for those who labor at sea.[46] The solicitude is apparent in a major case expanding the scope of the word "seaman." In *International Stevedoring Co. v. Haverty*[47] where an action was brought under the Jones Act by a longshoreman injured while stowing cargo in a hold on a vessel, the Supreme Court treated the word "seamen" as used in the Jones Act as being quite flexible saying:

> We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of opinion that a wider scope should be given to the words of the Act, and that in this statute "seaman" is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was. . . .[48]

Although this case is an excellent example of the thinking by the courts at this time, it is not an indication of the law today since within six months after the *Haverty* decision, Congress enacted the Longshoremen's and Harbor Worker's Compensation Act.[49]

The effect of this Act is to confine the scope of the Jones Act to members of the crew of a vessel plying in navigable waters and to substitute for rights of recovery granted by the *Haverty* case only rights given by this Act.[50]

The conclusion that can be drawn from the *Haverty* case and the enact-

[45] Accord: Greene v. United Fruit Co., 85 F. Supp. 81 (S.D.N.Y., 1949); Gutierrez v. Pacific Tankers, 81 F. Supp. 278 (S.D. Tex., 1948).

[46] The Osceola, 189 U.S. 158 (1903).

[47] 272 U.S. 50 (1926).

[48] Ibid., at 52.

[49] 33 U.S.C.A. §§ 901 to 950 (Supp., 1958).

[50] Swanson v. Marra, 328 U.S. 1 (1946).

ment of the Longshoremen's Act is that the courts will give the term "seamen" a wide scope, unless limited by Congress. Subsequent to the enactment of the Longshoremen's Act the word "seaman" has generally held to mean one who is "a member of the crew."[51] The requirements for a "seaman" to be such are that the ship be in navigation; that there be a more or less permanent connection with the ship on the seaman's part; and that the worker be aboard primarily to aid in navigation.[52] A worker must satisfy these requirements to qualify. A seaman who had just gotten the job through the union and who was injured on the vessel while on his way to work could not recover under the Jones Act since he would only be a prospective employee.[53]

A perplexing question to the courts since the enactment of the Jones Act was treated by the court in *Lauritzen v. Larsen*.[54] There, a Danish seaman temporarily in New York joined the crew of a ship of Danish registry and flag, owned by Danish citizens and signed ship's articles providing that crew members would be governed by Danish law. While the ship was in Havana harbor, the seaman was injured in the course of his employment. The lower court awarded him judgment on the theory that American law applied. The Supreme Court reversed, Justice Jackson writing: "But we can find no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters."[55]

There are many variations possible in this situation such as a foreigner on a foreign ship injured while in American waters or an American on a foreign ship injured in American waters. The situation in the *Lauritzen* case is an extreme one in that there was practically no connection with the United States. The application of the Jones Act to foreign events, foreign ships and foreign seamen was held by the court to depend on the usual doctrine and practices of maritime law.[56]

Under this test the Jones Act is not applicable where foreign law is favored by an overwhelming preponderance of the connecting factors which are significant in the choice of the law applicable to a claim of actionable wrong. Such factors are the place of the wrongful act, the nationality of the ship, the allegiance or domicile of the seaman and the

[51] E.g., Swanson v. Marra, 328 U.S. 1 (1946); Desper v. Starved Rock Ferry, 188 F.2d 177 (C.A. 7th, 1951).

[52] McKie v. Diamond Marine Co., 204 F.2d 132 (C.A. 5th, 1953); Cf. Carumbo v. Cape Cod Steamship Co., 123 F.2d 991 (C.C.A. 1st, 1941).

[53] Miller v. Browning, 165 F.2d 209 (C.C.A. 2d, 1947).

[54] 345 U.S. 571 (1953).

[55] Ibid., at 593.

[56] Ibid.

allegiance of the ship owner. Obviously, the *Lauritzen* case does not divulge any rule of law which can be applied with unfailing certainty in the solution of like problems. The case does, however, serve as a guide which can be applied to new situations as they arise. It should be noted that there are situations where the law is settled. For example, the Jones Act has been held to apply to a seaman employed on an American vessel regardless of his nationality.[57]

The Jones Act provides that a seaman who has been injured *in the course of his employment* may bring an action for damages. This phrase is no exception to what seems to be the general rule regarding construction of the terms of the Jones Act. Like the rest, it has had a varying construction over the thirty-nine years.

