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Admiralty - Coast Guard Negligence in Rescue Operation Held Not Recoverable on Basis of Public Policy

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CASE NOTES

ADMIRALTY–COAST GUARD NEGLIGENCE IN RESCUE OPERATION HELD NOT RECOVERABLE ON BASIS OF PUBLIC POLICY

The owner of the barge *Barlow* brought a libel against the United States to recover for damages to the barge which collided with a breakwater while the Coast Guard cutter *Mohawk*, in the course of a rescue operation at sea, attempted to tow the barge to safety. The United States District Court for the District of Delaware entered a decree ordering the United States to pay the owner of the *Barlow* one-half of the damages suffered, and both the United States and the owner of the barge appealed. The Court of Appeals for the Third Circuit held, on the basis of public policy, that the United States should not be liable for the negligence of the Coast Guard in the course of a rescue operation at sea. *P. Dougherty v. United States*, 207 F. 2d 626 (C.A. 3d, 1953); certiorari denied, 347 U.S. 912 (1954).

There was no dispute as to the district court's findings that the operation of the Coast Guard cutter *Mohawk* was negligent. The only points in issue were whether the government could be held liable for the negligence of the Coast Guard in the course of a sea rescue, and if so, what standard of care must be exercised?

The first and most salient consideration is whether the government can be held liable for the negligence of the Coast Guard in the course of a sea rescue. Section 1 of the Public Vessels Act[1] provides that:

> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States. . . .

Section 2 of the same Act continues with:

> Such suits shall be subject to and proceed in accordance with the provisions of Chapter 20 of this title (The Suits in Admiralty, Merchant Vessels Act of March 9, 1920)[2] . . . insofar as the same are not inconsistent herewith.

[1] 43 Stat. 1112 (1925), 46 U.S.C.A. § 781 (1953).

[2] 41 Stat. 525 (1920), 46 U.S.C.A. §§ 741–752 (1953).

Section 3 of the Merchant Vessels Act[3] provides that:

> Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties.

This statute was held by the United States Supreme Court to impose upon the United States the same liability as is imposed by the admiralty law on the private shipowner.[4]

The instant case held that for reasons of public policy there should be no liability for Coast Guard negligence in the course of a sea rescue, the court giving as its reason that the Coast Guard should not be exposed to an obligation in addition to the possible loss of life and loss of status in their chosen careers.

It is apparent that the court of appeals refused to apply the clear cut language of the Public Vessels Act to the case at hand. That the Coast Guard is an agency of the United States Government has never been questioned; that a Coast Guard cutter functions in only a public capacity is clear to every citizen. Hence saying that the United States is not liable for the negligence of the Coast Guard in the course of a sea rescue appears to be a contradiction of the Public Vessels Act.[5]

The dissent in the instant case summed up the matter clearly and concisely when it stated that the majority opinion laid down a principle which would relieve the United States of any liability whatever for any fault or misfeasance of the Coast Guard during the course of a rescue operation at sea. The dissent went on to say that the majority was substituting sentiment for the plain provisions of the Public Vessels Act, and that the instant case dealt with an act of Congress clearly expressing the legislative intent, and that the conclusion should have been that the United States had to answer for the *Mohawk's* negligence.

Not to hold the government liable in the instant case is to place the Coast Guard on an unapproachable pedestal apart from all other agencies of the government which are subject to the Public Vessels Act, when, in fact, the Act does not specify immunity to any branch of the government.

The instant case is the first case in which the United States has been held liable by a United States district court for Coast Guard negligence in the course of a sea rescue, but the idea that the United States might be held liable for a Coast Guard vessel's torts is not a novel one. Of eight cases dealing with this problem, none are prior in date to 1950, an indication that the problem is increasing in importance. Six of these

[3] Ibid., at 526 and § 743.

[4] Canadian Aviator, Ltd. v. United States, 324 U.S. 215 (1945).

[5] 43 Stat. 1112 (1925), 46 U.S.C.A. § 781 (1953).

eight cases will cast little, if any, light on our problem, since three are still pending,[6] two were voluntarily dismissed,[7] and one was dismissed on motion.[8]

In the case of *Ladd v. United States*,[9] the United States was held liable for Coast Guard negligence. This case can be distinguished from the instant case in that no rescue was involved, merely negligent operation of a Coast Guard cutter. What makes the *Ladd* case so important is that the United States was held liable, and even though the case is not concerned with a rescue operation, it poses the question as to why the United States should be held liable for the negligent operation of a Coast Guard cutter only when it is not in the course of a rescue operation.

