

1967

Seamen--Personal Injuries--Choice of Law  
[*Tsakonites v. Transpacific Carrers Corp.*, 368 F.2d  
.426 (2d Cir. 1966)]

Wilbur C. Leatherberry

Follow this and additional works at: <https://scholarlycommons.law.case.edu/caselrev>

 Part of the [Law Commons](#)

---

#### Recommended Citation

Wilbur C. Leatherberry, *Seamen--Personal Injuries--Choice of Law* [*Tsakonites v. Transpacific Carrers Corp.*, 368 F.2d .426 (2d Cir. 1966)], 18 W. Res. L. Rev. 1761 (1967)

Available at: <https://scholarlycommons.law.case.edu/caselrev/vol18/iss5/17>

This Recent Decisions is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Case Western Reserve Law Review by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

## SEAMEN — PERSONAL INJURIES — CHOICE OF LAW

*Tsakonites v. Transpacific Carriers Corp.*, 368 F.2d 426  
(2d Cir. 1966).

There is considerable controversy surrounding choice-of-law problems in tort cases involving more than one state,<sup>1</sup> and questions with respect to choice of law similarly arise when torts occur aboard ocean-going ships. On numerous occasions federal courts have had to decide whether or not to apply the provisions of Section 20 of the Jones Act<sup>2</sup> in cases involving alien seamen and foreign vessels.<sup>3</sup>

In the recent case of *Tsakonites v. Transpacific Carriers Corp.*,<sup>4</sup> a Greek seaman brought suit against the Greek corporation which owned the ship on which he was employed. The principal shareholder of the defendant was a Greek citizen who had been a permanent resident alien in New York for three years. The corporation conducted approximately half of its business from New York and the other half from Piraeus, Greece. At the time of his injury which occurred aboard ship in New York harbor, the plaintiff was engaged in work pertaining to the New York portion of the corporate business. He was a domiciliary of Greece, and his contract of employment, signed in Greece, provided that Greek law would govern any claim arising out of his employment. The ship sailed under the Greek flag.<sup>5</sup>

The district court's dismissal of the plaintiff's claim was affirmed by the Second Circuit which, in applying the rules laid down by the Supreme Court in *Lauritzen v. Larsen*,<sup>6</sup> held that Section 20 of the Jones Act does not provide a remedy for an alien seaman against an alien shipowner for a tort committed in an American port.<sup>7</sup>

---

<sup>1</sup> For example, one case, *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963), was the subject of discussion for several noted scholars in one issue of a law review. *Comments on Babcock v. Jackson, a Recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963). One of those scholars has recently published a book on choice of law. CAVERS, *THE CHOICE-OF-LAW PROCESS* (1965).

<sup>2</sup> 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1964).

<sup>3</sup> *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959); *Lauritzen v. Larsen*, 345 U.S. 571 (1953).

<sup>4</sup> 368 F.2d 426 (2d Cir. 1966).

<sup>5</sup> *Id.* at 426-27.

<sup>6</sup> 345 U.S. 571 (1953).

<sup>7</sup> 368 F.2d at 429. The plaintiff could have brought the action in maritime tort under the court's admiralty jurisdiction. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 390-91 (1959) (concurring opinion of Brennan, J.). The plaintiff

The *Lauritzen* case involved a Danish seaman who sued a Danish shipowner for injuries sustained aboard a Danish flag vessel in the harbor of Havana, Cuba. The Supreme Court held that the Jones Act was inapplicable and that the action had been properly dismissed.<sup>8</sup>

In *Lauritzen* the Court listed several factors influencing the choice of law in maritime tort cases. It found the "place of the tort" to be of very limited importance in maritime cases because of the many different legal authorities involved in waters navigated by vessels in international commerce.<sup>9</sup> The "flag of the vessel" was considered the most significant factor. By virtue of a legal fiction, the ship is considered to be part of the territory of the nation flying the flag. A more realistic theory underlying the "law of the flag" approach is that it is the most practical rule to apply since it does not change as the ship travels.<sup>10</sup> The "allegiance or domicile of the plaintiff" was listed as a factor<sup>11</sup> which favored Danish law in *Lauritzen* and would naturally favor Greek law in the instant case.<sup>12</sup> The "allegiance of the shipowner" in *Lauritzen* clearly favored the application of Danish law since the shipowner was a "Dane by nationality and domicile."<sup>13</sup> In *Tsakonites*, however, the owner of ninety-six percent of the stock of the defendant corporation was a New York domiciliary.<sup>14</sup>

An eminent authority has stated that the *Lauritzen* case "necessarily left unresolved all the possible combinations of 'contacts' which are not exactly the *Lauritzen* combination (which was almost the weakest possible case for the application of domestic law)."<sup>15</sup>

---

was undoubtedly seeking to avail himself of the liberal provisions of the Jones Act which incorporates the provisions of the Federal Employer's Liability Act, 35 Stat. 66 (1908), as amended 45 U.S.C. §§ 53-54 (1964), mitigating the severity of common law defenses. The Jones Act also provides for a jury trial, which is not available in admiralty suits.

