OVERLAPPING REMEDIES FOR INJURED HARBORWORKERS: INTERACTION ON THE WATERFRONT

Injured harborworkers, frequently protected by state law, have also been the subject of episodic federal legislation evoked by Supreme Court decisions and by pressure groups representing various sectors of the waterfront economy. As a result, overlapping statutes combine with traditional actions in admiralty to give these workers a proliferation of remedies—federal and state workmen's compensation, tort recoveries and nonfault damages for "unseaworthiness." Because each statute defines its own scope independently of the others, claimants and courts attempting a proper choice of remedy are met with intricate questions of statutory delimitation.

On their face, applicable federal statutes are mutually exclusive, each being self-confined to a particular area of waterfront employment. Thus, the Federal Employers' Liability Act (FELA) creates a remedy in tort for employees of interstate railroads, the

1. All states have enacted comprehensive workmen's compensation statutes which provide a variety of benefits including medical costs, lump sum payments for specified injuries, disability payments based on prior wage levels and death benefits to dependents. For description of the state enactments and items compensable thereunder, see DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 39-53 (1936) (hereinafter cited as DODD); 2 Hanna, EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION 16-18 (1954); 2 Larson, WORKMEN'S COMPENSATION §§ 57.00-64.00 (1952) (hereinafter cited as LARSON); Somers & Somers, WORKMEN'S COMPENSATION 38-93 (1954) (hereinafter cited as Somers & Somers).

2. See notes 5-7 infra.

3. The unseaworthiness remedy arose in American admiralty law in the late nineteenth century. It accords seamen tort damages for injury aboard ship resulting from defective equipment or personnel. Shipowner negligence is not essential to the action because it rests on an implied warranty of seaworthiness. See, generally, Gilmour & Black, ADMIRALTY 315-33 (1957) (hereinafter cited as Gilmour & Black); see also notes 166-72 infra and accompanying text.

4. For a recent analysis and criticism of the statutory network with suggestions for "the essential job of untangling it," see Gardner, Remedies for Personal Injuries to Seamen, Railroadmen, and Longshoremen, 71 Harv. L. Rev. 438 (1958).

5. 35 Stat. 65 (1908), as amended, 45 U.S.C., §§ 51-60 (1952) (hereinafter cited as the FELA). The act provides employees of interstate railroad carriers with a tort action for injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." FELA § 51. Employer defenses of assumption of risk, fellow-servant and contributory negligence are disallowed. Id. §§ 51-54. Actions may be brought either in state or federal courts; the limitations period is three years. Id. § 56. Prior to 1939, much litigation arose over the "interstate" status of plaintiff at the time of injury; the general test was expressed as follows: "[W]as the employé [sic] at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." Shanks v. Delaware, L. & W.R.R., 239 U.S. 556, 558 (1916). This so-called "pin-point" test was explicitly overruled by statutory amendment in 1939 adding the provision: "Any employee of a carrier, any part of whose duties as
Jones Act qualifies seamen as FELA-type plaintiffs; and the Longshoremen's and Harborworkers' Compensation Act restricts longshoremen to scheduled compensation payments. Many harborworker jobs, however, are not sus-

such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall . . . be considered . . . as entitled to the benefits of this chapter." 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1952). See S. Rep. No. 661, 76th Cong., 1st Sess. pas
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ceptible of precise classification and permit claimants to choose between fixed compensation and invariably larger tort awards. Consequently, courts seeking to delineate the reach of a given federal statute must often apply a “place of injury” as well as a “nature of duties” test, either of which can supplement or supplant the other. Because of the concurrent availability of workmen’s

8. Some categories of employment are relatively clear. Persons who have signed seamen’s articles and work on vessels plying navigable waters are clearly within the scope of the Jones Act and eligible for unseaworthiness recovery. Gilmore & Black 282, 315-17; Hanna, Federal Remedies For Employee Injuries 96 (1955). This same seaman is ineligible for recovery under the Longshoremen’s Act § 903(a)(1) which excludes “masters and crew remeber” of any vessel. At the other extreme, the longshoreman engaged in loading and unloading ships is clearly not a seaman for purposes of Jones Act suit and receives his exclusive federal remedy under the Longshoremen’s Act when injured on navigable waters while obtaining state compensation if injured ashore. Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946). But when he is injured while working aboard ship he may be denominated a seaman for purposes of bringing an unseaworthiness action against the shipowner. See cases cited notes 167, 171 infra.

Other employment categories not clearly in either the seaman or harborworker category are less amenable to statutory classification. For instance, dredge workers and barge workers have, alternatively, been labeled seamen for Jones Act purposes and harborworkers for state and federal compensation recoveries. See, e.g., Norton v. Warner Co., 321 U.S. 565 (1944) (caretaker of barge barred from Longshoremen’s Act as seaman and crew member with sole remedy under Jones Act); Gahagan Constr. Corp. v. Armao, 165 F.2d 301 (1st Cir. 1948) (deckhand on dredge engaged in pumping sand from harbor bottom allowed Jones Act recovery as crew member of vessel engaged in navigation); Pariser v. City of New York, 146 F.2d 431 (2d Cir. 1945) (deckhand on harbor dredge allowed Jones Act recovery as crew member); Fuentes v. Gulf Coast Dredging Co., 54 F.2d 69 (5th Cir. 1931) (oiler and helper on dredge engaged in harbor filling operations relegated to state compensation). See also cases discussed notes 123-34 infra and accompanying text.

Additionally, a heterogeneous group of harborworkers including ship repair and service personnel may be classified either as maritime employees entitled to Longshoremen’s Act coverage or as maritime-but-local employees allowed state compensation remedies. See cases cited notes 21-22 infra. Employees of interstate railroad carriers are usually engaged principally in railroad work and subject to the FELA, but if their duties have maritime characteristics, due to work on ferries, car floats or barges, their remedy will be under either the Jones Act or the Longshoremen’s Act. See cases cited notes 70-80 infra. On the variety of workers employed in and around the harbor and the cases defining their proper remedy, see Hanna, Federal Remedies For Employee Injuries 13-14 (1955).

9. Both tests are applied before allowing an action for unseaworthiness damages. Plain-tiff must be a seaman, and be injured aboard ship. See cases cited note 167 infra. Nature of duties and place of injury may also interact to determine respective applicability of state and federal compensation statutes to harborworkers. See cases cited notes 21-22 infra. But nature of duties is supplanted by place of injury in disallowing FELA suit by a rail-road worker injured on navigable waters. Even though not a maritime employee, plaintiff is barred from FELA recovery because the Longshoremen’s Act provides the exclusive remedy for non-crew-members injured afloat. See text at notes 69-104 infra. On the other hand, employment category determines coverage under the Jones Act irrespective of locale of injury. A seaman and crew member may recover even though injured ashore rather than on navigable waters. See cases cited note 112 infra.
compensation in different jurisdictions, these tests, together with a determination of state power, may also be necessary to establish the relevance of local law within the context of a maritime claim.  

The Longshoremen's Act was passed in response to Supreme Court restriction of state legislation. Arguing from constitutional inclusion of all admiralty suits within the judicial power of the United States and the broad enabling authority of Congress, the Court overruled state enactments working "material prejudice to the characteristic features of the general maritime law or interference with the proper harmony and uniformity of that law in its international and interstate relations." This doctrine found its principal expression in the 1917 decision of *Southern Pac. Co. v. Jensen*, disallowing a state workmen's compensation award for injury on navigable waters, and in Court invalidation of two subsequent congressional statutes authorizing state compensation for such injuries as unconstitutional delegations of exclusive federal authority. The Longshoremen's Act followed, designed not

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10. See text at notes 36-68, 149-165 infra.
11. See notes 14-17 infra and accompanying text.
12. "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1. "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." Id. § 2. "The Congress shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ." Id. art. I, § 8, cl. 10. "To . . . make Rules concerning Captures on Land and Water . . . ." Id. cl. 11. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Id. cl. 18.
14. 244 U.S. 205 (1917).

The *Jensen* decision constituted a serious restriction on the scope of state compensation statutes, the constitutionality of which had been approved by the Court only three months earlier. New York Cent. R.R. v. White, 243 U.S. 188 (1917) (New York compulsory statute); Hawkins v. Bleakly, 243 U.S. 210 (1917) (Iowa statute allowing employers election to come within its provisions); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) (Washington statute establishing an exclusive state insurance fund). By 1920, on the authority of these decisions, all but six states had enacted workmen's compensation legislation. For the history of this development, see Somers & Somers 32-34.

16. The two invalidated statutes are Act of Oct. 6, 1917, c. 97, 40 Stat. 395; Act of June 10, 1922, c. 216, 42 Stat. 634, both amending § 9 of the Judiciary Act of 1789, now 28 U.S.C. § 1333 (1952). The Judiciary Act gave the federal district courts exclusive original cognizance "of all civil causes of admiralty and maritime jurisdiction . . . .", but left common-law actions in state courts, even though for maritime torts, by "saving to suitors in all cases the right of a common-law remedy where the common law is competent to
as a pre-emptive exercise of the admiralty power, but as a saving effort to complement local legislation by affording compensation only to harborworkers ineligible for state remedy under the uniformity doctrine. 17 The act was give it . . . ." Act of Sept. 24, 1789, c. 20, § 9, 1 Stat. 77. The 1917 statute added to this "saving clause" the phrase, "and to claimants the rights and remedies under the workmen's compensation law of any State . . . ." This amendatory legislation was invalidated in Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). Wrongly assuming the reason for disapproval was allowance of state action in matters too clearly maritime, Congress in 1922 again attempted constitutionally to include harborworkers within state compensation schemes by excluding from the "rights and remedies under the workmen's compensation law of any State" all "members of the crew of a vessel." But this effort also failed, the Court reasoning that, "except as to the master and members of the crew, the Act of 1922 must be read as undertaking to permit application of the workmen's compensation laws of the several States to injuries within the admiralty and maritime jurisdiction substantially as provided by the Act of 1917." Washington v. W. C. Dawson & Co., 264 U.S. 219, 223 (1924). For this reason, the statute was held to be in conflict with the Constitution which, the Court said, insures national uniformity so as to avoid "confusion and difficulty" which would result "if vessels were compelled to comply with local statutes at every port." Id. at 228.

Were similar legislation enacted today, it would probably be held constitutional, for the Jensen uniformity doctrine has been greatly modified. See remarks of Mr. Justice Jackson in Helvering v. Griffiths, 318 U.S. 371, 399-401 (1943). Even without national legislation, state compensation might be allowed under the "saving to suitors" clause, as amended in 1948, now 28 U.S.C. § 1333 (1952). This latter question is never reached because, prior to 1948, the Supreme Court sanctioned local compensation when state jurisdiction is problematical. Davis v. Dep't of Labor, 317 U.S. 249 (1942), discussed notes 25-27 infra and accompanying text. In Jensen, the majority had ruled that state compensation is "of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court and is not saved to suitors from the grant of exclusive jurisdiction." 244 U.S. at 218. Justice Holmes's celebrated dissent argued, however, that state compensation should come within the saved common-law remedies, since "the common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified . . . ." Id. at 222. Under the 1948 amendment, Congress accomplished by statute what Justice Holmes wanted the Court to do in 1917, for suitors are now saved not their "common-law remedies" but "all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333 (1952). Cf. Note, Effects of Recent Legislation Upon the Admiralty Law, 17 Geo. Wash. L. Rev. 353 (1949).

17. "Compensation shall be payable under this Act . . . only . . . if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." Longshoremen's Act § 903(a). See Gilmore & Black 339: "The exclusion of on-shore injuries to maritime employees otherwise within the Act may have reflected doubts as to Congressional power, in a statute passed under the Constitutional grant of admiralty jurisdiction, to go beyond the highwater mark, or it may have been a policy decision to leave as much as possible to the State compensation commissions." It would seem that both reasons existed. On congressional "purpose to permit state compensation protection whenever possible," see Davis v. Dep't of Labor, supra note 16, at 256. As of 1926, serious doubt prevailed whether the federal admiralty jurisdiction extended to inland injuries, even to "maritime" employees. For early cases denying Jones Act suit for seamen injured shoreside because admiralty jurisdiction was believed bounded by the navigable waters limit, see note 98 infra. The following typifies the earlier view: "In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction.
limited to cases in which "recovery . . . through workmen's compensation proceedings may not validly be provided by State law" and to injuries occurring upon the "navigable waters of the United States." 18

Superficially clear, the relation of the Longshoremen's Act to state statutes proved complex in practice. Uncertainty over the Court's uniformity requirement, 19 as incorporated in the "validly provided" clause, 20 was early compounded by a second judicial doctrine—"maritime-but-local"—allowing state action in cases arising on navigable waters but of limited federal concern. 21

Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction." Crowell v. Benson, 285 U.S. 22, 55 (1932) (dictum).

Even before the Longshoremen's Act, although the Jensen uniformity doctrine precluded state compensation for longshoremen injured on navigable waters, that doctrine did not pre-empt local remedy for shoreside injury to the same workers. State Industrial Comm'n v. Nordenholt Corp., 259 U.S. 263 (1922). By 1943, all doubt was resolved and the federal district courts were allowed, under the constitutional grant of admiralty power, to provide a congressionally enacted remedy for injuries ashore. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 39, 42 (1943); cases cited note 98 infra. In 1948, the Act for the Extension of Admiralty Jurisdiction, 62 STAT. 496 (1948), 46 U.S.C. § 740 (1952), conferred jurisdiction on the district courts for all injuries "caused by a vessel . . . notwithstanding that such damage or injury be done or consummated on land." See Farver, The Extension of Admiralty Jurisdiction To Include Maritime Torts, 37 GEO. L.J. 252 (1949); Note, 17 GEO. WASH. L. REV. 353 (1949).

18. Longshoremen's Act § 903(a).

19. Even in its most sweeping exercise of the uniformity doctrine, the Supreme Court admitted that state law may change or modify the general maritime law "to some extent." Southern Pac. Co. v. Jensen, 244 U.S. 205, 216 (1917). The history of the uniformity doctrine is traced in Morrison, Workmen's Compensation and the Maritime Law, 38 YALE L.J. 472 (1929).

20. To grant local relief, the state commission must find that compensation could be "validly provided" without violating the "uniformity" of federal maritime law under Jensen, for Congress in enacting the Longshoremen's Act was judicially held to have adopted the Jensen line of demarcation. See Davis v. Dep't of Labor, 317 U.S. 249, 256 (1942). But see criticism of this interpretation at note 26 infra. In Jensen, the Court said that the general maritime law was subject to some local intrusions. Note 19 supra. But considerable doubt remained over the extent to which local action might proceed without illegally impairing uniformity in maritime law. Allowable exceptions were decided on a case-by-case basis, which furnished no sure guide for claimants unable to find a precedent directly in point. See notes 21-22 infra for the variety of cases held to fall on each side of the dividing line.

