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EVOLVING STANDARDS OF JONES ACT NEGLIGENCE

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This paper will discuss recent cases on the definitions of negligence under the Jones Act as well as certain issues which directly affect Jones Act cases. The Jones Act is a federal statute which can be found at 46 U.S.C. section 688 et seq. Jones Act actions require proof of the four elements of negligence. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354, 115 S.Ct. 2172, 132 L. Ed. 2d 314 (1995), *Perkins v. American Electric Power Fuel Supply Inc.*, 246 F. 3d 593 (6th Cir. 2001) and *Gautreaux v. Scurlock Marine Inc.*, 107 F. 3d 331 (5th Cir. 1997). The unresolved or confused issues seem to be in regard to the level of proof required to show that the ship owner had a duty or breached that duty and the level of proof required to prove causation.

A. THE BASIC PREMISE OF THE JONES ACT; ARGUE THIS FIRST

Any analysis of the Jones Act has to begin with the basic premise that seamen are wards of the court and are entitled to special protection. This special protection involves increased standards for liability (and decreased levels of required proof). The second step of this analysis is that any interpretation of remedial legislation, such as the Jones Act, should be liberal in order to effect the goal of protection of the seamen. In the recent case of *Perkins v. American Electric Power Fuel Supply Inc.*, 246 F. 3d 593, 2001 A.M.C. 2780 (6th Cir. 2000), the 6th Circuit said:

It is a well-settled principal of law that seamen are “emphatically the wards of the admiralty.” *Chandras Inc. v. Latsis*, 515 U.S. 347, 354-55, 115 S.Ct. 2172, 132 L. Ed. 2d 314 (1995) (citation and quotation omitted); Accord, *Socony-Vacuum Oil Company v. Smith* 305 U.S. 424, 431, 59 S.Ct. 262, 83 L. Ed. 265 (1939); *Davis v. American Commercial Lines Inc.*, 823 F. 2d 1006, 1007 (6th Cir. 1987). The paternal regard of the courts and congress for seamen has, for the most part,

grown out of the peculiar conditions of their employment. These conditions by their very nature rigorous and subjecting the seamen to unusually severe discipline for extended periods of time, are quite unlike the conditions which attend land labor, and have resulted in extraordinary remedies being made available to those who accept this calling. *Paul v. United States*, 205 F. 2d 38, 42 (3rd Cir. 1953). “It is for this reason that remedial legislation [enacted] for the benefit and protection of seamen has been liberally construed to attain that end.” *Socony-Vacuum*, 305 U.S. at 431, 59 S.Ct. 262; Accord, *Isbrandtsen Company v. Johnson*, 343 U.S. 779, 782, 72 S.Ct. 1011, 96 L.Ed. 1294 (1952). *Perkins*, 246 F. 3d at 597, 598.

The bases for these doctrines has been discussed by many courts including the District Court for the Southern District of Indiana which recently said:

The law has long provided extensive protection to seamen because of the unique hazards attending their work. These ancient legal protections were built upon the needs of the sick or injured sailor, stranded on a distant and foreign shore, without friends or funds, waiting for winds, tides, and fortune to bring him home again. Justice story long ago provided a colorful and paternalistic description of the needs for these special legal protections: “Seaman are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment...” *Harden v. Gordon*, 11 F. CAS 480, 483 (C.C.D.Me. 1823) (No. 6,047). These legal protections are evident in the Jones Act and in doctrines of maritime law such as maintenance and cure....

Bennett v. Grand Victoria Resort and Casino, 2002 W.L. 440 235 (S.D.I. 2002).

B. THE ELEMENTS OF PROOF

Some courts have analyzed the elements of proof necessary for Jones Act negligence in three parts. First, the Plaintiff must establish that he was an employee of the Defendant and acting as such within the scope of his employment during the time of the accident. 46 U.S.C. § 688 (a). See, e.g., *Nasser v. CSX Lines, LLC*, 2002 W.L. 440 565 (E.D.N.Y.). This element of proof naturally would entail proof of the status of Plaintiff as a seaman.