The older construction of the phrase was that the Act only applied in situations where the injury would amount to a maritime tort. The court, in *McKie v. Diamond Marine*,[58] when deciding that a worker on a dredge cutting a new channel was sufficiently related to navigation as to make the Jones Act applicable stated:

> It is clear from the plain wording of the Act that its benefits were conferred upon any seaman who should suffer personal injury in the course of his employment. The right of recovery under the Act . . . depends not on the place where the injury is inflicted, this being wholly immaterial, but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters.[59]

This, of course, was a construction of the phrase in terms of maritime tort. Subsequent cases, however, indicated that the application of the Act in regards to the phrase "in the course of his employment" depends not on the navigable waters but on the maritime nature of the employment.[60]

In one of these cases, a deckhand in the service of a vessel plying navigable waters was ordered by the master to go ashore and assist in repairing a conduit through which the vessel was unloading cargo. The deckhand was injured and brought an action under the Jones Act. It was held that the injury occurred in the course of the deckhand's employment, which was a break with the older view that the seaman must be injured on the vessel plying navigable waters. It was stated by the Supreme Court:

> There is nothing in the legislative history of the Jones Act to indicate that its words *in the course of his employment* do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters.

[57] E.g., The Roseville, 11 F. Supp. 150 (S.D. Wash., 1935); Clark v. Montezuma Transportation Co., 216 N.Y.S. 295 (1926).

[58] 204 F.2d 132 (C.A. 5th, 1953).

[59] Ibid., at 134.

[60] O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943); Marceau v. Great Lakes Transit Corp., 146 F.2d 416 (C.C.A. 2d, 1945).

On the contrary it seems plain that in taking over the principles of recovery already established for railroad employees and extending them in the new admiralty setting to any seaman injured *in the course of his employment*, Congress, in the absence of any indication of a different purpose, must be taken to have intended to make them applicable so far as the words and the Constitution permit, and to have given to them the full support of all the Constitutional power it possessed. Hence the Act allows the recovery. . . .[61]

Prior to the enactment of the Jones Act the general maritime law did not provide any remedy for wrongful death.[62] By reason of the Federal Employers' Liability Act being incorporated into the Jones Act, if a personal injury to a seaman results in death, the seaman's personal representative is given a right to recover for the survivor's benefit such damages as will compensate them for any pecuniary loss which they sustained by the death, but if the seaman leaves no survivors in any of the classes alternatively designated in the Liability Act the personal representative cannot maintain any action.[63]

In *Beebe v. Moormack Gulf Lines*[64] a seaman had "married" after he was already married. Shortly thereafter, he was killed and claims were settled under the Jones Act in favor of his wife, child and mother. The alleged second wife sued for relief under the Act and the court, in denying her relief and explaining who was entitled to relief, stated:

> 46 U.S.C.A., Section 688 . . . vests the right of action in the personal representative of the deceased "for the benefit of the surviving widow or husband and children of such employee"; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee.[65]

The court held that the statute did not contemplate a second recovery by another so-called wife and widow.

Thus, where no beneficiaries of any classes named in the Federal Employers' Liability Act survive the decedent, there is no survival of the cause of action.[66] Where the sole beneficiary commences suit under the Jones Act for wrongful death and then dies as in *Van Beeck v. Sabine Towing Co.*,[67] a successor administrator may be appointed to continue the claim for the beneficiary's loss at least up to the time of his death. The court said:

[61] O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 39 (1943) (emphasis supplied).

[62] The Osceola, 189 U.S. 158 (1903); The Harrisburg, 119 U.S. 199 (1886).

[63] Lindgren v. United States, 281 U.S. 38 (1930).

[64] 59 F.2d 319 (C.C.A. 5th, 1932).

[65] Ibid., at 319.

[66] Bailey v. Baltimore Mail S.S. Co., 43 F. Supp. 243 (D.C.N.Y., 1941); St. Louis and San Francisco R.R. v. Oldham, 188 Okla. 245, 107 P.2d 1017 (1940).