<sup>8</sup> 345 U.S. 571, 592-93 (1953).

<sup>9</sup> *Id.* at 583.

<sup>10</sup> *Id.* at 584-86.

<sup>11</sup> *Id.* at 586-87.

<sup>12</sup> *Tsakonites v. Transpacific Carriers Corp.*, 368 F.2d 426 (2d Cir. 1966) in which the plaintiff was a citizen and domiciliary of Greece. It could well be argued that this factor should be more important than the flag of the vessel. The "flag" rule promotes uniformity of choice of law while the domicile of the plaintiff provides a means of determining which nation has an interest in the case.

<sup>13</sup> 345 U.S. at 588.

<sup>14</sup> 368 F.2d at 427. The allegiance or domicile of the defendant indicates a real interest which one nation has in the case, and this factor might therefore be given more weight than the law of the flag by a court which is more concerned with balancing the interests of the two nations than in providing for uniformity of choice of law.

<sup>15</sup> GILMORE & BLACK, ADMIRALTY § 6-63, at 387 (1957). In addition to the con-

*Tsakonites* involved two significant contacts with the United States which were not involved in *Lauritzen*. First, the tort in *Lauritzen* occurred in a foreign port (Havana), while the tort in *Tsakonites* occurred in American territorial waters (New York harbor). Second, in *Lauritzen* the defendant shipowner was neither a citizen nor a domiciliary of the United States, but in *Tsakonites* a considerable portion of the defendant corporation's business was conducted from New York by its principal shareholder who had been a permanent resident alien for three years.

The court in *Tsakonites* seems to have been on firm ground in finding that the fact the tort occurred in American waters was not sufficient to require application of the Jones Act. In *Romero v. International Terminal Operating Co.*,<sup>16</sup> a tort occurred in American waters, but the Supreme Court refused to apply the Jones Act to the suit between an alien plaintiff and an alien shipowner, although it did permit the plaintiff's suit as to other defendants who were United States citizens.<sup>17</sup> *Romero* merely elaborates and strengthens the Court's position in *Lauritzen* that the place of tort

---

tacts already discussed, the Court in *Lauritzen* listed the "place of contract" which it considered irrelevant in maritime tort cases even though significant in actions for maintenance and cure which are based on an implied contract theory. 345 U.S. at 588-89. The court in *Tsakonites* stressed the fact that the plaintiff had contracted for the application of Greek law. Yet, in admitting that the plaintiff "doubtless did not have the slightest knowledge of the provisions of American statutes," the court demonstrated the weakness of its own argument. 368 F.2d at 429. The contract was obviously one of adhesion since the plaintiff had neither the knowledge nor the bargaining power to have that term changed. Cf. *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920) where the Court applied a federal statute to an alien seaman's suit for wages, the payment of which would naturally be more closely related to the contract between the seaman and his employer than a tort action would be.

The *Lauritzen* case pointed out that the "inaccessibility of a foreign forum" was relevant only to the forum non conveniens issue of whether the court, after finding its own law inapplicable, should hear the case and apply foreign law. 345 U.S. at 589-90. The "law of the forum" was cursorily dismissed by the Court which felt that the objective of choice of law rules is to promote a uniform treatment of the case regardless of the forum chosen. *Id.* at 590.

<sup>16</sup> 358 U.S. 354 (1959). The real significance of *Romero* is that it clarified the relationship between jurisdiction and choice of law in the Jones Act cases. The assertion of a substantial Jones Act claim in the petition gives a federal court jurisdiction to determine whether the Jones Act provides the remedy which the plaintiff is seeking. *Id.* at 359. Thus, although the assertion of a substantial Jones Act claim will give the federal court jurisdiction, such jurisdiction will not be exercised unless the court finds the Jones Act applicable as a matter of choice of law. Maritime tort claims do not "arise under" within the meaning of 28 U.S.C. § 1331 (1964). 358 U.S. at 378-80. Admiralty cases are in a special category covered by 28 U.S.C. § 1333 (1964). Diversity jurisdiction, 28 U.S.C. § 1332 (1964), was not available as a means for the plaintiff in *Romero* to hold the alien ship owner, since the plaintiff was also an alien. This would similarly be true in *Tsakonites* since both the plaintiff and the defendant were Greek citizens.