The next required element of proof is the negligence of the ship owner. Finally, Plaintiff must establish that Defendant’s negligence caused his injuries. This paper will discuss recent developments in the latter two requirements first and then discuss recent cases on status as well as other issues.

C. NEGLIGENCE OF THE SHIPOWNER- GAUTREAUX DOES NOT CHANGE THE BASIC PREMISE

One of the most cited cases recently—at least by the Defense bar— for defining the standards under which the Defendant will be judged for negligence under the Jones Act is *Gautreaux v. Scurlock Marine Inc.*, 107 F. 3d 331 (5th Cir. 1997). The Fifth Circuit in *Gautreaux* indicated that whether an employer is negligent is determined under the “ordinary prudence” standard normally applicable in negligence cases.

It is evident from the recent cases that the Defendant/shipowners are attempting to argue that *Gautreaux* should be read to mean that ship owners should be judged by the same negligence standards as land based Defendants. *Gautreaux*, however, should not be read this way for at least two reasons. First, at least one court after *Gautreaux* has said that: “The vessel owner owes his seamen an obligation of fostering protection, which typically translates into “a higher duty of care” than that accorded to land based torts.” *Nasser v. CSX Lines, LLC*, 2002 W.L. 440 565 (E.D.N.Y.) Citing *Saleh v. United States*, 849 F. Supp. 886, 891 (S.D.N.Y. 1994) (quoting *Cortes v. Baltimore Insular Line Inc.*, 287 U.S. 367, 374 (1932)). The 6th Circuit in *Rannals v. Diamond Jo Casino*, 265 F. 3d 442 (6th Cir. 2001) said: “Furthermore, as the Supreme Court noted in *Socony-Vacuum Oil Company v. Smith*, 305 U.S. 424, 59 S.Ct. 262, 83 L.Ed. 265 (1939), the Jones Act was intended to expand—not limit—protections for seamen, and usually disallows “the application of rules of the common law which would affect [seamen] harshly.” *Id.* at 431, 59 S.Ct. 262; see also *Daughenbaugh*, 891 F. 2d at 1204 (holding that the Jones Act “is entitled to a liberal construction to accomplish its beneficent purposes”). *Rannals*, 265 F. 3d at 448. In *Rannals*, for example, a riverboat deck hand slipped on ice as she was walking toward her car while attending a firefighting training program. The training program was held by a company which contracted with the ship to provide such training. In *Rannals*, the ship owner had no direct control over the premises on which the seamen slipped and fell. The Circuit Court reversed a summary judgment in favor of the Defendant. The Court held that the employer’s duty to provide a safe place to work is non-delegable and, that under the Jones Act the ship owner employer is responsible and liable for the negligence of its contractors. (cf, *Foster v. Maritrans, Inc.*, 790 A. 2d 328 (Penn. 2001) (where the Pennsylvania appellate court held that condition of ice on an exposed deck was a common, foreseeable condition and did not make the vessel unseaworthy).

The reasoning in *Rannals* was that the Jones Act “incorporates the standards of the Federal Employers Liability Act (“FELA”) which renders an employer liable for the injuries negligently inflicted on its employees by its officers, agents, or employees.” *Hopson v. Texaco Inc.*, 383 U.S. 262, 263, 86 S.Ct. 765, 15 L.Ed. 2d 740 (1966). Under the FELA, an employer has a non-delegable duty to provide a safe workplace for its employees. Because the ship owner employer is responsible for the negligence of its “officers, agents or employees” this has been extended to mean responsibility for the parties with which the ship owner contracts. Thus, even though the employer’s conduct is judged under the “ordinary prudence” standard, ship owner/employer/Defendants under the Jones Act have duties which clearly are peculiar to the Jones Act, such as the non-delegable duty to provide the employee with a safe place to work and the liability of the employer for the negligence of its officers, agents or employees which includes its contractors. Therefore, even if Defendants are successful in arguing that the ship owner does not have a “higher duty of care” as expressed by the Second Circuit case referenced above, certainly the Jones Act imposes certain duties on the employer which duties are peculiar to the Jones Act.