[67] 300 U.S. 342 (1937).

Viewing the cause of action as one to compensate a mother for the pecuniary loss caused to her by the negligent killing of her son, we think the mother's death does not abate the suit, but that the administrator may continue it, for the recovery of her loss up to the moment of her death, though not for anything thereafter, the damages when collected to be paid to her estate.[68]

Regarding the damages recoverable by such statutory beneficiaries under the Jones Act, it has been held that the next of kin to avail themselves of the statute must have been dependent on the decedent.[69] Dependency need not be proven by husband or wife, parents or children[70] except in the case where the beneficiaries are the parents of an adult child in which case pecuniary loss must be alleged and proved.[71] The damages recoverable are deemed to be compensation for deprivation of reasonable expectations of pecuniary profits which would have resulted from continued life of the deceased.[72] Pain and suffering may be included as an element of damages if it can be shown that the injured person while he lived underwent a compensable physical injury resulting in pain and suffering.[73]

RIGHTS AVAILABLE TO THE SEAMAN UNDER THE JONES ACT

The gravamen of a suit under the Jones Act is the negligence of the employer of the plaintiff seaman or one of his agents.[74] Negligence is one more aspect of the Jones Act that has undergone a varied construction by the court. The *Mullen v. Fitzsimmons & Connell Dredge & Dock Co.*[75] case indicated a rather definite rule in deciding an action by two seamen for personal injuries incurred in the course of their employment. The court stated:

The Jones Act provides for relief for injured seamen similar to that provided for railroad employees under the various enactments for their benefit. This right of recovery depends on negligence in one or both of two particulars: 1. that of any of the officers, agents, or employees of such carrier, and 2. by reason of any defect or insufficiency in its cars, engines, appliances. [T]his Act must be interpreted in accordance and harmony with maritime law, customs, equipment, and practice.[76]

[68] Ibid., at 347.

[69] Cleveland Tankers v. Tierney, 169 F.2d 622 (C.C.A. 6th, 1948).

[70] Ibid.

[71] Garrett v. Louisville & Nashville R.R., 235 U.S. 308 (1914).

[72] Chesapeake and Ohio R.R. v. Kelly, 241 U.S. 485 (1916); American R.R. Co. of Porto Rico v. Didrickson, 227 U.S. 145 (1913).

[73] St. Louis, Iron Mountain, Southern R.R. v. Craft, 237 U.S. 648 (1915).

[74] Calmar S.S. Corp. v. Taylor, 92 F.2d 84 (C.C.A. 3rd, 1937); Cruse v. Sabine Transportation, 88 F.2d 298 (C.C.A. 5th, 1937); Buttingham v. Ore. S.S. Corp., 62 F.2d 616 (C.C.A. 4th, 1933); Pittsburgh S.S. Co. v. Palo, 64 F.2d 198 (C.C.A. 6th, 1933).

[75] 172 F.2d 601 (C.A. 7th, 1948).

[76] Ibid., at 603.

The language used in *Cortes v. Baltimore Insular Line*[77] to indicate the rule as to what should constitute negligence was substantially broader and more indicative of the trend of the courts today. In that case a seaman contracted pneumonia on a voyage and after a short stay in a land hospital died. An administrator brought an action for damages which were allegedly caused by the failure of the master of the ship to give him proper care. In expounding the duties owed by ship to seamen, Justice Cardozo said:

> We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This court has said that "the ancient characterization of seamen as wards of admiralty is even more accurate now than it was formerly."[78]

Justice Cardozo further stated that neither the Jones Act nor the Federal Employers' Liability Act attempt to define negligence. That definition is to be filled in by the general rules of law applicable to the conditions in which a casualty occurs. The broad language used by Justice Cardozo was a fair prophecy of the treatment that would be given negligence by the courts. Today it is very broad and in some cases, almost approaches absolute liability.

