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Benedict on Admiralty

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Volume 1A: Longshore and Harbor Worker Compensation Act Chapters I-V, Apps. A-E
1 SPECIAL ALERT TO VOLUME 1A

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Scope

In *Stewart v. Dutra Construction Company*,ⁿ¹ the Supreme Court reaffirmed that dredges are vessels for purposes of the Jones Act and Longshore and Harbor Workers' Compensation Act ("LHWCA"). The Court disapproved of the First Circuit's narrower interpretation that to be considered a Jones Act vessel the structure must either have the purpose or primary business of navigation or be in actual navigation or transit at the time of the injury.ⁿ²

In *Stewart* the plaintiff was a marine engineer who was seriously injured aboard the Super Scoop, the world's largest dredge, in Boston Harbor. Stewart had been hired to maintain the dredge's mechanical systems. He was injured while the dredge was idle. He had gone aboard a scow that worked alongside the dredge. The scow collided with the dredge, plunging Stewart headfirst to a deck below.

The Commonwealth of Massachusetts had contracted with Dutra Construction Company, the dredge's owner, to assist in digging a tunnel for the "Big Dig" project. The dredge had only limited means of self-propulsion. It would move short distances by manipulating its anchors and cables. For long distances it needed to be towed. The dredge had some characteristics typical of vessels, such as a captain, crew, navigational lights, ballast tanks and a crew dining area.ⁿ³

Stewart had sued Dutra under the Jones Act and alternatively under § 5(b) of the LHWCA. The District Court granted summary judgment against Stewart on the Jones Act claim because the dredge's primary purpose was not transportation and because it was stationary at the time of the injury. The First Circuit affirmed.ⁿ⁴ On remand the District Court granted summary judgment against Stewart on the LHWCA claim, and again the First Circuit affirmed.ⁿ⁵ Although Dutra conceded that the dredge was a vessel for purposes of the § 5(b) claim, the lower courts held that Dutra's alleged negligence was in its capacity as employer rather than as owner of the vessel.

Although the Court stated that it granted *certiorari* to determine whether the dredge was a vessel for purposes of the LHWCA, and held that it was a vessel for those purposes, it also determined that the same standard applied to the Jones Act.ⁿ⁶ The Court held that 1 U.S.C. 3 provides the definition of a vessel under the LHWCA. That section provides, "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."ⁿ⁷ The Court held that this definition includes stationary vessels and those temporarily anchored but excludes fixed structures or those that were permanently moored.ⁿ⁸

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The Court disapproved of both prongs of the First Circuit test. 1 U.S.C. § 3 only requires that the structure be "used, or capable of being used, as a means of transportation on water." It does not require that it be *primarily* used for that purpose. Nor is it required that the vessel be moving at the time of the injury. n9 A vessel is "in navigation" as long as it has not been removed from the water for extended periods of time. If there is a "practical possibility" as opposed to "merely a theoretical one" that a craft can again be put to sea, it remains a vessel. n10 The Court said that in some cases this may raise a factual question for the jury. n11

The Court also clarified what 1 U.S.C. § 3 means by "transportation." The Super Scoop satisfied the transportation requirement because it was capable of transporting equipment and workers over water. n12

The Court noted that to establish Jones Act status, a maritime worker must also prove that his duties contributed to the vessel's function or mission, and that his connection to the vessel was substantial both in nature and duration. n13

Although the Court did not specifically address the question of whether special purpose structures such as spud barges are vessels, n14 the Court's broad holding would include these craft within the definition of a Jones Act vessel. As long as there is a practical possibility that these craft can be used to transport equipment and workers over navigable waters, they remain Jones Act vessels. The Court's holding suggests that vessel status will usually be decided as a matter of law except in those instances where there is an issue about whether the craft is practically capable of being used as a means of transportation on water.

FOOTNOTES:

(n15)Footnote 1. 125 S.Ct. 1118, 2005 AMC 609 (2005).

(n16)Footnote 2. *See* 230 F.3d 461, 2001 AMC 1116 (1st Cir. 2000). The court based its decision on *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1992 AMC 1521 (1st Cir. 1992). The Fifth Circuit had established a similar test but recognized a structure as a vessel if it was designed or used primarily for transportation of cargo, equipment or persons across navigable waters or was so engaged at the time of the injury. *Bernard v. Binnings Constr. Co.*, 741 F.2d 824, 829, 1985 AMC 784 (5th Cir. 1984). The Second Circuit modified the *Bernard* test to hold:

Our test of whether summary judgment is warranted, then, considers (1) whether the structure was being used primarily as a work platform during a reasonable period of time immediately preceding the accident; (2) whether the structure was moored or otherwise secured at the time of the accident; and (3) whether, despite being capable of movement, any transportation function performed by the structure was merely incidental to its primary purpose of serving as a work platform. *Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30, 1996 AMC 777 (2d Cir. 1996).

The Ninth Circuit held that vessel status is except in rare cases a factual question for the jury. *Martinez v. Signature Seafood, Inc.*, 303 F.3d 1132, 2002 AMC 2242 (9th Cir. 2002)(excluding craft that are out of navigation). *See also* § 11a, *infra*.

(n17)Footnote 3. 125 S.Ct. at 1121.

(n18)Footnote 4. 230 F.3d 461, 2001 AMC 1116.

(n19)Footnote 5. 343 F.3d 10, 2003 AMC 2734 (1st Cir. 2003).

(n20)Footnote 6. 125 S.Ct. at 1123. The petition for *certiorari* framed the issue in terms of the standard for determining whether a special purpose watercraft (such as a dredge) is a Jones Act vessel. It did not refer to the status of a vessel under the LHWCA. *See* *Petition for Writ of Certiorari*, 2003 WL 22926387 (Dec. 3, 2003).

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(n21)Footnote 7. *See* 1 USCS § 3 (2005).

(n22)Footnote 8. 125 S.Ct. at 1126.

(n23)Footnote 9. *Id.* at 1128.

(n24)Footnote 10. *Id.*

(n25)Footnote 11. *Id.*

(n26)Footnote 12. *Id.*

(n27)Footnote 13. *Id.* at 1127. *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 1995 AMC 1840 (1995).

(n28)Footnote 14. *Compare* Maunel v. P.A.W. Drilling & Well Serv., Inc., 135 F.3d 344, 1998 AMC 1390 (5th Cir. 1998)(spud barge is a vessel as a matter of law because it was assembled to transport its rig and equipment) *with* Hurst v. Pilings & Structures, Inc., 896 F.2d 504, 1990 AMC 2666 (11th Cir. 1990)(spud barge is not a vessel as a matter of law since it was designed to be a work platform and its only transport function was incidental to its primary purpose). *See infra* § 11b.