D. NEGLIGENCE OF THE SHIPOWNER- QUANTUM OF PROOF IS STILL FEATHERWEIGHT

One of the other issues which is emerging in these cases is the quantum of proof required for negligence. The issue seems to be whether the quantum of proof applies to the causation element or also to the duty and breach of duty elements. Several circuits have held that “the quantum of evidence necessary to support a finding of Jones Act negligence is less than that required for common law negligence, ... and even the slightest negligence is sufficient to sustain a finding of liability.” *Ribitzki v. Canmar Reading & Bates Ltd. Partnership*, 111 F. 3d 658, 662 (9th Cir. 1997), quoting *Havens v. F/T Polar Mist*, 996 F. 2d 216, 218 (9th Cir. 1993); see also *Harbin v. Burlington Northern Railroad Company*, 921 F. 2d 129, 131 (7th Cir. 1990)(“A trial judge must submit an FELA case to the jury when there is even slight evidence of negligence”) as cited in *Bennett v. Grand Victoria Resort and Casino*, 2002 W.L. 440 235 (S.D.I. 2002). In a Florida state court opinion, *Lane v. Tripp*, 788 S. 2d 351 (Fla. 3d DCA 2001), the Third District Court of Appeal cited federal cases and said: “The Plaintiff has a “feather weight” burden of proof in establishing a claim for Jones Act negligence (citing *Ribitzki v. Canmar Reading & Bates Ltd.* 111 F. 3d 658 (9th Cir. 1997); *Bavaro v. Grand Victoria Casino*, 2001 W.L. 289 782 (N.D.Ill. March 15, 2001).

E. NEGLIGENCE OF THE SHIPOWNER – DUTIES OF THE SHIPOWNER ARE DIFFERENT FROM LAND BASED DEFENDANTS

In the *Lane* case, Plaintiff was a seaman employed by a yacht. After cleaning the yacht, the Plaintiff attempted to dismount the console, slipped on the wet footrest, and severely injured his knee. Summary judgment for the Defendant was reversed. The Defendant in *Lane* cited *Gautreaux* “for the proposition that the standard of care under the Jones Act is no longer ‘slightest causation’ but ordinary prudence and that this Court’s decision in *Solano v. Carnival Cruise Lines Inc.*, 491 S. 2d 325 (Fla. 3d D.C.A. 1986) is in conflict.” *Lane*, 788 S. 2d at 352. The court in *Lane* disagreed and said that the Defendant misread *Gautreaux*. The Third District Court of Appeal said that *Gautreaux* “concerned the duty of care owed and comparative negligence, not the Plaintiff’s evidentiary burden to overcome a motion for summary judgment. The court in *Gautreaux* explained that the term “slightest negligence” used by the United States Supreme Court in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500, 506, 77 S.Ct. 443, 1 L.Ed. 2d 493 (1957) referred to the quantum of evidence necessary to sustain a jury verdict. The prevailing law is still that the Plaintiff has a featherweight burden to overcome a motion for summary judgment in a Jones Act negligence case. See, *Bavaro* 2001 W.L. 289 782. This featherweight burden also should apply to overcome a directed verdict and to get the case to the jury.

The following are other examples of cases in which the ship owner’s duty may be somewhat peculiar to the Jones Act. For example, a recent case has held that the ship owner did breach its duty to provide “adequate safety measures” such as railings to prevent Plaintiff from falling from one level to another on a barge. *Perkins v. American Electric Power Fuels Supply*, 246 F. 3d 593 (6th Cir. 2000). In *Perkins*, the court held these “adequate safety measures” were not provided and that was evidence of Jones Act negligence. There a ratchet used to hoist materials failed and threw the Plaintiff from one level to another. The Plaintiff’s own expert testified that the failure of these ratchets was common in the industry. Also, the Plaintiff showed that the Defendant “had installed

safety ropes in other ships and other areas [of that vessel] which indicates that it would not have been excessively burdensome in light of the risks to the seamen for Defendants to install safety ropes here.” The Plaintiff also showed that one month before his accident, another person had fallen off from one level to another. (cf, *Jackson v. OMI Corp.*, 245 F. 3d 525 (5th Cir. 2001) (where the Fifth Circuit held that lack of a hand rail near a doorway on a ship which doorway had an elevated coaming, is not negligence or unseaworthiness).