However, liability must still be based on negligence. An action of assault has been held not to be within the scope of the Act.[79]

THE COMPLAINT IN A JONES ACT SUIT

The complaint must allege the existence of a relation of employee and employer between the plaintiff and the defendant. The Jones Act is specifically drawn to give rights *against the employer and no others.*[80] It is necessary that an allegation be made establishing the jurisdiction of the Jones Act over the suit. In *Pacific Atlantic Steamship v. Hutchison,*[81] where an administrator brought an action for pain and suffering and pecuniary loss under wrongful death, it was held that the allegation that the decedent was employed on the Linford Victory, a vessel plying navigable waters, was sufficient as a jurisdictional allegation.[82]

When a complaint is filed in good faith within the period of limitations,

[77] 287 U.S. 367 (1932).

[78] Ibid., at 377.

[79] Gain v. Alpha, 35 F.2d 717 (C.C.A. 2d, 1929).

[80] Hust v. Moore-McCormack Lines, 328 U.S. 707 (1946); Paduana v. Yamashita Kisen Kabushiki Kaisha, 221 F.2d 691 (C.A. 2d, 1955).

[81] 221 F.2d 615 (C.A. 9th, 1957).

[82] McKie v. Diamond Marine Co., 204 F.2d 132 (C.A. 5th, 1953); Shantz v. American Dredging Co., 138 F.2d 534 (C.C.A. 3rd, 1943).

suit is commenced on the day of filing.[83] Where a complaint was filed, which by reason of error did not name the defendant correctly, and the Statute of Limitations ran, the court allowed an amendment holding that the amended complaint would relate back to the date of the original complaint since the effect of the amendment was merely to correct a misnomer.[84]

It is not necessary that any reference be made in the libel or complaint to the Jones Act. The pleader must plead his facts, and when he does so he may invoke the protection of the common law or any applicable statute.[85]

ELECTIONS OF REMEDIES

Prior to the Jones Act, when a seaman suffered personal injuries in the services of his ship, the vessel and her owners were liable in admiralty for (1) his maintenance and cure and for his wages, at least until the end of the voyage; (2) an indemnity for the injuries if they were received as a result of the unseaworthiness of the ship or a failure to supply and keep in order the appliances of the ship.[86]

The Jones Act states that any injured seaman may *at his election* bring an action for damages at law. The problem of what this phrase was intended to mean by Congress has been a prolific source of litigation. The phrase is construed differently now than it was in earlier cases. The problem is centered around whether a seaman may bring an action with one cause of action under the Jones Act for negligence and another cause of action under the general admiralty law for unseaworthiness or whether he must elect to bring one or the other. The earlier cases held that since the Jones Act provides an alternative remedy the suitor must elect between the two causes of action before any relief will be granted.[87]

One of the problems given rise to by this thinking, however, was that once an election was made, as it had to be, the other cause of action could never be tried since the first judgment was held to be res judicata as to any subsequent claim on the other cause of action.[88]

This rule that an action for unseaworthiness and an action under the Jones Act could not be joined has no effect on the joinder of an action for

[83] Port v. Litoff, 103 F.2d 302 (C.C.A. 5th, 1939).

[84] Godfrey v. Eastern Gas & Fuel Associates, 71 F. Supp. 175 (Mass., 1947).

[85] Luckenbach Steamship Co. v. Campbell, 8 F.2d 223 (C.C.A. 9th, 1925).

[86] The Osceola, 189 U.S. 158 (1903).

[87] The Arizona v. Anelich, 298 U.S. 110 (1936); Pacific Steamship Co. v. Peterson, 278 U.S. 130 (1928); Plamals v. The Pinar Del Rio, 277 U.S. 151 (1928); Panama R. Co. v. Johnson, 264 U.S. 375 (1924).

[88] E.g., Baltimore Steamship Co. v. Phillips, 274 U.S. 316 (1927).

maintenance and cure with either an action under the Jones Act or for unseaworthiness. In that case the courts allowed the joinder holding that the action for maintenance and cure was a contractual claim and as such could be joined.[89]

The more recent cases have indicated that the actions for unseaworthiness and for negligence under the Jones Act may be joined holding that the meaning of the "election" provided for in the Act is an election between a trial by jury and a suit in admiralty without a jury.[90]

PARTIES LIABLE UNDER THE JONES ACT AND THEIR DEFENSES

As has been stated, the Jones Act provides for a suit by a seaman only against his employer.[91] The test for who is an employer was stated by the Supreme Court in *Cosmopolitan Shipping Co. v. McAllister*.[92]