21. "Maritime-but-local" means that, weighing the circumstances of the individual case, a court finds sufficient local ties and a sufficient lack of international implications to justify state action in a maritime matter. The doctrine was first enunciated in Western Fuel Co. v. Garcia, 257 U.S. 233 (1921), in which the statute of limitations under a state wrongful death statute was held to bar a negligence suit for a maritime tort fatally injuring a longshoreman while working in the hold of an anchored vessel. It was extended to workmen's compensation in Grant Smith-Porter Ship Co. v. Rohde, 257 U.S. 469 (1922), in which a carpenter injured on navigable waters while working on an uncompleted vessel was allowed state compensation. For general outlines and critical discussion of the maritime-but-local cases, see 1 BENEDICT, AMERICAN ADMIRALTY §§ 34-35 (5th
The borderline claimant, therefore, had both to outguess *Jensen* and to deduce the import of numerous fact situations in maritime-but-local decisions. If he made an incorrect jurisdictional choice, and on adjudication the statute of limitations had run under alternative law, he went remediless. Even if he avoided the time bar, delay and expense were increased by repeated litigation.

22. Typical of cases holding maritime torts to be local in nature were Carlin Constr. Co. v. Heaney, 299 U.S. 41 (1936) (land-based construction worker injured on boat while going to work on coastal island); Sultan Ry. & Timber Co. v. Dept of Labor, 277 U.S. 135 (1928) (logger injured while constructing booms for logs on navigable waters); Alaska Packers Ass'n v. Industrial Accident Comm'n, 276 U.S. 467 (1928) (fisherman-cannery helper injured while pushing boat off shore into water); Rosengrant v. Havard, 273 U.S. 664 (1927), *affirming per curiam sub nom. Ex parte Rosengrant, 213 Ala. 202, 104 So. 409* (1926) (lumber checker on barge); Miller's Indemnity Underwriters Co. v. Braud, 270 U.S. 59 (1926) (diver fatally injured while sawing off timbers of abandoned launching ways). See also State Industrial Bd. v. Terry & Tench Co., 273 U.S. 639 (1926) (worker building pier from floating raft); Fuentes v. Gulf Coast Dredging Co., 54 F.2d 69 (5th Cir. 1931) (worker on dredge pumping silt from harbor bottom).

The following were held to be outside the scope of maritime-but-local under the *Jensen* doctrine. Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941) (janitor assigned temporary duty of helping place outboard motors on pleasure craft drowned during short testing trip); Employers' Liab. Assurance Corp. v. Cook, 281 U.S. 233 (1930) (worker, who had such duties infrequently, injured while unloading ship); London Guaranty & Acc. Co. v. Industrial Accident Comm'n, 279 U.S. 109 (1929) (worker employed to handle pleasure craft fatally injured about one mile from shore); Northern Coal & Dock Co. v. Strand, 278 U.S. 142, 144 (1928) (longshoreman who "worked for the major portion of the time upon land" injured on ship while unloading coal); Great Lakes Dredge & Dock Co. v. Kierejewski, 261 U.S. 479 (1923) (boilermaker fatally injured while repairing scow moored on navigable waters); Union Oil Co. v. Pillsbury, 63 F.2d 925 (9th Cir. 1933) (watchman injured on vessel in dry dock).

23. The time limit for filing claim under the Longshoremen's Act § 913(a) is one year from the date of injury or death. Most state acts have two distinct limitation periods, one for notice of injury to the employer—usually "as soon as practicable or a period of a few weeks or months," and a second, longer period for filing claim with the compensation commission. The second period varies between one and two years. In some states, the statute is tolled during period of voluntary payments by the employer; in others, the statute runs from the date of employer's rejection of the claim. See 2 Larson §§ 78.20-.43(a); *id.* at 556-57 (app., table 19). Under the Longshoremen's Act § 913(a), payment of any compensation extends the filing period to one year after the date of last payment. See, e.g., Marshall v. Plets, 317 U.S. 383 (1943); Great Lakes Dredge & Dock Co. v. Brown, 47 F.2d 265 (N.D. Ill. 1930).

In Ayers v. Parker, 15 F. Supp. 447 (D. Md. 1936), the widow of a deceased worker was denied compensation by the federal deputy commissioner since the claim was not filed within one year of her husband's death. She had used up the one-year period prosecuting a claim for state compensation, denied by the state commissioner and state court on grounds that, because the fatal illness developed while decedent was working on navigable waters, claimant's exclusive remedy was federal compensation. Arundell Corp.
To avoid the rigors of its uniformity and maritime-but-local formulas, the Supreme Court, in *Davis v. Dep't of Labor*, created a margin of statutory choice for compensation claimants. In that case, which involved accidental death on navigable waters, the state court below found no authority for jurisdiction under maritime-but-local and denied compensation. Remanding for a state award, the Supreme Court said that the case fell within a "twilight zone" of doubt and confusion, and held that under the circumstances the first forum selected by claimant should be presumed correct.

The immediate purpose of the decision was to mitigate the hardship which operation of the statute of limitations could work on claimants denied recovery for jurisdictional reasons on their initial compensation suit. But such protection was actually needed only for the claimant ignorant of his alternative rights from the outset. Where he knew of the alternatives, but was uncertain as to proper choice, he could assure himself a remedy by filing simultaneous claims, if the federal claim was his second choice, within a one-year period as specified by Longshoremen's Act §§ 913(a), (d). Note, *Jurisdiction of State and Federal Compensation Agencies Over Injuries Occurring on Navigable Waters*, 53 YALE L.J. 348, 354 (1944); see *Ayers v. Parker*, 15 F. Supp. 447, 452 (D. Md. 1936) (dictum).

Referring to the claimant barred by the statute of limitations, Justice Black wrote for the majority: "Such a result defeats the purpose of the federal act, which seeks to give 'to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation,' and the state Acts such as the one before us which aims at 'sure and certain relief for workmen.'" 317 U.S. at 254, citing S. REP. No. 973, 69th Cong., 1st Sess. 16 (1927), and Rm. REV. STAT. § 7673 (1932) (Wash.).

In exercising a presumption for the choice of state remedy, Justice Black compared the allowable degree of state intrusion on the uniform federal admiralty law with the previously considered question whether application of a particular state act unduly burdens interstate commerce. In the latter situation, he noted, the Court had "relied heavily on the presumption of constitutionality in favor of the state statute." 317 U.S. at 257.

Realizing that the effect of the decision was to negate the uniformity doctrine for all practical purposes, Chief Justice Stone, in dissent, urged that the twilight zone doctrine was possible only through a direct overruling of *Jensen*. Id. at 262-63. But the majority reasoned that to overrule *Jensen* would be to overrule congressional intent reflected in the Longshoremen's Act, which had "accepted the *Jensen* line of demarcation between state and federal jurisdiction." Id. at 256. That no such intent prevailed in 1927 is indicated by Congress' pre-1927 efforts to supersede *Jensen* and provide state compensation despite possible intrusions on uniform admiralty law. See note 16 *supra* and accompanying text. Further, by 1927, the viability of *Jensen* had been greatly lessened by the well-established maritime-but-local doctrine. See notes 21-22 *supra*.

implied that an initial claim under the Longshoremen’s Act would also have been effective. Although *Davis* involved a fact situation in which state jurisdiction under maritime-but-local was unclear, the Court later confirmed that decision’s free-choice implications by following it not only in cases for which earlier precedent unequivocally indicated proper law but also in resolving whether injury occurred within the geographical purview of the Longshoremen’s Act. Thus, the outer limits of the twilight zone, though still undefined, are probably coextensive with the interaction of federal and state compensation laws.

27. Justice Black intimated that the Court would have exercised a presumption for that choice under the established doctrine of respect for the findings of a federal administrative agency. 317 U.S. at 256-57. As pointed out by Chief Justice Stone in dissent, the decision thus poses an absolute free choice for twilight zone claimants. *Id.* at 260-64.

28. The Court said the reason for preserving claimant’s first choice was that “the most competent counsel” were unable to predict with certainty his proper remedy under maritime-but-local. *Id.* at 255.


In *Moores*, the state court had allowed local compensation for a worker injured on board a commissioned vessel undergoing repairs in floating drydock. Although confronted with three federal cases and one of its own holding repair work on a completed vessel to be outside maritime-but-local, and thus outside the scope of state statutes under *Jensen*, the state court interpreted *Davis* to mean claimant’s first choice must be confirmed without any search for maritime-but-local precedents. Moores’s [sic] Case, 323 Mass. 162, 80 N.E.2d 478 (1948); 2 Larson § 89.25. The Supreme Court affirmed per curiam, relying on *Davis*. 335 U.S. at 874.

In *Baskin*, the state court of appeals had affirmed administrative denial of state compensation for a shipyard worker injured aboard a completed vessel, since no maritime-but-local precedent supported the case. Baskin v. Industrial Accident Comm’n, 89 Cal. App. 2d 632, 201 P.2d 549 (1949). Citing *Davis* and *Moores*, the Supreme Court reversed and remanded for state compensation. 338 U.S. at 854. After state award was made, the case was again appealed on the ground that claimant was barred from state compensation after electing federal jurisdiction by acceptance of voluntary payments under the Longshoremen’s Act. Kaiser Co. v. Baskin, 97 Cal. App. 2d 257, 217 P.2d 733 (1950). The state court rejected this defense and was affirmed per curiam. Kaiser Co. v. Baskin, 340 U.S. 886 (1950).

30. The Longshoremen’s Act is applicable only for injuries on “navigable waters of the United States (including any dry dock) . . . .” § 903(a). In Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366 (1953), affirming per curiam 201 F.2d 437 (5th Cir. 1953), the Supreme Court relied on *Davis* to allow federal compensation for injury occurring on a marine railway four hundred feet from the water, the railway being denominated a “dry dock.” See also Western Boat Bldg. Co. v. O’Leary, 198 F.2d 409 (9th Cir. 1952).

31. To date, no court has barred a claimant from recovery as being outside the twilight zone. See *Gilmore & Black* 352-53. One commentator has concluded from the cases that “any case doubtful enough to be litigated is doubtful enough to be included in the twilight zone.” Rodes, *supra* note 26, at 643-44 n.28. But see dictum in Chappell v. C. D. Johnson Lumber Corp., 112 F. Supp. 625 (D. Ore. 1953) (spotter on lumber barge said to be outside the twilight zone on federal side as maritime employee).

The following cases, all subsequent to *Davis*, affirmed claimant’s choice of state compensation. Allisot v. Federal Shipbuilding & Dry Dock Co., 4 N.J. 445, 73 A.2d 153
Operating to assure claimants of their chosen remedies, twilight zone doctrine poses new questions of statutory delimitation while suggesting answers to old ones. Within the framework of its original application, the doctrine implies that free choice between federal and state compensation might continue after an award so that a claimant could subsequently seek his alternative remedy.\(^3\) Within three other areas of statutory overlap, *Davis* may, by analogy, provide new flexibility for resolving borderline cases. The first of these areas comprises railroad workers whose duties require their presence on navigable waters; though currently restricted to compensation payments if injured afloat, these employees continue to pursue their customary FELA tort recoveries.\(^3\)\(^3\)\(^3\)

The second is similar, involving harborworkers who, injured aboard ship or otherwise qualifying as seamen, eschew the Longshoremen’s Act to bring tort suit under either the Jones Act or the admiralty doctrine of unseaworthiness.\(^3\)\(^4\)

The third embraces conflict between the Jones Act and state compensation statutes.\(^3\)\(^5\)

This Comment will analyze current law governing these problems of remedial interaction and will present certain suggestions for fulfilling legislative intent while promoting doctrinal consistency.


The twilight zone doctrine has effectively stemmed the tide of maritime-but-local litigation, for the rights of borderline claimants are now clear. If injured other than on navigable waters or a dry dock, the Longshoremen’s Act is by its terms unavailable and the state statute applies. § 903(a). If on navigable waters, and claimant obtains a federal award, he may be reasonably certain of judicial affirmance on the *Davis* presumption and the doctrine of administrative finality set out in *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940), discussed note 137 infra. See Avondale Marine Ways, Inc. v. Henderson, *supra* note 30; Gilmore & Black 352-53. If, after injury on navigable waters, claimant desires state remedy, the *Davis* presumption protects that choice also. See state cases cited *infra*. Litigation is further reduced since state commissioners will respect the presumption despite the absence of maritime-but-local precedent. See, *e.g.*, Opinion of the Chief Counsel, Legal Bureau, California Industrial Accident Comm’n, 15 Cal. Comp. Cases 162, cited in 2 Hanna, Employee Injuries and Workmen’s Compensation 406 n.15 (1954), advising the Commission to assume jurisdiction whenever sought by claimant. Cf. Skovgaard v. Tungus, 141 F. Supp. 653 (D.N.J. 1956).

32. Gilmore & Black 354. See note 53 infra and accompanying text.


35. *E.g.*, Northern Coal & Dock Co. v. Strand, 278 U.S. 142 (1928) (longshoreman barred from state compensation because performed occasional duties afloat and thus within exclusive scope of Jones Act); see note 149 infra and accompanying text.
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“Recovery Over”

Regardless of the procedural formalities attending a state workmen’s compensation proceeding, federal tribunals universally allow qualified claimants Longshoremen’s Act recovery subsequent to a state award. This “recovery over” equals the difference between compensation under the national act—nearly always the larger amount—and that received under state law.

36. Most states operate under the “agreement” method, whereby employer and employee concur on the amount of compensation due and state administrative officials merely verify the submitted agreement to assure compliance with the statute; no hearings or investigations are conducted unless the claim is contested. In Michigan and Wisconsin, the employer immediately begins payment on notice of injury and then files the claim; his continuing payments are administratively supervised to insure adherence to the statute. In New York, the “direct hearing” method is in force, but as a practical matter there is an actual hearing only if the claim is contested; uncontested awards are administratively approved by “motion hearing” of the claim submitted. In five states there is no compensation commission, the statutes being court-administered with the parties making their own agreements. Except for Wyoming, only perfunctory approval is given each such agreement, and no judicial investigation or hearing occurs in the absence of contest. See Somers & Somers 148-56. For outlines of procedures and formalities in the various states, see Dodd 62-337; 2 Larson §§ 82.30-32.

37. See, e.g., Western Boat Bldg. Co. v. O’Leary, 198 F.2d 409 (9th Cir. 1952) (federal compensation not barred by prior state administrative award and acceptance of payments); Newport News Shipbuilding & Dry Dock Co. v. O’Hearne, 192 F.2d 968 (4th Cir. 1951) (federal compensation not barred by prior agreement to accept state compensation payments); Massachusetts Bonding & Ins. Co. v. Lawson, 149 F.2d 853 (5th Cir. 1945) (federal relief subsequent to voluntary payments and signed final settlement receipt under state statute); Great Lakes Dredge & Dock Co. v. Brown, 47 F.2d 265 (N.D. Ill. 1930) (federal compensation allowed after state commissioner had made formal award). For discussion, see Gilmore & Black 354-55; 2 Larson §§ 89.40-60; 66 Harv. L. Rev. 524 (1953).