The Defendant ship owner can also be liable for failing to instruct a seaman especially an inexperienced seaman, on how to do the job. In *Harrison v. Sea River Maritime Inc.*, 181 F. Supp. 2d 691, (S.D.Tx. 2002). The District Court in a bench trial found for the Plaintiff seaman, a 41-year old woman who carried fire hoses down stairs and hurt her knee. The court said that the ship owner knew that the seaman had just joined the ship and was not instructed on how to do this job. Others testified that the fire hose should have never been taken down the stairway, that they should have been lowered from one deck to the next. No one bothered to tell the Plaintiff. In that bench trial, the District Court found the ship owner 90 percent at fault.

The ship owner also has a duty to assign seaman to duties for which the seaman is capable. In *Putnam v. Empress Casino Joliet Corp.*, 2002 W.L. 424 626 (N.D.Ill), the Northern District of Illinois held that the ship owner was liable where it assigned the seamen to duties it knew or should have known would expose him or her to an unreasonable risk of harm. Here, a Plaintiff was a card dealer on a casino ship. While working the roulette table, she was required to spin the ball and pay the winning bets as well as collect the losing bets, and complained of pain in her arms. Her supervisor refused to move her. While working the blackjack tables, she complained of pain in her arms. Again, her supervisor refused to move her. The orthopedic surgeon who treated the Plaintiff ordered an MRI which revealed only a narrowing of the neuroforamen, or opening where the nerve roots pass down to the arm, at the cervical 4-5 level on the right side. Otherwise, the MRI was normal. The doctor said that the narrowing at this level was not consistent with the pain experienced by Plaintiff beyond her mid arm. After physical therapy, the Plaintiff continued to experience pain in the right upper shoulder blade and right upper trapezius muscle. Otherwise she was normal. EMG nerve conduction tests were normal. The court held that the Plaintiff had proven that the activities caused the injuries. The court said, “Under the Jones Act, the Plaintiff’s burden of proof on causation is very light and has been described as ‘feather weight’,” Citing *Sella v. United States*, 998 F. 2d 418, 427-28 (7th Cir. 1993). In *Putnam*, the court went on to say: “Therefore, a Plaintiff need only establish that the employer’s acts or omissions played some part, no matter how small, in producing the employee’s injury”.

F. JONES ACT APPLIES ONLY TO A “SEAMAN”

The other consideration for whether the Jones Act applies is whether the plaintiff is a seaman and whether the plaintiff served on “a vessel”. The seminal case to determine seaman status is *Chandris, Inc. v. Latsis* 515 U.S. 347, 368, 115 S.Ct. 2172, 132 L.Ed. 2nd 314 (1995). In that case, the court quoted *McDermott International Inc. v. Wilander*, 498 US 337, 355, 111, S.Ct. 807, 112 L.Ed. 2nd 866 (1991) and said:

First, ...”an employee’s duties must contribute to function of the vessel or to the accomplishment of its mission.”... Second, and most important for all purposes here, a

seaman must a connection to a vessel in navigation [or to an identifiable group of such vessel] that is substantial duration in terms of its duration and its nature.

That test was also discussed by the court in *Harbor Tug Amberson Barge Company v. Papai*, 520 U.S. 548 117 Supreme Court 1535, 137 L.Ed. 2d 800 (1997).