<sup>17</sup> 358 U.S. at 384-85.

is of little significance in maritime tort cases.<sup>18</sup> Although Mr. Justice Douglas dissented in *Romero* on the theory that the case had sufficient contact with the United States to require the application of American law,<sup>19</sup> the majority's position seems to be in line with the general rule on the subject.<sup>20</sup>

The fact that the principal shareholder in *Tsakonites* was a permanent resident alien is of considerably greater significance than the fact that the tort occurred in American waters, as evidenced by the fact that one out of the three Second Circuit judges dissented on the basis of the former contact.<sup>21</sup>

The courts have not hesitated to refuse to apply the "law of the flag" where American shipowners "attempt to evade the more rigorous shipping restrictions imposed by the Jones Act."<sup>22</sup> One such case was *Bartholomew v. Universe Tankships, Inc.*<sup>23</sup> where an alien seaman who was a domiciliary of the United States was permitted to recover under the Jones Act. The court, in piercing two corporate veils, ignored the fact that the vessel flew a foreign flag, because it found that the vessel was actually under the ownership and control of United States citizens.<sup>24</sup> Admittedly several minor contacts<sup>25</sup> with the United States were present in *Bartholomew* that were absent in *Tsakonites*, but the case is persuasive because of the realistic approach taken by the court in imposing Jones Act liability. Similar

<sup>18</sup> For a discussion of this position, see text accompanying note 9 *supra*.

<sup>19</sup> 358 U.S. at 389.

<sup>20</sup> See RESTATEMENT, CONFLICTS OF LAW § 405 (Student ed. 1934). In *The Paula*, 91 F.2d 1001 (2d Cir.), *cert. denied*, 302 U.S. 750 (1937), the court applied the "law of the flag" rather than the Jones Act to a suit between aliens where the tort occurred aboard ship in an American port. The court thought that "the intention to legislate for alien seamen who have signed articles abroad on a foreign ship ought to be clearly expressed before the courts extend the statute to them." *Id.* at 1004. *But cf.* *Taylor v. Atlantic Maritime Co.*, 179 F.2d 597 (2d Cir. 1950), *cert. denied*, 341 U.S. 915 (1951) in which an alien plaintiff recovered under the Jones Act against an alien defendant for a tort occurring aboard a ship flying a foreign flag on the high seas; *Kyriakos v. Goulondris*, 151 F.2d 132 (2d Cir. 1945) in which the Jones Act applied where both the plaintiff and the defendant were Greeks, the ship was flying a Greek flag, and the tort occurred while the plaintiff was ashore in an American port. *Taylor* was overruled sub silentio by the Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571 (1953). *Lauritzen* also weakened the reasoning, if not the holding, of *Kyriakos* which was distinguishable because the tort in the latter occurred on shore in an American port.

<sup>21</sup> 368 F.2d at 429.

<sup>22</sup> See Comment, 53 MICH. L. REV. 100, 109 (1954).

<sup>23</sup> 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959).

<sup>24</sup> *Id.* at 442.

<sup>25</sup> The plaintiff, although an alien, was a domiciliary of the United States. The articles were signed in Baltimore, and the injury occurred in American waters. *Id.* at 441. None of these factors were considered very significant in *Lauritzen*. See note 15 *supra* and text accompanying notes 9 & 11 *supra*.

results have been reached in other cases<sup>26</sup> involving American citizens operating vessels under foreign flags.

In his dissent in *Tsakonites*, Judge Waterman points out the anomaly which the court's decision permits.<sup>27</sup> The principal shareholder of the defendant corporation succeeded in insulating himself from Jones Act liability by interposing a corporate veil, by maintaining his alien status while residing in the United States, and by conducting only half of his corporation's business from New York. This seems repugnant to the theory that resident aliens have not only approximately the same rights as American citizens but also the same liabilities.<sup>28</sup> To differentiate *Tsakonites* from *Bartholomew*<sup>29</sup> on the basis of alien versus United States citizenship is to make a distinction without a real difference.

Although the case of *Richards v. United States*<sup>30</sup> indicates that the Supreme Court recognizes and approves the trend in the direction of the "grouping of contacts" test,<sup>31</sup> the Court issued a caveat in *Romero v. International Terminal Operating Co.*:<sup>32</sup> "The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations."<sup>33</sup> Thus, although *Romero* is a mandate for a court deciding

---

<sup>26</sup> *Carroll v. United States*, 133 F.2d 690 (2d Cir. 1943) in which an alien plaintiff recovered against the United States, the owner of the ship, for a tort occurring on the high seas on a vessel operated by a New York corporation under a foreign flag; *Gerardin v. United Fruit Co.*, 60 F.2d 927 (2d Cir.), *cert. denied*, 287 U.S. 642 (1932) in which an American seaman recovered for an injury suffered on the high seas on board an American-owned ship flying an Honduran flag.