Because recovery over usually indicates indemnification, see note 175 infra and accompanying text, “recovery over” in quotation marks is used in this Comment to signify an award obtained under the Longshoremen’s Act subsequent to a formal state award or receipt of voluntary payments under state law.

38. Under the Longshoremen’s Act § 909, payments for death may be as high as 66%% of deceased’s average weekly wage, depending on the number of surviving dependents, plus funeral expenses not exceeding $400. Payments of 66%% of the average wage are always made during permanent or temporary total disability. §§ 908(a), (b). The maximum rate for permanent partial disability is 66%% of the average weekly wage—period and amount depending on the type and severity of injury. § 908(c).

Payments under state statutes are generally less in amount and duration. See Dodd 41-52, 617-96; 2 Hanna, EMPLOYEE INJURIES AND WORKMEN’S COMPENSATION 426-36 (1954); 2 Larson §§ 57.00-61.00, 64.00-50, app. B; Somers & Somers 38-93. For a diagrammatic scheme comparing amounts recoverable under the federal and state statutes, see Note, Jurisdiction of State and Federal Compensation Agencies Over Injuries Occurring on Navigable Waters, 53 Yale L.J. 348, 355 (1944).

There are only rare instances when state compensation exceeds federal, thus encouraging federal-then-state “recovery over.” No case reports state compensation sought after a final federal award. In the absence of final award, acceptance of voluntary payments under the Longshoremen’s Act does not bar “recovery over” provided the period of acceptance has not been unconscionably long. See, e.g., Kaiser Co. v. Baskin, 340 U.S. 886.
of "recovery over," as fashioned in the lower federal courts, rests on a presumption of finality attaching to determination of jurisdictional issues by United States compensation commissioners. Typically, a deputy commissioner, having found that injury occurred on navigable waters and hence was caused by a maritime tort, rules that state compensation was in derogation of the uniformity doctrine. The commissioner then holds any prior state award void and permits "recovery over," the ruling invariably being sustained on appeal. Justifying this procedure, some commentators contend for federal pre-emption. Others, urging simply that jurisdictional doubts should be resolved to give fullest protection to injured employees, find an analogy in cases allowing "recovery over" from one state to another when both have an interest in the worker's welfare. These advocates also see the federal award as needed.


39. When claimants "recover over" from one state compensation system to another or from state to federal awards, double recovery is not permitted. Only the excess of the subsequent award over payments previously received may be retained. Prior payments are held to have been made in contemplation of liability under the second-chose[n] statute. See RESTATEMENT, CONFLICT OF LAWS § 403 (1934); 2 LARSON § 85.70; cases cited note 37 supra.

40. Western Boat Bldg. Co. v. O'Leary, 198 F.2d 409, 416 (9th Cir. 1952) (allowing federal recovery subsequent to state award because fact findings of the federal agency, where supported by the evidence, are made final); Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F.2d 968, 971 (4th Cir. 1951) (affirming the federal deputy commissioner because "the case falls within the purview of the federal statute and outside the permissible scope of the state enactment" and the state commission therefore had "no jurisdiction in the premises"). The Supreme Court has never spoken on the validity of "recovery over" from state to federal compensation.

The above decisions necessarily imply that claimant was outside of the Davis twilight zone and that the Longshoremen's Act is thus available for subsequent recovery since the state compensation proceeding, lacking jurisdiction over the subject matter, is no bar to relitigation and is subject to collateral attack. Cf. Schopflocher, The Doctrine of Res Judicata in Administrative Law, 1942 Wis. L. Rev. 5, 25. At least one commentator, however, believing allowance of federal "recovery over" by disaffirmance of the prior state award to be "odd doctrine," would have "recovery over" rest on the theory that Davis eliminated the mutually exclusive nature of the state and federal statutes, with both remedies continuing to be available after award in one jurisdiction. Rodes, supra note 26, at 648. But see 66 Harv. L. Rev. 524 (1953); notes 49-53 infra and accompanying text.

41. See cases cited note 37 supra.

42. See, e.g., 2 LARSON § 89.52.


44. 2 LARSON § 89.30; Wellen, supra note 43, at 237. For an outline of local interest elements held to justify "recovery over" from one state system to another, see 2 LARSON §§ 86.30-34.
INJURED HARBORWORKERS

protection against employers initiating voluntary payments under the least generous compensation statute or otherwise attempting to foreclose claimant’s choice of remedy.  

Arguments for “recovery over” disregard basic statutory policy advancing a contrary conclusion. Since congressional purpose in passing the Longshoremen’s Act was limited to providing relief for claimants denied state compensation under the Supreme Court’s uniformity doctrine, the act recognizes the concern that each state may have for injured harborworkers. Accordingly, it leaves with the states the general power to compensate and makes federal recovery contingent on the nonavailability of a valid local remedy. Federal “recovery over” therefore defeats congressional intent by fostering annulment of state awards.

“Recovery over” is also inconsistent with the Davis twilight zone doctrine. Whenever a state agency grants an award and a deputy commissioner later rules for federal coverage, this dispute of expert opinion necessarily indicates

45. The general rule is allowance of “recovery over” from one state to another. See, generally, 1 HANNA, EMPLOYEE INJURIES AND WORKMEN’S COMPENSATION 55-57 (1953) ; 2 LARSON §§ 85.10-70 ; Dwan, WORKMEN’S COMPENSATION AND THE CONFLICT OF LAWS—THE RESTATEMENT AND OTHER RECENT DEVELOPMENTS, 20 MINN. L. REV. 19 (1935) ; 60 HARV. L. REV. 993 (1947). The usual rules of conflict of laws do not apply to workmen’s compensation; questions of policy vital to the interests of each state are involved, so the courts find each state empowered to apply its own law with no requirement to subordinate domestic policy to another state’s law. Alaska Packers Ass’n v. Industrial Accident Comm’n, 294 U.S. 532, 546 (1935). The full faith and credit clause does not “override the constitutional authority of another state to legislate for the bodily safety and economic protection of employees injured within it.” Pacific Employers Ins. Co. v. Industrial Accident Comm’n, 306 U.S. 493, 503 (1939).

Some cases bar “recovery over” on the ground that the first state statute specifically precluded subsequent recovery elsewhere. Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943) (oil field worker employed in Louisiana but injured in Texas denied higher Louisiana compensation after obtaining formal Texas award) ; Gasch v. Britton, 202 F.2d 356 (D.C. Cir. 1953) ; Holt, Reflections on Magnolia Petroleum Co. v. Hunt, 30 CORNELL L.Q. 160 (1944) ; Note, 56 YALE L.J. 562 (1947). But if statutory language does not explicitly deny alternative recovery in another state, “recovery over” is allowed. Industrial Comm’n v. McCartin, 330 U.S. 622 (1947) (resident of Illinois employed there but injured in Wisconsin allowed “recovery over” in Wisconsin after Illinois award, the Illinois statute [now ILL. ANN. STAT. c. 48, § 143 (Supp. 1957)] stating: “No common law or statutory right to recover damages . . . other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act . . . . ”). Although an apparent contradiction of Magnolia, McCartin did not directly overrule that case since the holding rested on the less-stringent language of that statute and the fact that the first award was not final because it recognized and approved a settlement of the parties which reserved to the employee his rights in Wisconsin. See 330 U.S. at 627-30.

46. See notes 17-18 supra and accompanying text.

47. “Compensation shall be payable . . . in respect of disability or death of an employee, but only if . . . recovery for the disability or death through workmen’s compensation proceedings may not validly be provided by State law.” Longshoremen’s Act § 903(a).

48. To justify federal “recovery over,” the district courts retrospectively disaffirm the prior state awards, holding them void on Jensen uniformity grounds. See cases cited note 37 supra.
that claimant is within the twilight zone of jurisdictional uncertainty and that free choice of remedy obtained at the outset.49 "Recovery over" therefore either denies claimant his Davis free choice by retrospectively making the Longshoremen's Act the only applicable statute, or else signifies that claimant's federal rights persisted after the state conferred compensation. Initial existence of alternative remedies does not, however, imply the continuing availability of both once a choice is made. To the contrary, Davis, confirming the conclusive weight due a twilight zone award, emphasized that the section of the act rendering federal relief the sole remedy where applicable gains meaning "after a litigant has been found to occupy one side of the doubtful jurisdictional line ...."51 A claimant who obtains a state award has manifestly been found to occupy that side of the line. "Recovery over" ignores this determination and eliminates the mutually exclusive nature of state law and the Longshoremen's Act by according compensation under the latter after an award under the former. "Recovery over" thus negates the "validly provided" clause of the act,52 for a state award, valid under Davis, is federally superseded. Any other interpretation of "recovery over" must assume that Davis suspends operation of the "validly provided" clause for judgments rendered within the twilight zone.53 Since the Davis Court indicated just the opposite, such a radical assumption appears unwarranted.

49. This degree of uncertainty over proper remedy is at least comparable to that prevailing where "the most competent counsel" are unable to make a sure choice under the maritime-but-local precedents. Davis v. Dep't of Labor, 317 U.S. 249, 255 (1942). As to the latter type of confusion prompting the Davis twilight zone solution, see note 28 supra and accompanying text.

50. "The liability of an employer prescribed in [this act] ... shall be exclusive and in place of all other liability of such employer to the employee ...." Longshoremen's Act § 905.

51. 317 U.S. at 256.

52. Longshoremen's Act § 903(a), quoted note 47 supra.

53. Chief Justice Stone, in his Davis dissent, argued that if claimant has a free choice then federal compensation is available, and that § 905, rendering the Longshoremen's Act the exclusive remedy where applicable, must operate to bar state compensation. To deny this effect to § 905, he stated, is not "within judicial competence," because § 905 is congressionally designed to operate to the exclusion of all other remedies whenever claimant may elect recovery under the Longshoremen's Act. 317 U.S. at 261.

To allow free choice, however, is not to negate § 905 since, when state compensation is chosen, the opportunity for exclusive operation of the Longshoremen's Act does not arise. The presumption favoring claimant's choice means that state compensation, if elected, was "validly provided" under § 903(a), and that federal compensation was thereafter unavailable under the "validly provided" clause.

The view that Davis retained the mutually exclusive nature of the Longshoremen's Act and state statutes so as to preclude "recovery over" has been described as "without adequate support in the decisions or comments." Rodes, supra note 26, at 650. For a contrary view, see Dunleavy v. Tietjen & Lang Dry Docks, 17 N.J. Super. 76, 85 A.2d 343 (County Ct. 1951), aff'd, 20 N.J. Super. 486, 90 A.2d 84 (App. Div. 1952), discussed more fully note 60 infra. In this case (an attempted federal-then-state "recovery over"), the court reasoned that once claimant made the choice of federal jurisdiction by accepting payments over a period of time, the exclusive liability provision of the Longshoremen's Act must take effect, for "we are not to suppose that the United States Supreme Court, in
In addition to implications of the twilight zone doctrine and congressional policy manifest in the Longshoremen's Act, the usual res judicata restriction on repeated litigation militates strongly against "recovery over." Although modified in the multistate "recovery over" situation because of coincident local policies, res judicata should be fully applicable in a state-federal context since the Longshoremen's Act explicitly confines the federal interest to areas in which local law may not be applied. Proscription of a second recovery finds further support in decisions barring FELA suits on the ground that a prior state award subsumes conclusive determination of a local cause of action.

developing for the perplexed claimant a free choice of a forum, intended to oppugn the constitutional character of the act of Congress." 17 N.J. Super. at 88, 85 A.2d at 350. See also 66 Harv. L. Rev. 524, 524-25 (1953), concluding that "the claimant in a 'twilight zone' case should be allowed to proceed in either forum; but once an award is made, the implicit determination of jurisdiction should preclude a subsequent award in the other forum." It has also been suggested that the defense of election may be raised when the first jurisdiction has been confirmed by a final administrative award, but that mere receipt of payments without award should not constitute a binding choice. Newport News Shipbuilding & Dry Dock Co. v. O'Hearne, 192 F.2d 968 (4th Cir. 1951).

54. The usual meaning of res judicata is that the cause of action is merged in the judgment to bar subsequent suit on the same cause of action. It may also mean, particularly in the present context, collateral estoppel to bar retrial on issues finally decided in a prior proceeding, where subsequent suit arising from the same injury but on a different cause of action under a different statute is commenced. RESTATEMENT, JUDGMENTS 160-61 (1942). Thus, even if the second claim is held to rest on a different cause of action, being brought under the federal statute, claimant might be barred from relitigating the issue of whether remedy was validly provided by state law since that issue was previously determined by the state commission. "Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . . ." Id. § 68. See also id. § 45. Although directed to the FELA plaintiff who has already obtained compensation, the Restatement's approach to alternative remedies is equally persuasive here. "Where the plaintiff obtains judgment for the payment of money against the defendant in an action to enforce one of two or more alternative remedies, he cannot thereafter maintain an action to enforce another of the remedies." Id. § 64. Further, "where a plaintiff has two possible remedies but they are mutually exclusive, that is to say that if one of them is available the other is not, and he obtains a judgment giving him one of the remedies, he is precluded from thereafter maintaining an action for the other remedy;" Id. § 64, comment g. On the res judicata effect of state administrative decisions generally, see GELLEHN, ADMINISTRATIVE LAW C. IX (2d ed. 1947); PARKER, ADMINISTRATIVE LAW 245-53 (1952); Davis, Res Judicata in Administrative Law, 25 Texas L. Rev. 199 (1947).

55. Note 45 supra and accompanying text.

56. Longshoremen's Act § 903(a), quoted note 47 supra. One commentator apparently favors application of res judicata theory to bar "recovery over" from state to federal compensation following prior state judicial action but not following judicially unconfirmed administrative awards. Rodes, supra note 26, at 649.

57. For discussion of the extension of the state compensation-FELA precedents to bar "recovery over" from state to Longshoremen's Act compensation, see 66 Harv. L. Rev. 524 (1953).

The FELA applies only to those railroad workers engaged in interstate commerce. Wabash R.R. v. Hayes, 234 U.S. 86, 89-90 (1914). And, because the FELA pre-empts
Thus, res judicata should preclude "recovery over" by a claimant who chooses state compensation but later discovers larger benefits under the Longshore-the field of relief for injured employees of interstate railroads, state compensation is unavailable even if negligence is not provable under FELA and plaintiff will go without remedy. New York Cent. R.R. v. Porter, 249 U.S. 168 (1919); New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917); Second Employers' Liability Cases, 223 U.S. 1 (1912).