The latest case in point is *Page v. United States*[10] which involved alleged negligence in the course of a sea rescue, and although the United States is not held liable, the decision is in accord with the *Ladd* case. The government was not liable because the court held that there was no negligence, but in dicta, the court stated that:

> Under the Public Vessels Act, the United States is liable for damages caused by her public vessels and this liability covers damages resulting from negligence of personnel in the operation of such vessels. Damages attributed to the negligence of Coast Guard vessels and personnel may be recovered under this act.[11]

However, the court in the Page case left unsettled the question of liability for Coast Guard negligence in the course of a sea rescue since the court refused to decide that problem because the circumstances of the case did not constitute negligence. Therefore, it would seem that the problem is one that requires clarification, and to deny certiorari is to refuse to render a decision on an issue which has been presented more

[6] Geerston v. United States (The Anna G–CG30311, W.D. Pa., Adm. No. 174)–Alleged negligence in the course of rescue–tried at Erie, April 1, 1952 and not yet submitted; Charles W. Smith, Inc. v. United States (The Olivia Brown-Navesink), (S.D. N.Y., Adm. No. 165-387)–alleged negligence in course of rescue, suit at issue since October, 1950; CGC Yocona-Kallie P., Hansen v. United States (D.C. Ore. No. 6634)–suit begun September, 1952.

[7] Johnson v. Sapio, United States impleaded (The Tradewinds III-CG36393), (D. N.J. Civil No. 752-50)–Coast Guard impleaded by fishing party boatman sued by passenger who broke leg in course of rescue, impleader voluntarily dismissed on day of trial at Camden, November 14, 1951. Friesenborg v. The Peter Maersk and United States (The Irma-Pauline-Peter Maersk-CGC Marion), (E.D. Va., Adm. No. 7423)–suit by rescued vessel hit by the Maersk against both the Maersk and Coast Guard cutter which was towing the rescued vessel. Voluntarily dismissed as to the government on July 28, 1951.

[8] Lacey v. United States, 98 F. Supp. 219 (D.C. Mass., 1951).

[9] 97 F. Supp. 80 (E.D. Va., 1951).

[10] 105 F. Supp. 99 (E.D. La., 1952).

[11] Ibid., at 102.

in the last four years than in the previous entire history of the Coast Guard.

Assuming that the United States can be held liable for the negligence of the Coast Guard in sea rescue cases, the problem then is to determine what the standard of care should be. In other words, should a breach of duty be determined on the basis of gross negligence or is the standard reasonable care? The majority opinion stated the basis to be that of gross negligence, a holding which the dissent opposed heatedly.

That the United States is under no civil liability for the failure of the Coast Guard to come to the aid of a vessel in distress is established by the provision of the statute[12] regulating the Coast Guard. Nowhere in the statute is the obligation to rescue expressed. Hence, liability can be imposed only when an actual rescue has been undertaken and performed in a negligent or wrongful manner. In *Lacey v. United States*,[13] the court held that nowhere in the statute was a right created to be rescued so that an award of civil damages could be awarded for failure of the Coast Guard to attempt to rescue one in distress. Therefore, liability can only be predicated on the common law rule of assumption of duty[14] or on the liability of a salving ship to the ship in distress once salvage has been undertaken.

The majority, in holding that gross negligence must be shown for recovery, made no distinction as to whether the Coast Guard should be viewed as a salvor or as a good Samaritan, indicating in the opinion that under either case gross negligence must be shown in order to establish a breach of duty. Whether a Coast Guard cutter should be viewed as a good Samaritan or a salvor should not raise any problem, since, if a cutter is viewed as a good Samaritan, the common law rule of ordinary care applies.[15] The basic problem exists when the Coast Guard is viewed as a salvor. It has been stated:

> A salvor is a person who without any particular relation to a ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing covenant that connected him with the duty of employing himself for the preservation of the ship.[16]

The instant case states that the standard of care required, no matter what the type of ship, is slight care, or the absence of gross negligence, and cites numerous cases which the majority feels supports its argument.[17]

[12] 63 Stat. 496, 501 (1949), 14 U.S.C.A. §§ 2 and 88 (1953).

[13] 98 F. Supp. 219 (D.C. Mass., 1951).

[14] Prosser, Torts § 32 (1941).

[15] Ibid.

[16] The Hope, 35 U.S. 108 (1836).

[17] Dorrington v. City of Detroit, 223 Fed. 232 (C.A. 6th, 1915); The S. C. Schenck, 158 Fed. 54 (C.A. 6th, 1907); The Daniel Kern, 27 F. 2d 920 (W.D. Wash., 1928); The Henry Steers, Jr., 110 Fed. 578 (E.D. N.Y., 1901).