> No single phrase can be said to determine the employer. One must look at the venture as a whole. Whose orders controlled the master and the crew? Whose money paid their wages? Who hired the crew? Whose initiative and judgment chose the route and the ports? It is in the light of these basic considerations that one must read the contract.[93]

The charter party, which very simply is a contract to let the vessel or some part thereof, can be an illustration of the application of the test. If the charter party let the entire vessel, with transfer of the command and consequent control over its navigation to the charterer, he will generally be considered the employer of those seamen he hires, but if the charter party let only the use of the vessel, the owner at the same time retaining its command and possession and control over its navigation, the charterer then is a mere contractor for designated services and duties and the responsibility of the owner is not changed.[94]

A captain of a ship may have such control over the ship as to become the owner *pro hoc vice*, thereby incurring the potential liability of an employer.[95]

Any discussion regarding the defenses of employers to action against

[89] E.g., Pacific Steamship Co. v. Peterson, 278 U.S. 130 (1928).

[90] McCarthy v. American Eastern Corp., 175 F.2d 724 (C.A. 3rd, 1949); Balado v. Lyker Bros. Steamship Co., 179 F.2d 943 (C.A. 2d, 1950); German v. Carnegie Illinois Steel Corp., 156 F.2d 977 (C.C.A. 3rd, 1946); Platt v. Chesapeake & O. Ry., 82 F. Supp. 968 (N.D. Ohio, 1948).

[91] Cases cited at note 80, supra.

[92] 337 U.S. 783 (1949).

[93] Ibid., at 795.

[94] Larson v. Lewis, 84 P.2d 296 (Calif., 1939).

[95] Cromwell v. Slaney, 65 F.2d 940 (C.C.A. 1st, 1933); The Carrier Dove, 97 F.2d 111 (C.C.A. 1st, 1899); Costa v. Gorton, 242 Mass. 294, 136 N.E. 100 (1922); Adams v. Augustine, 195 Mass. 289, 81 N.E. 192 (1907).

them under the Jones Act would necessarily to a large extent concern itself with the absence of them.

This is true because the Jones Act obviated some defenses existing prior to the enactment. Assumption of risk under the Jones Act is not a defense, though it was before the Act.[96] The same is true of contributory negligence, since under the Act, the doctrine of comparative negligence is followed.[97]

Failure to begin an action within the proscribed three-year period is held to extinguish the cause of action under the Jones Act and hence is an absolute defense by an employer.[98] An employer may also plead a release that is validly executed by a seaman.[99]

CONCLUSION

It should be apparent at this point that the Jones Act is not a clear succinct statement of the law. Attesting to this fact is the mass of litigation concerned to a large extent with ascertaining Congressional intent behind the words of the Act. Certain principles do emerge, however, from this body of interpretation, which comprise the law of the Act and which this writer has enumerated.

The purpose of the Jones Act is to extend the rights of the seamen. This is evidenced by the addition to his rights of an action for negligence, his right to a jury trial for this action, a right of recovery for wrongful death and more. Defenses which would bar this action were abolished. Congress has acted to help the seaman and the courts have complemented this Act by their decisions. It can well be said that seamen are the wards of admiralty.

[96] E.g., The Arizona v. Anelich, 298 U.S. 110 (1936).

[97] Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939); The Arizona v. Anelich, 298 U.S. 110 (1936).

[98] E.g., Engel v. Davenport, 271 U.S. 33 (1926).

[99] Sitchon v. American Export Lines, 113 F.2d 830 (C.A. 2d, 1940); Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).

DEVELOPMENTS IN "RIGHT-TO-COUNSEL" CASES

At what point in a criminal proceeding does an accused have the right to counsel? A theory more liberal than any heretofore promulgated is found in the concurring opinions of a recent Supreme Court decision. The case with the new answer is *Spano v. People*.[1] In *Spano* the petitioner, under indictment for murder, was subjected to a long period of police grilling. During this interrogation he refused to make a statement, but repeatedly asked to see his counsel. All requests for counsel were denied. Through

[1] 360 U.S. 315 (1959).