A state compensation award therefore implies that claimant was employed in intrastate commerce. For this reason, the award is res judicata on jurisdictional questions and precludes subsequent FELA suit based on an interstate commerce theory. Chicago, R.I. & Pac. Ry. v. Schendel, 270 U.S. 611 (1926); Dennison v. Payne, 293 Fed. 333 (2d Cir. 1923). "[T]he rule which forbids the reopening of a matter once judicially determined by a competent authority applies as well to the judicial and quasi judicial acts of public officers and boards as to the judgments of courts having general judicial powers." Landreth v. Wabash R.R., 153 F.2d 98, 100 (7th Cir. 1946); see also Hanna, Industrial Accident Commission Practice and Procedure 119-20 (1943).

To constitute res judicata, the administrative award must be final and not subject to judicial review under the statute or to continuing jurisdiction of the commission to reopen the award. PARKER, op. cit. supra note 54, at 248-49. A temporary award is not res judicata. Hinrichs v. Industrial Comm'n, 225 Wis. 195, 273 N.W. 545 (1937). The award must satisfy the definition of a judgment. 2 BEALE, Conflict of Laws 1390 (1935).

If claimant loses a state compensation claim, being designated an interstate railroad employee, subsequent suit on an interstate theory should not be barred since it is a separate cause of action and, "where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit." Troxell v. Delaware, L. & W.R.R., 227 U.S. 434, 440 (1913). The court noted, but did not decide, that if in a first suit "no action could have been maintained under the state law, in view of the [FELA] . . ., the fact that the plaintiff attempted to recover under that law and pursued the supposed remedy until the court adjudged that it never had existed would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled." Id. at 442.

Compensation awards are res judicata not only as to subsequent FELA suits but also later recovery under state employers' liability acts. French v. Rishell, 40 Cal. 2d 477, 254 P.2d 26 (1953); Kidder v. Marysville & A. Ry., 160 Wash. 471, 295 Pac. 162 (1931). State administrative decisions are also res judicata in areas other than workmen's compensation. See, e.g., Broderick v. Rosner, 294 U.S. 629 (1935) (state administrative action on stockholder assessment accorded finality under full faith and credit clause in sister state).

Some authority denies state administrative awards res judicata effect absent hearing of evidence and an explicit holding by the state body on the jurisdictional question. Hoffman v. New York, N.H. & H.R.R., 74 F.2d 227, 230 (2d Cir. 1934) (the facts upon which jurisdiction depend "cannot, as in the case of courts of general jurisdiction, be inferred from the mere exercise of jurisdiction"). In Hoffman, the commission's action was not an award but approval of an agreement under the compensation statute. See also Dennison v. Payne, supra; Bach v. Interurban Ry., 171 N.W. 723 (Iowa 1919). For an argument favoring collateral attack on administrative awards when jurisdictional facts were not litigated, see Schopflocher, supra note 40, at 29. But see Landreth v. Wabash R.R., supra (barring FELA suit after state award). Landreth distinguished Hoffman, stating that no proof on the jurisdictional question was offered there, while in Landreth evidence was received and, although not included in the commission's specific holding, claimant was inferentially found to be in intrastate commerce. 153 F.2d at 100. Hoffman may have been overruled sub silentio by Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), 49 Yale L.J. 959 (even where jurisdictional issue not raised in state administrative proceeding, not subject to collateral attack). But see Bretsky v. Lehigh Valley R.R.,
men's Act.58 He has received the full protection of the twilight zone doctrine—assurance of his first chosen remedy.59 His employer should now be able to rely on the same doctrine to bar new claims in a different jurisdiction.60

On the other hand, "recovery over" may be desirable when claimant's initial choice of remedy is impeded by, for example, ignorance of available alternatives or pressure from his employer to accept state compensation.61

156 F.2d 594 (2d Cir. 1946) (compensation award subject to collateral attack if jurisdictional issues were raised but commission refused to pass on them).

Some state compensation statutes explicitly bar subsequent suit for the same injury. See, e.g., N.J. STAT. ANN. §§ 34:15-58 (Supp. 1957) (award made by workmen's compensation commission "shall have the same effect . . . as judgments rendered in causes tried in the court of common pleas . . . . The judgment shall be final and conclusive between the parties and shall bar any subsequent action or proceeding . . . .") See Schopflocher, supra note 40, at 200.

58. For discussion of the different levels of compensation under state and federal statutes, see note 38 supra.

59. Davis v. Dep't of Labor, 317 U.S. 249 (1942), discussed notes 24-27 supra and accompanying text.

60. Employer uncertainty resulting from attempted "recovery over" is exemplified in the facts of Dunleavy v. Tietjen & Lang Dry Docks, 17 N.J. Super. 76, 85 A.2d 343 (County Ct. 1951), aff'd, 20 N.J. Super. 486, 90 A.2d 84 (App. Div. 1952), discussed note 53 supra. Claimant originally filed under the state statute, but withdrew this claim in favor of federal compensation. On termination of his incapacity, after six years of accepting voluntary payments under the Longshoremen's Act, he attempted "recovery over" to the state remedy, "for while the federal law provides compensation throughout the period of actual incapacity for work, the state law would provide additionally an award for injury as such, unaffected by actual capacity for work, both as to amount and duration of payments." 17 N.J. Super. at 91, 85 A.2d at 351. This, the court reasoned in denying the second change of mind, "can fairly be thought of . . . as bargaining and hindsight . . . ." Id. at 94, 85 A.2d at 353. Hence, the court relied on the Davis presumption for claimant's first choice, the "exclusive liability" provision of the Longshoremen's Act and a theory of "vested jurisdiction" activated by acceptance of payments under one statute for a long period, to bar the state claim. Id. passim. Judge Dreven's lower court opinion contains an exhaustive and perceptive analysis of Davis twilight zone history.

61. Some state commissions encourage injured workers with small claims to file without advice of counsel on the ground that the purpose of the commission itself is to look after claimants' interests. 2 LARSON § 83.15. Discouragement of resort to counsel may take the form of small counsel fees when the statute places fees directly under the commission's supervision. Id. § 83.13. Formerly, legal fees were reduced in California in order to preserve for claimant the bulk of his recovery. Allen, Fixing of Attorney's Fees by the Industrial Accident Commission, 7 CALIF. S.B.J. 234 (1932). The current approach is reportedly the opposite, and "claimants are not infrequently advised that the natures of their cases are such that the retention of legal assistance would be wise." 1 HANNA, EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION 324 (1953).

62. See, e.g., Magnolia Petroleum Co. v. Hunt, 320 U.S. 430 (1943). Claimant was told by his employer that he could not collect any compensation if he did not sign the claim form under the least onerous of the two state statutes available. Id. at 450. Under some state systems, the employer may be able to initiate proceedings against claimant's wishes. See Chicago, R.I. & Pac. Ry. v. Schendel, 270 U.S. 611 (1926) (railroad worker's widow sought FELA damages but was barred by prior compensation award initiated by employer in Iowa against her wishes, the Iowa statute allowing either party to petition
In such cases, both the Longshoremen's Act and Davis furnish criteria for permitting subsequent federal relief. To protect the worker from needless surrender of potential claims, section 915 of the act invalidates waivers of employee rights. Moreover, Davis twilight zone doctrine assures a claimant not the first jurisdiction chosen but the first jurisdiction of his choice. Consequently, when the procedural circumstances attending state action render "recovery over" equitable, courts can override prior compensation by either invoking section 915 or according claimant his free choice under Davis. "Recovery over" would rarely be possible, however, following a contested, litigated claim, if state awards are res judicata as to jurisdictional questions. But when claimant commences formal action, his voluntary selection of state remedy may be virtually assumed. And in those

for arbitration of compensation claim); Overcash v. Yellow Transit Co., 352 Mo. 993, 180 S.W.2d 678 (1944) (claimant, learning during proceedings in Kansas of higher award available in Missouri, barred from the higher recovery by employer petition for final Kansas award). See also Landreth v. Wabash R.R., 153 F.2d 98 (7th Cir. 1946). Although under most state systems no agreement is approved for less than the statutory remedy, the great bulk of claims—particularly the smaller ones—are uncontested and claimants may accept benefits short of the proper remedy. 2 Larson § 82.00; Richter & Forer, The Railroad Industry and Work-Incurred Disabilities, 36 Cornell L.Q. 203, 244 (1951).

63. "No agreement by an employee to waive his right to compensation under this chapter shall be valid." Longshoremen's Act § 915(b). This provision may mean both that the employee may not contract away his compensation rights generally, and that in addition he cannot, after a valid claim arises, agree to compromise for less than the statutory amount. 2 Larson § 82.32. However, there may be a valid accord and satisfaction or release without waiver and, although parties cannot confer jurisdiction on state tribunals by agreement, compromise agreements under state systems may be operative. See, e.g., Heagney v. Brooklyn Eastern Dist. Terminal, 190 F.2d 976 (2d Cir. 1951) (plaintiff barred from FELA suit by prior agreement to accept state compensation even though he might be in interstate commerce and otherwise eligible for FELA suit). But see Judge Frank's dissent, arguing that since the FELA is a pre-emptive federal enactment and a state compensation statute cannot validly be substituted for it where plaintiff is in interstate commerce, a waiver is invalid to confer state jurisdiction and the only real defense to subsequent FELA suit is a full release or compromise. Id. at 980-85. No general prohibition prevents claimants from entering into compromise agreements forsaking their tort remedy under a federal statute by full releases. Gallen v. Pennsylvania R.R., 332 U.S. 625 (1948) (release for $250 under state compensation statute bars later FELA suit although at time made parties did not know severity of the injury). But there is room for judicial flexibility, and a prior agreement may be held not binding if claimant was ignorant of his rights. Massachusetts Bonding & Ins. Co. v. Lawson, 149 F.2d 853 (5th Cir. 1945) (though claimant had received $355 in voluntary payments under Florida statute for which he signed a "receipt in full settlement," subsequent federal award allowed); see Newport News Shipbuilding & Drydock Co. v. O'Hearne, 192 F.2d 968 (4th Cir. 1941) (similar).

64. Davis v. Dep't of Labor, 317 U.S. 249 (1942), discussed notes 24-27 supra and accompanying text.

65. See notes 54, 57 supra and accompanying text.

66. A survey in 1951 of state compensation commissions throughout the country found that they "generally have come to frown upon an employee's appearing without counsel, or a layman's attempting to practice before them." Bear, Survey of the Legal
occasional cases in which the employer begins local compensation pro-
ceedings, "recovery over" can be sanctioned, if fairness requires, on the
ground that a state remedy is not "validly provided" when it violates federal
free choice policy.

THE AMPHIBIOUS RAILWAYMAN

Most interstate railroad workers who are negligently injured in the course
of employment have an FELA cause of action in tort against their employers.
The few authentic seamen working for railroads—such as ferry and barge
crew members—may seek damages under the Jones Act and the unseaworthi-
ness doctrine. Between these two groups are a number of land-based railway
employees who occasionally work afloat and for whom interaction of remedies
is of peculiar significance because an employer, defending an FELA suit for

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"Today, more and better legal talent is available to claimants because the volume of
compensation litigation has increased to the point where lawyers can afford to specialize
on the claimant's side and because courts and commissions have become more liberal in
allowing attorney's fees." Somers & Somers 181. Witness the growth, since its inception
in 1946, of the National Association of Compensation Claimants' Attorneys (NACCA),
and its regular publication, the NACCA Law Journal. Specifically, although in Illinois
the agreement system prevails by statute, see note 36 supra, representation is not limited
to contested cases, and in a survey of the state commissioners "testimony to the high rate
of attorney representation was unanimous, with no estimate lower than 90 per cent in non-
fatal cases, and one commissioner estimating 98 per cent." Conard & Mehr, Cost of Ad-
ministering Reparation of Work Injuries in Illinois 39 (Univ. of Ill. mimeo release
1952), cited in Somers & Somers 156 n.23, 182 n.83.

67. See note 62 supra.

68. On development of the policy that the Longshoremen's Act allows claimant a
free choice between state and federal compensation, see notes 25-31 supra and accompanying
text. A state award granted at employer's instance and over claimant's objections
could be read as derogation from that policy, and "recovery over" allowed on grounds
state compensation was not "validly provided" under Davis. By its terms, the Longshore-
men's Act is applicable where state compensation may not be "validly provided." Long-
shoremen's Act § 903(a), quoted note 47 supra.

69. Relevant provisions of FELA are set forth in note 5 supra. Railroad workers not
engaged in interstate commerce are covered either by state workmen's compensation
statutes or, in twenty-one states, by state employers' liability statutes patterned after
the federal act. Pollack, Workmen's Compensation for Railroad Work Injuries and
Diseases, 36 Cornell L.Q. 236, 259 (1951). State compensation is never available for
the interstate railroad worker since the FELA pre-empts the field of injuries to such
workers. See cases cited note 57 supra.

70. See, e.g., Butwinski v. Pennsylvania R.R., 249 F.2d 644 (2d Cir. 1957) (floatman
injured aboard railroad company tugboat eligible for Jones Act damages as a crew
member); Weiss v. Central R.R., 235 F.2d 309 (2d Cir. 1956) (Jones Act recovery for
railroad ferry deckhand). For an outline of workers eligible for unseaworthiness damages,
see note 167 infra and accompanying text. The seaman employed by a railroad may also
be eligible for maintenance and cure. See cases cited note 151 infra.

71. These employees are ordinary railroad workers (not longshoremen employed by
the railroad) who happen to be engaged in port activities such as loading trains on car
barges. For cases involving this group of employees, see notes 77-78, 80 infra.
injury on navigable waters, can successfully argue the exclusive applicability of the Longshoremen's Act.\textsuperscript{72} Although the plaintiff thus barred from FELA recovery is statutorily assured of subsequent Longshoremen's Act compensation,\textsuperscript{73} he loses the easily attainable and usually far greater tort recovery.\textsuperscript{74} Absent a Longshoremen's Act defense, qualification as an interstate railroad employee is not difficult;\textsuperscript{75} and a nominal showing of employer negligence ordinarily produces an award of damages since FELA plaintiffs enjoy special judicial favor in taking their cases to the jury.\textsuperscript{76}

\textsuperscript{72} These statutes are mutually exclusive because § 905 of the Longshoremen's Act renders compensation the exclusive liability of employers where that act applies, thus making FELA unavailable. See note 50 supra. Because these employees when injured are said to be engaged in "maritime employment" on "navigable waters," their employer is held eligible to claim the exclusive liability of the Longshoremen's Act §§ 902(4), 903(a). See cases cited notes 77, 79 infra and accompanying text. For text of § 902(4), see note 80 infra; for § 903(a), see note 47 supra.