The *Henry Steers Jr.*[18] case is cited as setting down the rule that gross negligence is required. It is difficult to see how the court can derive this from the *Steers* case when the court in that case stated, "The rule of general application in cases of salvage is . . . [the] use [of] . . . care and skill that would be exercised by persons of ordinary skill and prudence in the business undertaken."[19] However, the majority, in rendering the opinion in the instant case, apparently confused the statements in the *Steers* case as to the requirement of gross negligence to forfeit the salvage award entirely with the required standard of care of a salvor in the course of a salvage operation. It has been held that gross negligence works a total denial or forfeiture of salvage awards.[20] The importance of the *Steers* case is that it shows the distinction between the requirement of gross negligence to reduce the salvage award, and ordinary negligence to render a salvor liable for a negligently performed salvage operation.

Neither does the *S. C. Schenck*[21] case, relied on by the majority, set down the gross negligence rule since the facts do not correspond to those in the instant case. In the *Schenck* case the rescue was never made; it was ineffectual at the outset. Hence, there could be no negligence during the course of a sea rescue. Also, the *Schenck* case was one of great emergency, and the standard care required in an emergency has never, even under the common law rule of torts, been as strict as where calm reflection is possible.[22] Another case cited by the majority of the court which does not seem to support their view is *Dorrington v. City of Detroit*,[23] which held that "Persons undertaking a salvage service are bound to exercise reasonable care and such skill as persons performing such services ordinarily possess. . . ."[24] It was further held in the *Dorrington* case that when liability is sought to be fastened solely because of an ineffectual salvage attempt, no independent injury resulting, liability would not attach if there was evidence of good faith and absence of culpable negligence or wilful misconduct. It is obvious that this rule will not fit the instant case because in the instant case the service was not ineffectual.

The last case relied on by the majority is *The Daniel Kern.*[25] In that case the libelant did not recover because of the failure to establish any negligence. The court held that salvors in good faith are held to reasonable judgment such as a man of ordinary prudence would use when called upon to protect his own property. The majority in that case

[18] 110 Fed. 578 (E.D. N.Y., 1901).

[19] Ibid., at 581.

[20] The Mulhouse, 17 Fed. Cas. 962 (1859).

[21] 158 Fed. 54 (C.A. 6th, 1907).

[22] Prosser, Torts § 37 (1941).

[23] 223 Fed. 232 (C.A. 6th, 1915).

[24] Ibid., at 241.

[25] 27 F. 2d 920 (W.D. Wash., 1928).

relies on the statement in the *Schenck* case to the effect that there is no responsibility if the service was rendered in good faith, without clear evidence of culpable negligence or wilful misconduct. The court then went on to say that it was apparent that reasonable judgment and skill were being exercised since no testimony of any culpability or wilfulness was given. The *Kern* case does not evidence adherence to a gross negligence rule because the explanations of both ordinary negligence and gross negligence were inserted merely for the purpose of showing that neither was present.

In conclusion, it appears that the United States should be held liable for the negligence of the Coast Guard in the course of a sea rescue, and that the standard of care to be imposed should be that of reasonable care. Although this would seem to be placing an undue burden on the government since the duty to rescue is not one imposed by law but assumed voluntarily, the fact remains that there is a federal statute making *all* government vessels liable for negligence. Until this statute is amended or repealed, the court is duty-bound to apply it, and since the statute is unambiguous, it would seem that this court, in saying that the legislature did not intend to include vessels used in rescue operations, has usurped its power. It has created an exception which the legislature did not see fit to make.

CONFLICT OF LAWS–SURVIVAL OF CAUSE OF ACTION HELD MATTER OF PROCEDURE

Plaintiffs and defendant's intestate, all residents of California, were involved in an auto collision in Arizona, the latter dying as a result of injuries thereby sustained. After the appointment of defendant as administrator of decedent's estate, each of the plaintiffs brought damage actions in California, which were rejected. Separate actions were filed against the decedent's estate, to which the defendant demurred and moved for abatement, since the statutes of Arizona made no provision for survival of causes of action after the death of the tortfeasor. By statute in California, causes of action for negligent torts survive the death of the tortfeasor, and can be maintained against the administrator or executor of his estate.[1] The trial court granted motions to abate and the appeals of plaintiffs were consolidated. The Supreme Court of California reversed the lower court's decision, holding survival of a cause of action upon death of the tortfeasor a matter of procedure and, therefore, governed by the law of the forum, in accordance with the rule from conflict of laws. *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944 (1953).

[1] Cal. Civ. Code (Deering, 1949) § 956.