One of the ways in which the court determines whether the connection of the employee is “substantial in terms of both duration and nature” is whether the employee spends at least 30% of his time on the vessel. The Fifth Circuit in *Roberts v. Cardinal Services Inc.*, 266 F 3d 368 (5th Circuit 2001) held that an employee of a company which was plugging at stationary oil platforms was not a seaman. That case, however, reaffirmed that the court can depart from the *Chandris* 30% rule in appropriate cases. For example, in *Wisner v. Professional Divers of New Orleans*, 731 So. 2d 200 (LA. 1999) the Louisiana Supreme Court relied upon a Fifth Circuit case to hold that a commercial diver who spends less than 30% of his time could be a seaman because he “faced regular exposure to the perils of the sea”. See also, *Bertrand v International Mooring and Marine Inc.*, 700 F 2d 240 (5th Cir. 1983) and *Wallace v. Oceaneering International*, 727 F 2d 427 (5th Cir. 1984).

The fact that the plaintiff may not be a Jones Act seaman, however, does not preclude the plaintiff from an action under the general Maritime Law for unseaworthiness and negligence, according to one California court. In *Freeze v. Lost Aisle Partners*, 116 Cal. Rptr. 2d 520 (Cal. App. 2002), the court reversed a judgment for the defendant. In that case, an employee of a restaurant situated on an island was injured when she assisted in the docking maneuvers of a barge owned by the restaurant. The Plaintiff had wrapped a line around her hand to pull the barge in. When the pilot of the barge put the engines in reverse, the line pulled tight and crushed her hand. The Plaintiff had testified she was employed as a “laborer, construction. Just kind of all around duties”. The Court said that the plaintiff, Mary Freeze, was not a Jones Act seaman. The court cited *Seas Shipping Company v. Sieracki*, 328 U.S. 85, 90, 66 S.Ct. 872, 90 L.Ed. 1099 (U.S. 1946) and said that in *Sieracki* “the Supreme Court extended the seaman’s seaworthy warranty to those workers, other than crew members, who were injured while working onboard a ship in navigable waters, because he or she is doing a seaman’s work and incurring a seaman’s hazards”. *Sieracki*, 328 U.S. at 99. Thus, even though Mary Freeze was not a Jones Act seaman, she was still a *Sieracki* seaman. According to the California Court, she retained her right to an action for unseaworthiness and an action for negligence under the general maritime law.

G. JONES ACT APPLIES ONLY TO A “VESSEL”

In order to have an action for Jones Act negligence, the plaintiff is required to have a connection to a “vessel”. Gambling ships have been deemed vessels. See, e.g., *Weaver-Aurora Inc.*, 255 F. 3rd 379 (7th Cir. 2001). If the casino were indefinitely moored, its status in navigation would be doubtful. See, *Pavone v. Miss River Boat Amusement Corp.*, 52 F 3d 560, 570 (5th Cir. 1995) and *Weaver v. Hollywood Casino-Aurora Inc.*, 255 F 3d at 387. However, where the Jones Act does not apply, at least in wrongful death cases, the “new” cause of action created by the U.S. Supreme Court for wrongful death for negligence under the general maritime law may apply. In *Norfolk Shipbuilding and Dry Dock Corp., v. Garris*, 532 U.S. 811, 121 S.Ct. (1927) (US 2001), the US Supreme Court extended the *Moragne* cause of action for death caused by

unseaworthiness to an action for negligence. In *Garris*, the *seaman* was performing sandblasting aboard a vessel berthed in navigable waters of the United States and was killed. The court said that this negligence action is not precluded by the Jones Act, the Death on the High Seas Act, or the Long Shore and Harbor Workers Compensation Act.