<sup>27</sup> 368 F.2d at 430.

<sup>28</sup> In *Leonhard v. Eley*, 151 F.2d 409 (10th Cir. 1945), the court stated: Aliens residing in the United States, so long as they are permitted by the government to remain therein, are entitled generally, with respect to the rights of person and property and to their civil and criminal responsibility, to the safeguards of the Constitution and to the protection of our laws. . . . Their duties and obligations, so long as they reside in the United States, do not differ materially from those of native-born or naturalized citizens. *Id.* at 410.

<sup>29</sup> *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959). For a discussion of *Bartholomew* and similar cases, see notes 23-26 *supra* and accompanying text.

<sup>30</sup> 369 U.S. 1 (1962).

<sup>31</sup> *Id.* at 12-13.

<sup>32</sup> 358 U.S. 354 (1959).

<sup>33</sup> *Id.* at 383. Mr. Justice Brennan, who dissented, concurred in this part of the Court's reasoning. *Id.* at 414. Professor Cavers does not believe that international choice-of-law problems are sufficiently different from those in an interstate situation so as to require a different approach. CAVERS, *op. cit. supra* note 1, at 117. He does, however, recognize some differences. *Id.* at 117-20.

choice of law questions in a case involving the United States and a foreign nation, the Court clearly did not rule out the alternative of applying United States law in a case involving more substantial contact with the United States than did *Romero*.<sup>34</sup>

Although interstate choice of law problems do differ significantly from international choice of law problems, a brief examination of some of these cases may assist in an analysis of the admiralty situation. In interstate conflicts of law, the venerable "place of tort" rule is rapidly being supplanted by a "grouping of contacts" test.<sup>35</sup>

In the leading case of *Babcock v. Jackson*,<sup>36</sup> the New York Court of Appeals rejected the "place of tort" rule which was based on the "vested rights" doctrine that the right was created by the law of the place of the tort and was therefore wholly controlled by that law.<sup>37</sup>

*Babcock* and similar cases<sup>38</sup> were based on the theory that this rule was often harsh and inflexible because the place of tort was frequently a fortuitous circumstance.<sup>39</sup> These courts have sought to decide the cases in terms of conflicting policy considerations<sup>40</sup> or conflicting interests of the states involved<sup>41</sup> rather than to apply the more mechanical rule of place of tort.<sup>42</sup>

<sup>34</sup> In *Romero* the only contact with the United States was the fact that the tort occurred in American waters.

<sup>35</sup> Recent cases adopting the new rule include: *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965). For a discussion of this new test, see text accompanying notes 47-50 *infra*.

<sup>36</sup> 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963).

<sup>37</sup> *Id.* at 477-78, 191 N.E.2d at 281, 240 N.Y.S.2d at 746.

<sup>38</sup> *E.g.*, *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964); *Wilcox v. Wilcox*, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).

<sup>39</sup> In *Dym v. Gordon*, 16 N.Y.2d 120, 125, 209 N.E.2d 792, 794, 262 N.Y.S.2d 463, 467 (1965), the New York Court of Appeals refused to apply the rule it had announced in *Babcock* because the plaintiff and the defendant had chosen to live in another state for the summer, and it was not mere fortuity which led to their involvement in an accident in another state.

<sup>40</sup> *E.g.*, *Kilberg v. Northeast Airlines, Inc.*, 9 N.Y.2d 34, 41-42, 172 N.E.2d 526, 529, 211 N.Y.S.2d 133, 137-38 (1961) where the court found the Massachusetts damage limit inapplicable in a wrongful death action because it conflicted with New York's strong policy favoring unlimited damages.

<sup>41</sup> *E.g.*, *Griffith v. United Air Lines, Inc.*, 416 Pa. 1, 203 A.2d 796 (1964) in which the court found that the state where the tort occurred had "relatively little interest in the measure of damages." *Id.* at 23, 203 A.2d at 806.

<sup>42</sup> In *Friday v. Smoot*, 211 A.2d 594, 596-97 (Del. 1965), the court refused to adopt the new rule and mechanically applied the place of tort rule even though its effect was to deny recovery to a Delaware plaintiff in a case where the new test would have permitted recovery.