\textsuperscript{73} Under the Longshoremen's Act, the prior claim tolls the statute of limitations. "Where recovery is denied to any person, in a suit brought at law or in admirality to recover damages in respect of injury or death ... the limitation of time [under this act] ... shall begin to run only from the date of termination of such suit." Longshoremen's Act § 913(d). This provision applies to an FELA suit. Hoage v. Terminal Refrigerating & Warehousing Co., 78 F.2d 1009 (D.C. Cir. 1935). But it does not extend to proceedings under a state compensation statute, such a claim not being a "suit brought at law." Dawson v. Jahncke Drydock, Inc., 33 F. Supp. 668 (E.D. La. 1940); Ayers v. Parker, 15 F. Supp. 447 (D. Md. 1936). See note 23 supra.

\textsuperscript{74} Longshoremen's Act recoveries are restricted to a percentage of wages or to fixed disablement sums. See note 38 supra. Jury verdicts are not so restricted and include damages for pain and suffering and other tortious items. The average jury verdict for FELA plaintiffs has increased significantly in recent years. For a comparison of the overall increase in FELA recoveries with the increase in railway payrolls from 1940-51, see Pollack, The Crisis in Work Injury Compensation On and Off the Railroads, 18 Law & Contemp. Probs. 296, 315 (1953). In some cases of permanent total disability, however, even a large FELA recovery will amount to less if prorated on a monthly basis over the remainder of plaintiff's life than will certain state compensation awards. Pollack, Workmen's Compensation for Railroad Work Injuries and Diseases, 36 Cornell L.Q. 236, 252-55 (1951).

\textsuperscript{75} Under the expansive scope of FELA, as amended in 1939, only the rare railroad employee cannot demonstrate that "any part" of his duties are in "furtherance of" interstate commerce, or that they "in any way directly or closely and substantially, affect such commerce"—the jurisdictional requirement set out in the statute. 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1952). For discussion of the purpose of the amendment, and its scope, see note 5 supra.


The Supreme Court has shown increased willingness to grant certiorari to review fact determinations of trial judges adverse to plaintiffs. Comment, Supreme Court Certiorari Policy and the Federal Employers' Liability Act, 43 Cornell L.Q. 451, 463-64 (1958). The practice of granting certiorari absent a state court decision on a federal
Railroad workers hurt on navigable waters have not enjoyed FELA advantages since the 1930 decision of *Nogueira v. New York, N.H. & H.R.R.* There, the FELA plaintiff was a railroad freight handler injured while loading a car aboard a float; the Supreme Court deduced that he was engaged in maritime employment and therefore within the exclusive coverage of the Longshoremen's Act. Extending *Nogueira* in 1953, the Court in *Pennsylvania R.R. v. O'Rourke* denied a railroad brakeman FELA suit because even his temporary presence on navigable waters invested him with status as a maritime employee. Place of injury thus became the sole determinant of the question in conflict with Supreme Court precedent or a conflict among the circuits has been sharply criticized. See, e.g., *Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States* 662-65, 740-43 (2d ed. 1951); Gibbs, *Certiorari: Its Diagnosis and Cure*, 6 Hastings L.J. 131, 152 n.127, 156 (1955). But see Tonahill, *Comments on Willerson v. McCarthy*, 3 NACCA L.J. 194, 195-96 (1949) (supporting the Court's policy).

Alleged judicial solicitude for plaintiffs has prompted many Supreme Court dissents contending that the FELA has been made to impose liability without fault. See, e.g., *McAllister v. United States*, supra at 23-24 (dissenting opinion by Mr. Justice Frankfurter); *Stone v. New York, C. & St. L. Ry.*, supra at 411 (same). See also *Bailey v. Central Vt. Ry.*, 319 U.S. 350, 354-58 (1943) (dissenting opinion by Mr. Justice Roberts, arguing that the fact that the trial court took the case from the jury is no reason to grant certiorari "where a plaintiff failed to adduce proof to support his contention"); cases cited note 135 infra.

77. 281 U.S. 128 (1930).
79. 344 U.S. 334 (1953).
80. *Id.* at the instant of injury, was operating a handbrake on a railroad car being removed from a car float. *Id.* at 340. The Second Circuit had upheld plaintiff's choice of FELA remedy, reasoning that the Longshoremen's Act is applicable only if the injury occurs on navigable waters and the general nature of plaintiff's duties is maritime. *O'Rourke v. Pennsylvania R.R.*, 194 F.2d 612, 614 (2d Cir. 1952). In reversing, the Supreme Court seemed to reason either that the Longshoremen's Act applies exclusively if the injury was on navigable waters and the employer has any employees engaged in maritime employment (even though plaintiff is not one of them); or, alternatively, that because a car float is a vessel on navigable waters its operations are maritime and plaintiff's on-board injury renders him a maritime employee. 344 U.S. at 338.

The first line of reasoning relies on the following provisions of the Longshoremen's Act § 904(a): "Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under [this act] . . . .", and § 902(4): "The term 'employer' means an employer any of whose employees are engaged in maritime employment . . . ." 344 U.S. at 338. In the context of the statute, however, the cited sections clearly are not designed to foreclose noncompensation remedies for all nonmaritime employees of employers who may have some employees "engaged in maritime employment." Rather, these provisions operate to bring all such employers within the act, imposing upon them the obligation to "secure the payment" of compensation for those employees who are
applicable statute however nonmaritime the nature of plaintiff's duties. Consequently, no twilight zone free choice exists between FELA and Longshoremen's Act, the proper remedy being a matter of court-found law. Nor has the Supreme Court adopted a modified twilight zone approach under which the jurisdictional issue of plaintiff's general duties would be determined by a jury.

Delimiting FELA and the Longshoremen's Act by the navigable-waters test alone, the Court has achieved simplicity along an unclear borderline, but only by imposing an arbitrary standard which denies the customary remedy of genuinely nonmaritime employees. Under the Court's rule, any railroad worker—brakeman, conductor, engineer—loses his FELA suit simply by boarding a car barge. This result is inconsistent with the intent of Congress and the statutory language. FELA was passed to pre-empt state legislation in the field of employer liability by providing the exclusive remedy for injured interstate railroad workers. The Longshoremen's Act, by way of contrast, is a saving statute, complementary in nature, with coverage dependent upon the reach of local legislation. These disparate legislative purposes hardly suggest pre-eminence of the Longshoremen's Act as against prior legislation under the interstate commerce power. In fact, a contrary conclusion is indicated by inclusion of injuries occurring on "boats" under FELA coverage and by congressional retention of that provision after careful re-evaluation of the statute's jurisdictional scope.
Requiring Longshoremen's Act rather than FELA awards through judicial application of the O'Rourke place-of-injury test revives doctrine resembling that of Crowell v. Benson, 88 under which appellate courts find de novo all facts determinative of statutory applicability. 89 This extension of the much maligned 90 Crowell rationale into FELA suits, while probably unintended, nonetheless runs counter to decisional law since 1932 91 and is specifically incompatible with the Court's current disposition of jurisdictional issues under the Jones Act. 92 Having recently enunciated a basic policy of affirming the fact-finder's determinations if based on "substantial evidence," 93 the Supreme Court now reverses trial court direction of verdicts against Jones Act plaintiffs and requires for jury resolution of their jurisdictional status. 94 Moreover, the Court has not looked behind jury verdicts finding borderline plaintiffs to have been crew members, and thus eligible for Jones Act tort damages rather than Longshoremen's Act compensation. 95 This policy, clearly undercutting Crowell, suggests that O'Rourke might be overruled by the present Court. And since

88. 285 U.S. 22 (1932).
89. The issue in Crowell was the scope of judicial review of an award under the Longshoremen's Act. The act provides that the deputy commissioner "shall have full power and authority to hear and determine all questions in respect of [any] . . . claim," § 919(a), and that the district court can set aside an order only if "not in accordance with law," § 921(b). The Court recognized that, "as to questions of fact . . . the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final." 285 U.S. at 46. But the Court held that where the determination of fact is "fundamental" or "jurisdictional," it is subject to judicial review by trial de novo. Otherwise, the Court reasoned, the deputy commissioner would be deciding questions the resolution of which determine whether or not he had jurisdiction under the act. Id. at 54-55. The decision affirmed the district court's review by trial de novo of the two "jurisdictional facts"—whether the injury occurred on navigable waters and whether claimant was an employee of defendant at time of injury. The decision purportedly rested on the need to insure independence of the judiciary in resolving constitutional matters as against congressional establishment of administrative tribunals.Id. at 64. The case has been largely restricted to its holding which in turn has been substantially eroded by subsequent decisions; today, the "jurisdictional fact" doctrine is practically never applied to decisions of either juries or administrative bodies. See GILMORE & BLACK 340-42; Landis, Crucial Issues in Administrative Law, 53 Harv. L. Rev. 1077, 1093 (1940); Schwartz, Does the Ghost of Crowell v. Benson Still Walk?, 98 U. Pa. L. Rev. 163 (1949).
90. See authorities cited note 89 supra.
91. See GILMORE & BLACK 340-42; Schwartz, supra note 89 (collecting cases).
92. See cases cited notes 124-35 infra and accompanying text.
93. The leading case on the "substantial evidence" rule is South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). For description of Bassett and the rule, see note 137 infra. For recent Supreme Court revival of the rule in Jones Act cases, see notes 124-34 infra and accompanying text.
the FELA, like the Jones Act, defines its scope in terms of employment category—employee of interstate railroad 96 and seaman 97—reversing O'Rourke would end jurisdictional incongruities in current law by letting the reach of both statutes depend on application of the nature-of-duties test. 88

Correction of O'Rourke discrimination against nonmaritime workers injured afloat can be achieved short of creating a Davis-type twilight zone between FELA and the Longshoremen's Act. In fact, the Davis free-choice solution, designed to prevent total loss of remedy, is inapposite since the Longshoremen's Act tolls the statute of limitations during suit under other federal enactments and an employee deprived of FELA protection can therefore still recover federal compensation. 99 Furthermore, allowing employees to choose between fundamentally different remedies would defeat the congressional design of restricting longshoremen to workmen's compensation 100 while granting ordinary railroad employees a tort recovery conditioned on proof of negligence. 101

96. FELA § 51 covers “Any employee of a carrier, any part of whose duties . . . shall be the furtherance of interstate or foreign commerce . . . .” See note 5 supra.


98. In deciding whether the Jones Act or the Longshoremen's Act is applicable, situs of injury is of no moment, the usual and ordinary duties of plaintiff determining his status as seaman and crew member. At one time the Jones Act was held to provide no remedy for seamen injured shoreside on the theory that they were beyond the scope of federal admiralty jurisdiction. See, e.g., O'Brien v. Calmar S.S. Corp., 104 F.2d 148, 149 (3d Cir.), cert. denied, 308 U.S. 555 (1939) (seaman injured on pier in course of employment denied Jones Act suit and relegated to state compensation for remedy); Esteves v. Lykes Bros. S.S. Co., 74 F.2d 364 (5th Cir. 1934) (similar). For earlier Supreme Court dictum supporting this theory, see note 17 supra. In 1943, the Supreme Court declared the Jones Act available for injury ashore, stating that place of injury has no relevance so long as plaintiff was a seaman and was injured in the course of employment. O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36, 38, 42 (1943) (deckhand of vessel injured ashore); accord, McKie v. Diamond Marine Co., 204 F.2d 132 (5th Cir. 1953); Marceau v. Great Lakes Transit Corp., 146 F.2d 416 (2d Cir.), cert. denied, 324 U.S. 872 (1945).

99. Longshoremen's Act § 913(d), quoted note 73 supra. The main reason impelling the twilight zone solution in the Davis context was to foreclose hardship for claimants, unsuccessful on their first suit, who were barred by the statute of limitations from the alternative remedy. See notes 23, 26 supra and accompanying text.

Railroad employees, if not crew members under the Jones Act, may be compensated under the Longshoremen's Act where they have maritime duties and are injured on navigable waters. See, e.g., Lowe v. Central R.R., 113 F.2d 413 (3d Cir. 1940) (railroad car float watchman); Pere Marquette Ry. v. Bassett, 42 F. Supp. 781 (D. Mich. 1941) (similar); Baltimore & O.R.R. v. Parker, 4 F. Supp. 815 (D. Md. 1933) (barge hand assigned to supervising loading of cargo from barge to steamships).

100. Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946), discussed notes 119-20 infra and accompanying text.

101. In O'Rourke, the Court mentioned Davis, but did not adopt a solution of free jurisdictional choice or even acknowledge statutory overlap, since "we have two federal statutes and a line marking their coverage can be drawn." 344 U.S. at 341 n.8.

The position against absolute free choice between disparate tort and compensation remedies is adopted by Gilmore & Black 357-58; 2 Larson §§ 90.31, 90.41. For arguments in favor of extending the Davis "free-choice" doctrine to allow an option between tort
A solution consistent with legislative policy in both FELA and the Longshoremen's Act would be a return to the test which Nogueira purportedly relied upon—statutory delimitation as a matter of fact based on the general nature of claimant's employment duties. Under this solution, a Longshoremen's Act defense to FELA suit would fail if the jury found that plaintiff was principally engaged in railroad rather than maritime work. Of course, a jury might attempt to extend tort relief to employees clearly within the Longshoremen's Act—for example, those doing ordinary stevedoring work for a railroad. But such unjustified findings could be judicially overturned as failing to meet the standards of the "substantial evidence" rule.

THE ELUSIVE "CREW MEMBER"

Demarcation between the Jones and Longshoremen's Acts is inexact, thus encouraging injured workers of ambiguous status to shift across this statutory borderline as opportunity may dictate. The Jones Act provides and compensation remedies, see Richter & Forer, Federal Employers' Liability Act, in 12 F.R.D. 13, 26-27 (1951); 8 NACCA L.J. 154-55 (1951); 10 NACCA L.J. 148-49 (1952); 19 NACCA L.J. 116-17 (1957). For a novel suggestion to grant a dual tort-compensation remedy, the tort damages to be available when injury results from "some human failure to pay due regard to the employee's safety," and the compensation award to be available when "injury results from some risk normally incidental to the employment pursued," see Gardner, Remedies for Personal Injuries to Seamen, Railroadmen, and Longshoremen, 71 HARV. L. REV. 438, 463-64 (1958).

102. In Nogueira, the Court reasoned that although plaintiff, a freight handler only temporarily aboard a car barge, was injured on navigable waters in the course of his normal work, he was a maritime employee under the Longshoremen's Act. 281 U.S. at 128, 130.

103. Longshoremen are within the exclusive scope of the Longshoremen's Act when injured on navigable waters and therefore may not bring tort actions against their employers. Swanson v. Marra Bros., Inc. 328 U.S. 1 (1946). See notes 118-20 infra and accompanying text. This prohibition also applies to other conventional harborworkers, such as ship repairmen. See, e.g., Rist v. Pittsburgh & Conneaut Dock Co., 104 F. Supp. 29 (N.D. Ohio 1951) (repairman injured aboard ship barred from FELA suit by Longshoremen's Act eligibility).