H. SUBJECT MATTER JURISDICTION AND VENUE

One of the first questions to ask is whether admiralty law applies (and thus federal subject matter jurisdiction applies), and whether your forum is the appropriate forum to bring the action. In *Amanquinton, v. Peterson*, 2002 WL215041 (4th DCA 2002), the Fourth District Court of Appeal in Florida affirmed the trial court's dismissal of a seaman's action on the basis of "subject matter jurisdiction". Even though the court says that it explored subject matter jurisdiction, it discussed the concept of personal jurisdiction and cited *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 310, 90 S.Ct.1731, 26 L.Ed 2d 252 (1970) and the factors therein. Even though the *Rhoditis* factors are usually used to make a determination on forum non conveniens, this court used it to determine personal jurisdiction which was incorrectly labeled as subject matter jurisdiction. Those factors are: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) allegiance of the defendant ship owner; (5) the place where the contract of employment was made; (6) the inaccessibility of the foreign forum; and (7) the law of the forum. The court said that the fact that the time charterer was located in Florida and the ship made some stops at Florida ports, there is no evidence that the ship owner had "substantial and continuing contacts" with Florida. Citing *Haave v. Tor Husfjord Shipping A/S*, 630 So. 2d 623 (Fla. 3rd DCA 1993). In *Amanquinton*, the ship owner's base of operation was in Germany and the only link that the vessel had with Florida or the U.S. was through its time charterer.

Subject matter jurisdiction, that is admiralty jurisdiction, is dependent on the location of the accident. The locality test has now been refined so that parties seeking to invoke the federal admiralty jurisdiction pursuant to 28 U.S.C. Section 1333 (1) over a tort claim must satisfy conditions of location and of connection with maritime activity. In *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F 3d 379 (7th Cir. 2001), the Seventh Circuit decided that a gambling ship is a vessel and that the plaintiff did prove connection to a maritime activity. In determining whether the case has connection to maritime activity, the court should determine whether there is a potential effect on maritime commerce. "In determining whether this requirement is met, a court must consider the incident giving rise to the claim at an intermediate level of generality." See, *Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Company*, 513 U.S. 527, 538, 115 S. Ct. 1043, 130 L.Ed. 2d 1024 (1995). "The court should not consider the particular facts of the case before it, but must instead assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity". *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F379, 385 (7th Circuit 2001) citing *Sisson v. Ruby*, 497 U.S. 358, 364, 364n, 2, 365, 110 S.Ct. 2892,111, L.Ed. 2d 292 (1990). In *Weaver*, for example, an injury of a multiple chest of drawers containing coins and tokens known as the bank falling on another employee was an injury with sufficient nexus to maritime activity. The Seventh Circuit in *Weaver* also cited two cases finding sufficient connection to maritime activity, that is, potential disruption of maritime commerce, where a passenger was served liquor during a cruise and subsequently injured the plaintiff while driving on land (*Bay Casino v. M/V Royal Empress*, 199 F.R.D. 464

(E.D.N.Y) and where an excessive amount of alcohol was served to a casino patron while in navigable waters (*Young v. Players Lake Charles, L.L.C.*, 47 F.Supp 2d 832, 835 (S.D. Tex. 1999).

In a similar analysis, but under the rubric of venue, Florida's Third District Court of Appeal found that New Commodore Cruise Lines Ltd did have the sufficient connection with Miami-Dade County, Florida to support venue there. The connection was that the defendants had two individuals located in the county. *Yee v. New Commodore Cruise Lines, Ltd*, 807 So. 2d 178 (Fla. 3rd DCA 2002). In that case, the court relied on a Florida venue statute, Section 47.051, entitled "Actions Against Corporations". That statute provides inter alia,:

Actions against foreign corporation doing business in this state shall be brought in a county where such corporation has an agent or other representative, where the cause of action accrued, or where the property in litigation is location.

The court distinguished this case from a case in which a cruise line has only travel agents in the county. See, *New Commodore Cruise Lines Ltd v. Sabio*, 724 So. 2d 149, (Fla. DCA 1998).

I. CONCLUSION

The basic premises of the Jones Act remain the same; The seaman is the ward of the Court and the Jones Act is remedial legislation and should be interpreted liberally to effect its purpose. *Gautreaux* has not changed that. The shipowner is to be held to a level of duty which takes into account the circumstances of the seaman. Some courts describe this as a higher level of duty. All courts seem to agree that the quantum of proof required for "negligence", i.e., for breach of the duty and for causation, is featherweight.

The test for a "seaman" is not ironclad. If someone is exposed to the perils of the sea but is not strictly at sea for 30% of the time, he/she may still be a "seaman". A "vessel" is usually a structure which is capable of navigation. Even two agents located in the state constitutes sufficient contacts for venue.