Two recent cases<sup>43</sup> involving international choice of law have applied the conflicting interest approach which is used in interstate cases. In both instances the Brazilian damage limit (which amounted to less than two hundred dollars) was applied by a federal court to limit the recovery of an American plaintiff against a Brazilian airline. Brazil's interest in protecting its infant airline industry from large damage claims was held to outweigh the United States' interest in the compensation of the plaintiff, which was largely illusory anyway because compensation from other sources was assured.<sup>44</sup>

Application of this interest analysis to *Tsakonites* should lead to the choice of United States law. Greece has an interest in protecting its shipowner from Jones Act liability, but that interest is far weaker than the interest of Brazil in its airlines. The airlines were an infant industry in Brazil, but the shipping industry of Greece is well established. In *Tsakonites* the burden on the Greek shipowner will be offset by improved compensation of the Greek plaintiff, but in the Brazilian cases the plaintiffs were American. In the Brazilian cases the United States' interest was in compensating the American plaintiffs who would have been compensated regardless of the outcome of the dispositions, whereas in *Tsakonites* the United States' interest was in subjecting all shipowners operating from its ports to Jones Act liability commensurate with the benefits received from its hospitality. This American interest is basically one of preventing alien shipowners who operate from the United States from obtaining a competitive advantage over American shipowners by securing the benefits of American residency without the corresponding liabilities.

In the Brazilian cases, resort to a "law of the flag" type of approach was not necessary because the torts occurred during flights which were to have taken place entirely within Brazil. The "law of the flag" rule was developed in admiralty because of the need for a means of providing uniformity of law to govern torts which occurred aboard ocean vessels which had to pass through numerous jurisdictions and which spent much time on the high seas over which

---

<sup>43</sup> *Tramontana v. S. A. Empresa de Visacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), cert. denied, 383 U.S. 943 (1966); *Ciprari v. Servicos Aereos Cruzeiro do sul, S.A. (Cruzeiro)*, 245 F. Supp. 819 (S.D.N.Y. 1965), aff'd per curiam, 359 F.2d 855 (2d Cir. 1966).

<sup>44</sup> *Tramontana v. S. A. Empresa de Visacao Aerea Rio Grandense*, supra note 43, at 469-70 n.3, 471; *Ciprari v. Servicos Aereos Cruzeiro do sul, S.A. (Cruzeiro)*, supra note 43, at 824-25.

no nation has jurisdiction.<sup>45</sup> The argument for uniformity and certainty is the same mechanical argument which is advanced in support of the "place of tort" rule in interstate choice of law.<sup>46</sup>

In properly applying the "grouping of contacts" to the choice of law, the courts must evaluate the contacts qualitatively as well as quantitatively.<sup>47</sup> Neither the "place of the tort" nor the "law of the flag" should be permitted to overshadow the real conflicting interests and policies. In both *Lauritzen*<sup>48</sup> and *Romero*,<sup>49</sup> the Court correctly applied the law of the flag since there were virtually no significant contacts with the United States. In such cases there is no reason to depart from the uniform law of the flag rule. *Tsakonites* was a case which called for a departure from the law of the flag, but, unfortunately, it did not occur. The court in fact gave little consideration to the other contacts.<sup>50</sup>

A congressional amendment to the Jones Act clarifying its coverage would greatly assist the courts in determining when to apply the act.<sup>51</sup> Whether or not such an amendment is forthcoming, it is hoped that the Supreme Court will reverse the *Tsakonites* decision and itself provide the much-needed clarification as to what choice-of-law test is to be applied in international situations.

#### WILBUR C. LEATHERBERRY

---

<sup>45</sup> For a discussion of this rule, see text accompanying note 10 *supra*.

<sup>46</sup> See, e.g., *Friday v. Smoot*, 211 A.2d 594, 597 (Del. 1965).

<sup>47</sup> In *Wilcox v. Wilcox*, 26 Wis. 2d 617, 633-34, 133 N.W.2d 408, 416 (1965), the court explained that "the mere counting of contacts should not be determinative of the law to be applied. It is rather the relevancy of the contact in terms of policy considerations important to the forum, *vis-à-vis* other contact states." *Ibid*.

<sup>48</sup> *Lauritzen v. Larson*, 345 U.S. 571 (1952).

<sup>49</sup> *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).

<sup>50</sup> Admittedly, the court did discuss the other contacts, but because of the great weight it assigned to the law of the flag, it reached a result which was harmful to United States' interests and policies.

<sup>51</sup> The statute, on its face, provides a remedy for "any seaman," not just any American seaman, as Mr. Justice Black has pointed out in one of his dissents. *Id.* at 388.