104. See notes 93 supra, 137 infra and accompanying text. Despite recent Supreme Court reluctance to overturn jury findings on the jurisdictional issue, see text at notes 124-136 infra, federal courts still reverse if a finding was not based on substantial evidence. See, e.g., Texas Co. v. Savoie, 240 F.2d 674 (5th Cir. 1957) (overruling jury crew member finding for Jones Act plaintiff who was oil company roustabout because "there is no substantial evidence to support the jury's finding that he was a member of the crew"). See also cases cited note 137 infra.


106. See cases cited notes 123-34 infra and accompanying text.

107. When actionable negligence is not provable, the borderline seaman who would ordinarily qualify for the Jones Act may attempt to claim under the Longshoremen's Act since negligence is not essential to recovery. See, e.g., Alaska Packers Ass'n v. Alaska Industrial Bd., 88 F. Supp. 172 (D. Alaska 1950) (reversal of federal compensation for
any seaman who shall suffer personal injury in the course of employment” with a tort remedy against his negligent employer. Hence, persons fitting both descriptions pursue tort recovery when negligence is provable and compensation otherwise. In practice, statutory delineation is attempted through the negative implications of the Longshoremen’s Act clause excepting “a master or member of a crew of any vessel” from federal compensation coverage. Implementing this restriction, courts require plaintiff to qualify as a crew member in order to sue under the Jones Act even if the situs of the accident renders federal compensation unavailable.

deckhand of cannery towboat). But when negligence can be shown, harborworkers may attempt to sue under the Jones Act to recover tort damages. See, e.g., Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946) (Jones Act suit denied longshoreman injured on dock). See also cases discussed notes 118-34 infra and accompanying text.

108. 41 STAT. 1007 (1920), 46 U.S.C. § 688 (1952). The Jones Act does not specify that the action must be solely against the employer. There is no clear holding on the point, but no Jones Act suit has ever been decided against a nonemployer. A general agent in charge of the ship is not liable. Cosmopolitan Shipping Co. v. McAllister, 337 U.S. 783 (1949); cf. Turner v. Wilson Line, 242 F.2d 414, 417 (1st Cir. 1957); Arnold v. Luckenbach S.S. Co., 1958 Am. Mar. Cas. 339 (S.D.N.Y. 1957). Because the Jones Act injury must be in the “course of employment,” the action, by implication, may be brought only against the employer. See GILMORE & BLACK 255-56 (collecting cases).

109. See facts of cases cited notes 112, 118, 126 infra.

110. For examples of borderline harborworker-seamen pursuing Jones Act tort recovery in the presence of actionable negligence, see Hagens v. United Fruit Co., 135 F.2d 842 (2d Cir. 1943) (deck hand, employed aboard hoister engaged in removing pilings from river, held to be Jones Act crew member); Early v. American Dredging Co., 101 F. Supp. 393 (E.D. Pa. 1951) (deck hand on dredge held Jones Act crew member even though not under seaman’s articles and lived at home); Mamat v. United Fruit Co., 39 F. Supp. 103 (S.D.N.Y. 1940) (seaman, discharged as member of crew and hired to work with shore gang, denied Jones Act recovery since not engaged in seaman’s work); cases discussed in text at notes 119-34 infra.

For examples of borderline workers seeking federal compensation in the absence of provable negligence, see Pacific Employers Ins. Co. v. Pillsbury, 130 F.2d 21 (9th Cir. 1942) (deck hand aboard vessel who had duties of loading and storing cargo held eligible for compensation as non-crew-member); Blaske v. Bassett, 35 F. Supp. 315 (D. Mo. 1940) (laborer with duties of loading ship, held compensable under Longshoremen’s Act as non-crew-member); cases cited note 137 infra.

111. “No compensation shall be payable in respect of the disability or death of—(1) A master or member of a crew of any vessel . . . .” Longshoremen’s Act § 903(a).

112. Compare Swanson v. Marra Bros., Inc., 328 U.S. 1 (1946) (longshoreman injured on dock outside scope of Jones Act because not a crew member), with Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957) (crew member status accorded Jones Act plaintiff injured on land and hence unable to obtain federal compensation). The Jones Act is not limited to injuries on navigable waters but creates a tort action for any seaman-crew member wherever injured in the course of employment. O’Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943). The seaman may recover if injured on land while returning to the vessel from shore leave, the prospective duties on return being sufficient to bring him within the course of employment. Marceau v. Great Lakes Transit Corp., 146 F.2d 416, 418 (2d Cir. 1945). For an earlier view that admiralty jurisdiction did not extend beyond navigable waters and limiting the Jones Act accordingly, see cases cited notes 17, 98 supra.
Conversely, a claimant seeking compensation must positively establish his non-crew-member status.\textsuperscript{113}

Like the FELA, the Jones Act is more attractive than the Longshoremen's Act when negligence is demonstrable because of the relatively large tort measure of recovery.\textsuperscript{114} The requisite quantum of negligence is even smaller than under FELA since seamen are judicially recognized as dependent upon a paternalistic shipowner who owes them a duty beyond that imposed by the common-law standard of due diligence.\textsuperscript{115} At one time—after \textit{Jensen} and before the Longshoremen's Act—Jones Act damages were available to longshoremen and other harborworkers unable to receive state compensation because of the uniformity doctrine.\textsuperscript{116} But, the Longshoremen's Act having since been read as restricting non-crew-member employees to compensation,\textsuperscript{117} such plaintiffs can now obtain Jones Act damages only if the courts grant free election of remedy or respect favorable jury resolution of the crew-member issue.

Until recently, courts consistently vacated Jones Act awards to most longshoremen and conventional harborworkers by ruling such plaintiffs not crew members as a matter of "law."\textsuperscript{118} In 1946, the Supreme Court said in \textit{Swanson}...
v. Marra Bros., Inc." that tort recovery is available only to "members of the crew of a vessel plying in navigable waters," and upheld dismissal of a longshoreman's complaint. The Court's 1953 decision in Desper v. Starved Rock Ferry Co. reaffirmed the rule that the crew member question is one of "law" and not "fact." There, plaintiff, though injured while repairing craft laid up for the winter, had been a seaman during the summer and was a "probable navigator in the near future." The Court held that duties at the time of injury determined status and that his work of painting and repairing vessels which he would soon navigate was not that "usually done by a seaman." Thus, Swanson and Desper—much in the manner of O'Rourke's delimitation of FELA and the Longshoremen's Act—foreclose any twilight zone jurisdictional election by preventing juries from including conventional harborworkers and longshoremen within the crew-member category.

Sharp contrast is provided by recent Supreme Court deference to jury determination of the crew-member question in cases involving workers who per-

119. 328 U.S. 1 (1946).
120. Id. at 7.

The Court reasoned that applicability of the Jones Act depends on the nature of plaintiff's duties and status rendering him an actual seaman; that the Longshoremen's Act reflects congressional intent to grant federal compensation exclusively to all harborworkers, not crew members; that prior affirmances of Jones Act damages for longshoremen were directly overruled by the Longshoremen's Act since it restricts Jones Act scope to crew members; but since the injury occurred on land (a dock) the Longshoremen's Act is inapplicable, and plaintiff's remedy is state compensation (which he had already obtained).

Prior to Swanson, the last Supreme Court allowance of Jones Act suit for a longshoreman employed by a stevedoring company had been Uravic v. F. Jarka Co., 282 U.S. 234 (1931), in which the Court relied on International Stevedoring Co. v. Haverty, 272 U.S. 50 (1926), to reverse dismissal of the complaint. 282 U.S. at 238-39. The opinion contained no reference to possible applicability of the Longshoremen's Act. For a case anticipating the reasoning of Swanson, see Frankel v. Bethlehem-Fairfield Shipyard, Inc., 132 F.2d 634 (4th Cir. 1942) (shipyard worker, injured while installing dynamo in engine room of vessel, denied Jones Act suit).

Theoretically, at least, a longshoreman injured more than three miles from shore could be eligible for Jones Act suit, since the Longshoremen's Act is applicable only to injuries occurring on the "navigable waters of the United States." § 903(a). See Pillsbury, Jurisdiction Over Injuries to Maritime Workers, 18 VA. L. Rev. 740, 757, 763 (1932). But if the Swanson case applied the crew member requirement of the Longshoremen's Act to bar Jones Act suit where the Longshoremen's Act was unavailable because the injury was shoreside, the same limitation on Jones Act suit by a longshoreman might similarly be applied where the Longshoremen's Act is inapplicable because injury occurred outside territorial waters. If fatally injured, his representatives might have a claim under the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. §§ 761-68 (1952). In nonfatal cases, the Court could affirm a jury finding of crew member status and thus allow some remedy.

In rare cases, longshoremen engaged in loading and unloading ships may have such a permanent connection with the ship as to be held crew members and excluded from Longshoremen's Act coverage. See, e.g., Coos Bay Lumber Co. v. Pillsbury, 37 F. Supp. 914 (N.D. Cal. 1941).

122. See notes 79-82 supra and accompanying text.
form ordinary shoreside jobs on coastal or inland waters. Leaving unresolved the apparent conflict with its intervening Swanson, Desper and O’Rourke decisions, the Court has resuscitated the older rule of South Chicago Coal & Dock Co. v. Bassett which made the crew-member issue one of “fact” with the fact-finder’s determination conclusive if supported by substantial evidence. As a result, certain plaintiffs who are neither harborworkers nor crew members in the traditional sense have obtained Jones Act tort relief rather than the exclusive remedy of the Longshoremen’s Act. For example, the Court’s 1955 decision of Gianfala v. Texas Co. affirmed a jury award of Jones Act damages to a driller injured while working on a barge above an offshore oil field. Since a Jones Act plaintiff must be a crew member of a vessel engaged in navigation, the Supreme Court necessarily accepted such characterization by the jury of this oil driller on a barge held to the sea floor by water in its hold. The Court further developed its Gianfala departure last year in Senko v. LaCrosse Dredging Corp. That decision accorded seaman and crew-member status to a handyman—who usually worked ashore and was injured ashore—because he did occasional maintenance jobs on a swamp dredge. Speaking to the jurisdictional question, the Court said that “a jury’s decision is final if it has a reasonable basis, whether or not the appellate court agrees with the jury’s estimate.”

123. 309 U.S. 251 (1940). For discussion of the case and its doctrine, see note 137 infra.
124. 350 U.S. 879, reversing per curiam 222 F.2d 382 (5th Cir. 1955).
126. In overruling the jury’s finding, the Fifth Circuit had relied on Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952), as holding that the “crew member of any vessel” provision of the Longshoremen’s Act had been incorporated into the Jones Act and that a crew member must have some permanent connection with some navigable vessel. 222 F.2d at 387. The circuit court could find no evidence either that plaintiff had such a connection or that this vessel was engaged in navigation. To the contrary, the barge was moved at most once a year and deceased’s “navigational” duties on such occasions were restricted to turning a valve to pump out the sea water which held the barge stationary on the bottom. Id. at 384-85.

128. Id. at 376. The dissent argued that these duties were “about as nautical as measuring the depth of a natural swimming pool under construction in marshy ground . . . . [H]is connection was not with the vessel but with the construction gang. He had no duties connected with navigation; in fact he had never been on the dredge when it was pushed from one location to another, and never even saw it moved.” Id. at 376-77.
129. Id. at 374. This decision was in accord with prior lower court cases allowing the Jones Act remedy for dredge workers. See, e.g., McKie v. Diamond Marine Co.,
The Supreme Court has applied its Senko doctrine twice so far this year. In Grimes v. Raymond Concrete Pile Co., the Court, overruling a directed verdict for defendant, remanded for jury determination of whether a pile-driver operator on a radar tower in the ocean is a "crew member of any vessel." And in Butler v. Whiteman, the Court again reversed a directed verdict for defendant and remanded for jury trial. There, plaintiff’s decedent, a laborer employed by a tugboat owner to do odd jobs around a wharf, drowned under unexplained circumstances. According to the trial court, all three elements of a Jones Act cause of action were missing. Decedent could not have been a crew member of a vessel engaged in navigation, since no steam had been raised on the tug for over a year and he had had no navigational duties; the trial court also found no evidence of negligence. Nonetheless, the Supreme Court held that all three issues—vessel in navigation, crew member, negligence—presented jury questions.

The Gianfala, Senko, Grimes and Butler cases—transforming any scintilla of evidence of crew membership into a jury question—reflect a general relaxation

204 F.2d 132 (5th Cir. 1953); Pariser v. City of New York, 146 F.2d 431 (2d Cir. 1945); Early v. American Dredging Co., 101 F. Supp. 393 (E.D. Pa. 1951). But see Fuentes v. Gulf Coast Dredging Co., 54 F.2d 69 (5th Cir. 1931); United Dredging Co. v. Lindberg, 18 F.2d 453 (5th Cir. 1927).

The novelty of Senko was not its allowance of Jones Act recovery for a dredge worker but its affirmance of crew member status for a worker who spent most of his working time ashore with a construction gang and was injured ashore. The Court had previously found crew member status for a full time barge worker. Norton v. Warner Co., 321 U.S. 565 (1944).

130. 356 U.S. 252 (1958), reversing per curiam 245 F.2d 437 (1st Cir. 1957).

131. The defense to Jones Act suit had been plaintiff’s eligibility under the Defense Base Act, 55 Stat. 622 (1941), as amended, 42 U.S.C. §§ 1651-54 (1952), which adopts the Longshoremen’s Act remedy for workers injured while employed outside the continental United States under a public works contract. The district court had not passed on the crew member question, wrongly interpreting the Defense Base Act as not incorporating the provisions of the Longshoremen’s Act excluding crew members; and held plaintiff to the compensation remedy even if a crew member. See Grimes v. Raymond Concrete Pile Co., 245 F.2d 437, 439 (1st Cir. 1957). Although this interpretation of the crew member exclusion was seen as error, the court of appeals thought it would be “perfectly futile” to remand since no evidence existed to support crew member status. Id. at 440.

As a matter of “law,” the court of appeals held the permanently stationed radar tower not to be a vessel; furthermore, even if it were a vessel, plaintiff had no “more or less permanent connection” with it. Ibid. On appeal, two justices dissented, joining in the determination that a crew member must be one who is “naturally and primarily on board a vessel to aid in . . . navigation . . . .” 356 U.S. at 254. But the majority thought there was an “evidentiary basis for a jury’s finding,” both as to crew member status, and as to the “vessel” question. Id. at 253, citing Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957), Gianfala v. Texas Co., 350 U.S. 879 (1955), and South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940).


133. See Harris v. Whiteman, 243 F.2d 563, 564-65 (5th Cir. 1957).

134. 356 U.S. at 271.
of standards for employee tort recoveries by the present Court. With increasing frequency, certiorari is granted and cases remanded for jury trial following dismissal of FELA complaints. Within this context, the Senko rationale portends a modified twilight zone of remedial flexibility for all workers on the seaman-harborworker borderline. For a still undefined group, tort damages
will follow a jury finding of negligence and crew membership. And, since compensation commissioners also make awards to borderline claimants, the alternative twilight zone choice is effected through judicial exercise of the administrative finality doctrine. But courts could reject Jones Act "recovery over" suits after compensation by analogizing to that same doctrine.

The facts of Butler v. Whiteman—where the employee was a dockworker—suggest that a Jones Act-Longshoremen's Act twilight zone might embrace all conventional harborworkers. Butler failed to mention the Swanson precedents, however, under which Jones Act coverage for an actual longshoreman is

The alternative remedy was not considered by the courts, in view of affirmance of the Jones Act count. See 350 U.S. at 879.

137. Where borderline plaintiffs are unable to prove Jones Act negligence, they can usually obtain compensation, for the federal commissioner's award need rest only on substantial evidence of non-crew-member status. The leading case is South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940) (deckhand on small river craft with duty of guiding coal down chute during refueling of other vessels allowed federal compensation). Under Bassett, where the award is final no trial de novo is granted, and the "jurisdictional fact" doctrine of Crowell v. Benson, 285 U.S. 22 (1932), discussed notes 88-89 supra, is not exercised. Under the Administrative Procedure Act, 60 Stat. 237 (1946), as amended, 5 U.S.C. §§ 1001-11 (1952), the appellate court may not review the facts before the administrative agency by trial de novo, but can only apply the substantial evidence rule, O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508 (1951). But if claimant is clearly a crew member, the federal compensation award may be reversed as not resting on substantial evidence. Norton v. Warner Co., 321 U.S. 565 (1944) (worker with navigation duties who lived aboard barge); Daffin v. Pape, 170 F.2d 622 (5th Cir. 1948) (part time crew member of yacht). But cf. Avondale Marine Ways, Inc. v. Henderson, 346 U.S. 366 (1953); note 30 supra; GILmore & BLACK 352-53. For collected cases defining the content of "substantial evidence," see PARKER, ADMINISTRATIVE LAW 224-27 (1952).

Courts seem to implement the substantial evidence rule more readily to reverse commissioner decisions unfavorable to claimants than to vacate awards. Compare O'Leary v. Brown-Pacific-Maxon, Inc., supra; Norton v. Warner Co., supra, with Myers v. Bethlehem Steel Co., 250 F.2d 615 (4th Cir. 1957) (reversing, as not supported by the evidence, deputy commissioner's denial of award to longshoreman's grandchild, the issue being her status as a "dependent" of deceased under the act); Charleston Shipyards, Inc. v. Lawson, 227 F.2d 110 (4th Cir. 1955); Ennis v. O’Hearne, 223 F.2d 755 (4th Cir. 1955); O'Leary v. Coastal Nav. Co., 193 F.2d 717 (9th Cir. 1951). The courts' proclivity to affirm the deputy commissioner when he makes awards and to overrule him when he denies them thus complements the Gianfala-Senko-Grimes-Butler doctrine and improves the possibility of free choice of remedy.

138. However, some courts have allowed Longshoremen's Act, then Jones Act "recovery over" provided no compensation benefits have actually been received. See, e.g., Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir. 1953); Segal v. Travelers Ins. Co., 94 F. Supp. 123 (D.D.C. 1950). Thus, Jones Act recovery is allowed after a Longshoremen's Act compensation order but before payment. The order is held not res judicata on the crew member issue because the Longshoremen's Act does not make an award binding on federal district courts as to jurisdictional issues even after the period of direct appeal has terminated. See 2 HANNA, EMPLOYER INJURIES AND WORKMEN'S COMPENSATION 501-02 (1954) (collecting cases); cf. PARKER, op. cit. supra note 137, at 249.

139. See notes 132-34 supra and accompanying text.
not a jury question but a matter of "law." The overruling of Swanson and extension of tort remedies to virtually every harborworker is in fact both unlikely and unwarranted. Present twilight zone decisions are largely restricted to actual borderline employees. Wholesale application of these precedents would negate congressional policy dictating limited liability for employers of longshoremen and would subvert the Longshoremen's Act by making compensation a secondary remedy sought only in the absence of negligence.

Although Longshoremen's Act compensation is presently available to a restricted group of quasi seamen who also qualify for Jones Act damages, creation of a substantial twilight zone for seamen under Senko—affording ocean-going mariners federal compensation in the absence of negligence—is improbable for two reasons. First, largely because of maritime union antipathy toward fixed compensation, the Longshoremen's Act explicitly omits crew members from its coverage, and the Supreme Court has given this exclusion comprehensive construction. More important, authentic seamen rarely seek compensation because of the ease of proving negligence under the Jones Act and because they have the alternative remedies in admiralty of "unseaworthiness" damages and "maintenance and cure." The latter provides certain living costs and medical expenses attendant upon disability incurred during the term of employment; the former arises without proof of negligence if injury resulted

140. See notes 119-21 supra and accompanying text.
141. See note 7 supra (Longshoremen's Act § 905(a) the exclusive remedy where applicable).
142. See notes 8, 137 supra.
143. Longshoremen's Act § 903(a)(1). On union opposition to inclusion of seamen within the Longshoremen's Act, see note 159 infra.
145. See note 115 supra.
146. "Maintenance" means living expenses during incapacity and is judicially awarded without proof of fault. The cases vary as to whether maintenance is measured by actual out-of-pocket expenses or by a flat per diem rate. Union contracts often contain a clause setting the daily rate which is enforced by the courts. Gilmore & Black 267-69. The "cure" part of the recovery is for medical expenses which continue until recovery or maximum possible cure. Id. at 262-66. The seaman may also receive unearned wages for the period of incapacity up to the end of his employment term. Id. at 268.

Seamen prefer maintenance and cure rather than compensation for several reasons. They are not the exclusive remedy against the employer and may be joined with a Jones Act or an unseaworthiness count. Pacific S.S. Co. v. Peterson, 278 U.S. 130 (1928). And the shipowner's liability includes not only injury or illness arising "out of employment"—the limit of the compensation statute—but practically all injuries or illnesses which arise "during" employment regardless of whether they were caused by the worker's performance of duties. See, e.g., Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938) (maintenance and cure allowed for Brueger's disease although no causal connection with accident or exertion on the job). Seamen can collect maintenance and cure even for injuries incurred on shore leave. Farrell v. United States, 336 U.S. 511 (1949) (seaman returning to ship fell over a chain guard into a drydock due to "no negligence but his own"); Aguilar v. Standard Oil Co., 318 U.S. 724 (1943) (seaman fell into ditch at railroad siding while leaving the pier for shore leave).
from defective conditions aboard ship.\textsuperscript{147} Thus, the \textit{Senko} doctrine, while fostering free choice between Jones and Longshoremen's Acts, should not change the remedies actually sought by most seamen.

\textbf{The "Local" Seaman}

While the twilight zone of the Jones and Longshoremen's Acts virtually assures the borderline seaman a federal compensation award for injury on navigable waters,\textsuperscript{148} his compensability under state law for injury ashore is less certain. Interpreting the Jones Act as congressional pre-emption of state remedies for all mariners, some courts deny local relief to harborworker-seamen on \textit{Jensen} uniformity grounds.\textsuperscript{149} Thus, in the absence of Jones Act negligence, quasi seamen may be without statutory remedy if injured on land in the course of employment.\textsuperscript{150} Moreover, traditional admiralty actions for unseaworthiness or maintenance and cure may be unavailable in the circumstances characteristic of Jones Act and state compensation interaction.\textsuperscript{151} For instance,

\begin{itemize}
\item \textsuperscript{147} For description of the unsaworthiness cause of action, see notes 3 \textit{supra}, 166, 172 \textit{infra}.
\item \textsuperscript{148} See the doctrine of South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940), discussed note 137 \textit{supra}.
\item \textsuperscript{149} See, e.g., Hardt v. Cunningham, 136 N.J.L. 137, 54 A.2d 782 (1947) (state compensation denied for barge crew member who drowned in effort to leap from dock to barge, on grounds doctrine of local concern does not enable state compensation for a "seaman"); Rudolph v. Industrial Marine Serv., 187 Tenn. 119, 213 S.W.2d 30 (1948) (state compensation denied for seaman fatally injured ashore while on errand for employer). For the argument that the Jones Act totally pre-empts the field of injuries to seamen, see 2 \textsc{Larson} § 90.42.
\item The leading case on denial of state compensation by a pre-emptive Jones Act, involving a longshoreman rather than a marginal harborworker-seaman, is \textit{Northern Coal & Dock Co. v. Strand}, 278 U.S. 142, 147 (1928). There, claimant longshoreman spent only 2\% of his working time at the "maritime" duty of unloading ships; he was held to be a "seaman" under the Jones Act and, since that act provides a remedy, "no state statute can provide any other or a different one." See also \textit{Lindgren v. United States}, 281 U.S. 38 (1930) (reversing award under state wrongful death statute on a "pre-emptive Jones Act" theory even though deceased's representatives had no cause of action under the Jones Act for want of actionable negligence); \textit{Employers' Liab. Assurance Corp. v. Cook}, 281 U.S. 233 (1930). The \textit{Strand} and \textit{Cook} cases may be assumed to have been overruled by \textit{Swanson v. Marra Bros., Inc.}, 328 U.S. 1 (1946), see notes 119-20 \textit{supra} and accompanying text, since they relied on the pre-\textit{Longshoremen's Act} case of \textit{International Stevedoring Co. v. Haverty}, 272 U.S. 50 (1926), discussed note 116 \textit{supra}, which had held longshoremen "seamen" for Jones Act purposes. The \textit{Swanson} case interpreted the crew member exception of the \textit{Longshoremen's Act} to overrule \textit{Haverty}, placing longshoremen within the exclusive scope of the \textit{Longshoremen's Act}.
\item The pre-emptive Jones Act doctrine is also invoked by borderline Jones Act plaintiffs to overcome a defense of maritime-but-local. \textit{Alaska Industrial Bd. v. Alaska Packers Ass'n}, 186 F.2d 1015 (9th Cir. 1951); \textit{Occidental Indemnity Co. v. Industrial Accident Comm'n}, 24 Cal. 2d 310, 149 P.2d 841 (1944). Thus, pre-emptive Jones Act theory exists today without support from \textit{Haverty}.
\item The \textit{Longshoremen's Act} will be unavailable because restricted to injuries on navigable waters. § 903(a).
\item For examples of cases where, by an unusual combination of circumstances, state
owner-operators of chartered craft have no unseaworthiness remedy because they are owners and no maintenance and cure claim because not ordinary seamen.\textsuperscript{152}

If a worker under the \textit{Senko} rule\textsuperscript{153} could gain federal compensation when injured on navigable waters,\textsuperscript{154} case law rationally should permit him state remedy for shoreside injury. An equitable solution could be reached either by twilight zone free choice\textsuperscript{155} between Jones Act and state compensation, or by affirming state administrative awards on maritime-but-local grounds.\textsuperscript{156} The free-choice approach has been adopted by one state court which, citing \textit{Davis}, reasoned that the twilight zone "hinges, not upon distinctions between various

\begin{itemize}
\item compensation was the only available remedy for borderline seamen-harborworkers, see notes 157-58 \textit{infra}.
\item In fatal cases, where claimant can show no negligence under the Jones Act, the only recourse may be state compensation. While most state statutes provide death benefits to dependents, the traditional admiralty rule is nonsurvival of personal causes of action. GILMORE \& BLACK 302-03. See note 1 \textit{infra} for description of state statutes. On the maintenance and cure remedy, see note 146 \textit{infra}. Even if the borderline worker were eligible for maintenance and cure, and the action were held to survive, it would be only for costs and unearned wages accrued prior to death. Sperbeck v. Burbank \& Co., 190 F.2d 449 (2d Cir. 1951). If the worker dies instantly, his representatives have little recourse under this action, since no expenses have accrued.
\item Only occasional litigation involves the maintenance and cure remedy for harborworkers since plaintiff, to be eligible, must be a "seaman in the primitive sense." GILMORE \& BLACK 255. \textit{But see} Weiss v. Central R.R., 235 F.2d 309, 313 (2d Cir. 1956) (railroad worker, who lived ashore and had no permanent connection with any vessel but worked part time on railroad ferry, awarded $5,000 maintenance and cure for reactivation of latent disease which "some evidence" showed was produced by exertion on job); Chesser v. General Dredging Co., 150 F. Supp. 592 (S.D. Fla. 1957) (mate on dredge clearing swamp allowed maintenance and cure as seaman); Bailey v. City of New York, 55 F. Supp. 699 (S.D.N.Y. 1944) (maintenance and cure for ferryboat engineer who worked a regular eight-hour day and slept at home).
\item As for unseaworthiness, although the action might survive decedent's death, the claim might be only for damages accrued prior to his death and would probably be exercisable only under a state wrongful death statute. See Kernan v. American Dredging Co., 355 U.S. 426, 430 n.4 (1958) (dictum); \textit{cf.} Skovgaard v. Tungus, 141 F. Supp. 653 (D.N.J. 1956). Some writers suggest that the traditional rule of nonsurvival in American admiralty law be modified to allow personal representatives of a seaman to collect on an unseaworthiness count. GILMORE \& BLACK 302-03 n.172. Some recent cases have so held, utilizing state statutes providing that the personal injury action survives. Halecki v. United N.Y. and N.J. Sandy Hook Pilots Ass'n, 251 F.2d 708 (2d Cir. 1958), 58 Colum. L. Rev. 736; Holland v. Steag, Inc., 143 F. Supp. 203 (D. Mass. 1956).
\end{itemize}

\textit{152.} The unseaworthiness remedy is available only for shipboard injury because of violation of the owner's warranty of the ship's seaworthiness. Fredericks v. American Export Lines, Inc., 227 F.2d 450 (2d Cir. 1955), \textit{cert. denied}, 350 U.S. 989 (1956). As to requirements for maintenance and cure eligibility, see note 151 \textit{infra}.

\textit{153.} See notes 127-34 \textit{infra} and accompanying text.

\textit{154.} See notes 136-37 \textit{infra} and accompanying text.

\textit{155.} See notes 26-31 \textit{infra} and accompanying text.

\textit{156.} For discussion of the maritime-but-local doctrine, see notes 21-22 \textit{infra} and accompanying text.
types of maritime employees, but upon the maritime employee's choice of the State compensation remedy as against the overlapping federal remedy available. A different theory is found in a similar case in which the Fifth Circuit allowed state compensation by holding the dockside drowning of a small vessel's captain to be maritime-but-local. This latter rationale seems the better. Failure to distinguish among "various types" of seamen, coupled with complete reliance on the "employee's choice," leads to the conceptually inconstant inclusion of authentic, ocean-going seamen within local law analogous to the federal compensation act from which Congress, at their behest, excluded them. On the other hand, courts could restrict state compensation under maritime-but-local doctrine to shore-side harborworker injuries noncompensable in admiralty and for which Jones Act coverage, given negligence, would be problematical.

157. Beadle v. Massachusetts Bonding & Ins. Co., 87 So. 2d 339, 342 (La. Ct. App. 1956). Deceased, the pilot, deckhand and sole crew member of a towboat, drowned while operating his personally owned motorboat on an errand for his employer. Being clearly a crew member, federal compensation was unavailable; in the absence of negligence, his widow could not pursue Jones Act damages. Because the boat was his own, unseaworthiness was unavailable, and no maintenance and cure expenses had accrued before his death. The widow's sole remedy was state compensation, which was allowed. The court did not rely solely on maritime-but-local, which might have sufficed since he was drowned on an inland river, but chose to rest the decision on the twilight zone theory of the Davis line of cases. Ibid. For discussion of the Beadle case, see 19 NACCA L.J. 116 (1957).

158. Maryland Cas. Co. v. Toups, 172 F.2d 542 (5th Cir. 1949). Deceased was the captain and sole crew member of a harbor boat which carried pilots to seagoing vessels in Port Arthur, Texas. He drowned when he fell from a dock where he was working. The court, while admitting he was a seaman engaged in maritime employment and permanently attached to a vessel—which would justify Jones Act suit if negligence were provable—found no serious impairment of the uniformity of national admiralty law in allowing state compensation. Id. at 546.

Although the court stated that "his death occurred in navigable waters of the United States," id. at 545, it is doubtful that federal compensation could have been claimed, the traditional rule being that jurisdiction is determined by the point from which the employee fell, Minnie v. Port Huron Terminal Co., 295 U.S. 647 (1935); T. Smith & Son, Inc. v. Taylor, 276 U.S. 179 (1928).


160. The Longshoremen's Act § 903(a) (1), by its terms, does not cover masters and crew members.

161. Maritime-but-local doctrine traditionally excludes ocean-going seamen from state coverage. See 1 BENEDICT, AMERICAN ADMIRALTY §§ 34-35 (5th ed. 1925); Dickinson & Andrews, A Decade of Admiralty in the Supreme Court of the United States, 36 Calif. L. Rev. 169, 179 (1948). Thus, the doctrine could be used to avoid fortuitous hardship to
The suggested application of the maritime-but-local rationale would not conform with the view of some courts that the Jones Act, like the FELA, totally pre-empts state law. But so reading the Jones Act ignores congressional intent in passing it. Congress sought to improve chances of recovery for injured seamen, not to deny pre-existing state remedies for local employees. Indeed, during the same period in which it adopted the Jones Act, Congress was attempting to overcome Jensen and extend state compensation to all harborworkers. Significantly, the Jones Act did not displace the prior nonfault remedies of maintenance and cure and unseaworthiness for seamen; therefore, supersession of state compensation seems unlikely when alternatives are unavailable to harborworker-seamen of uncertain status. In sum, maritime-but-local doctrine would, by its terms, deny state remedies to ocean-going seamen; at the same time, it could afford relief to non-negligently injured harborworkers on the Jones Act border who are fortuitously denied federal compensation and nonfault suits in admiralty.

IN-PORT UNSEAWORTHINESS

Originally designed to protect ocean-going seamen from the hazards of shipboard duty, the admiralty doctrine of unseaworthiness has been extended landward by the Supreme Court on the ground that longshoremen—in loading and unloading ships—and other harborworkers—in effecting repairs and maintenance—perform work “traditionally done by seamen.” Moreover, the Longshoremen’s Act, though constituting where applicable the exclusive ambiguous claimants without benefitting those clearly intended by Congress to have recourse only to the Jones Act and admiralty remedies.

162. See cases cited note 149 supra.

163. The Jones Act was passed for the specific purpose of overturning Supreme Court precedent applying the fellow-servant rule to seamen suing for employer negligence. See Gilmore & Black 250-51, 279-82.

164. The Jones Act was passed in 1920. Congress passed acts in 1917 and 1922 in an attempt to authorize state compensation for all harborworkers; both were declared unconstitutional by the Supreme Court. See note 16 supra and accompanying text.


Unseaworthiness doctrine, dating from the late nineteenth century, gives seamen a tort action for injury resulting from any shipboard deficiencies. The doctrine imposes absolute liability on the shipowner. See, generally, Gilmore & Black 315-33.

167. The unseaworthiness action was first allowed for longshoremen in Atlantic Transp. Co. v. Imbrovok, 234 U.S. 52 (1914). The Court reasoned that loading and unloading ships was formerly done by the ship’s crew, “but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class ‘as clearly identified with maritime affairs as are the mariners.’ ” Id. at 62. For thorough historical exploration of this notion and the conclusion that crew members have never “traditionally done” such work, see Tetreault, supra note 166, at 412. The Imbrovok rationale was later utilized to allow other harborworkers the seaworthiness remedy. See, e.g., Alaska S.S. Co. v. Petterson, 347 U.S. 396 (1954) (longshoreman
remedy against an employer, reserves to the injured harborworker his rights against third parties. Hence, a longshoreman injured aboard ship may often obtain unseaworthiness damages from the shipowner despite concurrent eligibility for compensation payments from his employer—usually a stevedoring company. Because the unseaworthiness doctrine imposes an absolute, undelegable liability for any deficiency in equipment or personnel, a longshoreman may recover against the shipowner even if the cause of injury was negligence by the worker's own employer or his fellow longshoremen and the ship was within the stevedoring company's sole control during loading operations. Under the practice sanctioned by the 1956 decision of Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., however, the shipowner, once judged liable to the longshoreman, can recover over from the stevedoring company

injured aboard ship by defective block); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) (carpenter injured aboard ship); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) (longshoreman injured by boom shackle aboard ship); GILMORE & BLACK 315-33, 344-58 (collecting cases).


168. Longshoremen's Act § 905, quoted note 7 supra.

169. "If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect... to receive such compensation or to recover damages against such third person." Longshoremen's Act § 933(a). But once claimant has accepted compensation under an award, his rights against third parties are assigned to the employer. Id. § 933(b).

170. Unseaworthiness recovery is available only for shipboard injury. See note 152 supra.


172. Ibid. (shipowner liable for defect not discoverable by prudent inspection). The Court defined the shipowner's liability as follows: "It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character... It is a form of absolute duty owing to all within the range of its humanitarian policy." Id. at 94-95. For a case involving shipowner liability for employee torts against fellow employees, see Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336 (1955) (plaintiff, injured by "belligerent" shipmate, eligible for unseaworthiness damages).


if injury resulted from the company's negligent performance of contractual
duties.\textsuperscript{175}

When sued for recovery over by shipowners, employers theoretically could
rely successfully on the exclusive-remedy clause in the Longshoremen's Act. That provision limits employer liability "on account of" injury in the course of
employment to the schedule of compensation payments set forth in the act.\textsuperscript{176} But in approving recovery over, the Court avoided this limitation by postu-
lating a contract of indemnity between employer and shipowner.\textsuperscript{177} Thus, the
longshoreman can indirectly achieve tort recovery from his employer through
an unseaworthiness action; and the exclusive-remedy provision—an integral
part of the congressional plan for workmen's compensation—is effectively
nullified.\textsuperscript{178}

\textsuperscript{175} In \textit{Ryan}, plaintiff longshoreman was injured by cargo negligently stowed by his
fellow longshoremen. The Supreme Court, affirming full indemnification from employer to
shipowner, said:

"The shipowner here holds [employer's] . . . uncontroverted agreement to perform all
of the shipowner's stevedoring operations at the time and place where the cargo in question
was loaded. That agreement necessarily includes petitioner's obligation not only to stow the
pulp rolls, but to stow them properly and safely. Competency and safety of stowage are
inescapable elements of the service undertaken. This obligation is not a quasi-contractual
obligation implied in law or arising out of a noncontractual relationship. It is of the essence
of petitioner's stevedoring contract. It is petitioner's warranty of workmanlike service that
is comparable to a manufacturer's warranty of the soundness of its manufactured product."
350 U.S. at 133-34.

For thorough discussion of \textit{Ryan} and the issues involved in recovery over, see \textsc{gilmore & black} 358-74.

\textsuperscript{176} Longshoremen's Act § 905, quoted note 7 supra.

\textsuperscript{177} \textit{Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.}, 350 U.S. 124 (1956).

\textsuperscript{178} See Note, 66 \textsc{yale l.j.} 581, 585 (1957).

Under § 933(b) of the Longshoremen's Act, acceptance of compensation under an
award operates as an assignment to the employer of the third-party action; §§919(a)-(c)
enables the employer to initiate the claim for compensation. Therefore, foreseeing inden-
mification action by the shipowner, an employer may attempt to force a formal award
on claimant and then abandon the third-party claim. In \textit{Czaplicki v. The Hoegh Silver-
cloud}, 351 U.S. 525 (1956), the longshoreman obtained a compensation award. However,
the employer's insurance company to whom the assigned third-party action had been subro-
gated did not proceed against the shipowner. To protect the longshoreman's right to gain
unseaworthiness damages, the Supreme Court held that he could sue even after receiving
a formal award when he is "the only person with sufficient adverse interest to bring suit."
\textit{Id.} at 531. The decision was a supposed solution to the concern expressed by Justice
Black in \textit{Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.}, \textsc{supra} note 177, at 135-47
(dissenting opinion), that in allowing shipowner's recovery over the Court was forcing
employers to prevent employees from receiving unseaworthiness damages. Justice Black
feared that the threat of recovery over would prompt employers to cease making voluntary
compensation payments without award, a practice which allowed claimant to retain his
third-party action.

The \textit{Czaplicki} doctrine has been criticized as not effectively protecting employees.
See, \textit{e.g.}, Note, 66 \textsc{yale l.j.} 581, 586-87 (1957). For in that case, the Court said: "[A]ll
that we hold is that, given the conflict of interests and \textit{inaction by the assignee}, the employee
should not be relegated to any rights he may have against the assignee, but can maintain
According unseaworthiness damages to shoreside personnel perverts admiralty doctrine while further confusing the relation of seaman remedies to harborworkers.\textsuperscript{179} The shipowner warranty of seaworthiness, a court-created "obligation growing out of the status of the seaman and his peculiar relationship to the vessel," was initially designed to benefit persons "exposed to the perils of the sea and all the risks of unseaworthiness . . . ."\textsuperscript{180} An actual seaman lacks statutory protection absent employer negligence;\textsuperscript{181} but \textit{Davis} free-choice doctrine assures harborworkers fixed compensation granted by both state and federal laws.\textsuperscript{182} For them, unseaworthiness constitutes gratuitous superimposition of tort protection above the enacted schedules. Furthermore, ordinary longshoremen, having been legislatively restricted to compensation act coverage,\textsuperscript{183} are clearly not seamen within the Jones Act.\textsuperscript{184} Transforming these same longshoremen into seamen for purposes of unseaworthiness damages thus creates a twilight zone resting on an obviously anomalous classification.\textsuperscript{185} Made possible solely by the fortuitous introduction of a third-party shipowner, and frustrating congressional efforts to distinguish harborworker and seaman remedies, this twilight zone represents an unwarranted importation of maritime remedies onto the waterfront.

\textsuperscript{179} Extension of the remedy to longshoremen is criticized in Tetreault, \textit{supra} note 166, at 391-403; Note, 66 \textit{Yale L.J.} 581, 587-88 (1957).

\textsuperscript{180} \textit{Seas Shipping Co. v. Sieracki}, 328 U.S. 85, 104 (1946) (dissenting opinion).

\textsuperscript{181} The only remedial federal statute not requiring proof of negligence is the Longshoremen's Act, which specifically excludes "crew members." § 903 (a) (1). And an ocean-going seaman would not qualify for state compensation under the doctrine of a pre-emptive Jones Act. See cases cited note 149 \textit{supra}. Of course, seamen qualify for nonstatutory, non-negligent relief in the form of maintenance and cure and unseaworthiness damages.

\textsuperscript{182} Under \textit{Davis}, the harborworker benefits from a presumption in favor of his choice of remedy—state or federal. See notes 26-29 \textit{supra} and accompanying text.

\textsuperscript{183} Longshoremen's Act § 905; \textit{Swanson v. Marra Bros., Inc.}, 328 U.S. 1 (1946).

\textsuperscript{184} See notes 119-20 \textit{supra} and accompanying text.

\textsuperscript{185} For example, the \textit{Swanson} case, barring longshoremen from Jones Act suit because they do not qualify for "seaman" status, was handed down by the Court on the same day as \textit{Seas Shipping Co. v. Sieracki}, 328 U.S. 85 (1946), which held longshoremen to be "seamen" for purposes of unseaworthiness actions.
CONCLUSION

Assuming claimant’s free choice of remedy, no justification appears for “recovery over” after a state compensation award. To the contrary, permitting the second recovery misconstrues the purpose of the federal remedy and subverts the principle of elective relief central to the twilight zone. Sanctioning free choice is not intended to maximize relief at the cost of administrative finality but to assure injured employees that their initial claims will not be disallowed on jurisdictional grounds. Conceptually justifiable only when the worker’s status is ambiguous under applicable compensation law, the twilight zone does not imply repeated awards dictated by claimant opportunism.

Injured harborworkers on other statutory borderlines present problems suggesting twilight zone solution. Railroad employees who generally work ashore but are fortuitously injured on navigable waters are presently deprived of FELA damages because federal compensation is available. Retention of their customary relief appears preferable to nice distinctions creating exceptions to congressional coverage of railway liability. Because of the disparate remedies at issue, jury characterization of the plaintiff’s employment duties, not free choice, could determine FELA applicability. This treatment would accord with Jones Act precedent allowing certain harborworker-seamen to take to the jury the issue of plaintiff eligibility under the act. Analogously, other harborworker-seamen, non-negligently hurt ashore but currently denied compensation, could have a state commissioner resolve whether injury was maritime but local. On the other hand, to avoid negation of the exclusive recovery-limited liability clause basic to the Longshoremen’s Act, harborworkers clearly within the act should not receive unseaworthiness damages. Thus, in sum, modified twilight zone recovery based on jurisdictional determinations by triers of fact can and should be allowed only when ambiguity of status indicates remedial flexibility. Extending twilight zone doctrine beyond borderline cases would pervert judicial doctrine designed to simplify areas of statutory overlap, and defeat Congress’ selective distribution of available relief by category of waterfront employment.