

# **BARGE TO BROOKLYN LEADS TO FEDERAL MARITIME LIABILITY, PREEMPTS STATE LAW**

**By**

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Recently the New York State Court of Appeals decided that a power-generating barge moored in the Gowanus Canal constituted a “vessel,” thus permitting a maintenance worker injured aboard the barge to bring an action for compensation under federal maritime law. Now, before you say that interest in that decision would be limited to the admiralty bar only, keep this in mind: a) New York is a state that in major part is surrounded by water and thus highly dependent upon it, to say nothing of internal waterways; and b) because of the significant activity that transpires on those waters, the definition of “vessel” and the liability connected thereto has broad implications for legal practitioners, generalists as well as maritime specialists. Given those wide ramifications, we will examine this new Court of Appeals decision, but first let us say a few words about the underlying law.

Obtaining redress for injury at sea is, of course, a field dominated by two centuries of federal maritime law, with its historical antecedents going back even further than that. For instance, merchant sailors injured on their vessels seek compensation via the long established Jones Act,<sup>1</sup> specifically tailored to serve their needs, while passengers on cruise ships would bring suit in federal court under general maritime law. In addition, federal law provides the Longshore and Harbor Workers' Compensation Act ("LHWCA").<sup>2</sup> Congress specified the titular beneficiaries in the law with the intention to provide a nearly exclusive set of remedies for workers who were injured in employment related to maritime commerce, but fell outside the scope of then-existing law because they were not actually injured while on the high seas.<sup>3</sup> LHWCA operates as a no-fault compensation scheme, and precludes recovery against employers.<sup>4</sup> Nonetheless, an injured employee might be able to recover against a third party.<sup>5</sup> That being said, let us turn to this latest judicial pronouncement.

In Lee v. Astoria Generating Co., L.P.,<sup>6</sup> the defendant was the operator of four barges, each barge housing two electricity generating gas turbines. Moored in the Gowanus Canal, the barges were connected to the local power grid. In addition to being afloat in the Canal, approximately every ten years the barges take turns being disconnected from their moorings, and towed to a drydock for maintenance. Moreover, from time to time one or more of the barges were moved to a new location for purposes of providing electric power at a different site.

In 2000, the defendant hired a Pennsylvania company to perform an overhaul of the turbines while the barges were still tied up in the Gowanus. Lee, the plaintiff, was an employee of the maintenance company. While climbing down an exhaust well to service one of the turbines, he fell approximately eight feet, and sustained a back injury. He was awarded benefits pursuant to LHWCA, but also commenced this state court action against the defendant, alleging violations of New York's Labor Law and common law negligence claims. Importantly, Sections 240(1) and 241(6) of the Labor Law assess strict liability against parties, including third parties, for injuries sustained by workers on the job.<sup>7</sup> In sum, this plaintiff was pursuing independent state law claims against the defendant because it was the owner of the barge upon which he sustained his back injury.

When the defendant argued that Lee's state law action was preempted by LHWCA, the plaintiff countered that the barge was not a "vessel," and he was free to pursue his more traditional land-based remedies. After various lower court proceedings, the Appellate Division, First Department, sided with Lee, declaring the barge is not a vessel. Moreover, even if it had such status, the plaintiff's state laws claims were not preempted by federal maritime law.<sup>8</sup> This appeal followed.

Writing for a nearly unanimous Court of Appeals, Judge Theodore Jones posited the question before the tribunal as whether the barge was a "vessel" for purposes of the federal LHWCA. Declaring it was indeed a vessel, and so Lee's New York state law claims were preempted, the Court reversed the court below. Given that the plaintiff's injury could only be redressed under LHWCA if it was an injury sustained upon

navigable waters, the Court's determination would hinge upon whether the structure upon which Lee was injured was indeed a "vessel," as defined by law.

To be sure, although Congress has never defined "vessel" for purposes of LHWCA, there is a plethora of guidance on the topic from the U.S. Supreme Court. As recently as 2005, the high Court has stated that, for federal law purposes, a "vessel" is any watercraft or man-made contrivance used or capable of being used as a means of transportation upon navigable waters.<sup>9</sup> A construct temporarily stationed in a particular location maintains its status as a vessel, since it is ultimately capable of movement. Nonetheless, a structure that floats is not a "vessel" if it is not practically capable of being used as a means of waterborne transportation. As noted by Court of Appeals, a structure that is permanently affixed to the shore or the ocean floor does not qualify as a "vessel."

Turning to the case at bar, Judge Jones catalogued the particular characteristics of the power barges at the heart of this case. They had in fact been towed across the waters at least once a decade. They could and were in fact moved for maintenance and to be reconnected to the electrical grid at a different location. Practically speaking, the barges could be used as a means of transportation across the water. While stationed for very lengthy periods at the same spot in the Gowanus Canal, they nevertheless were not permanently anchored or moored. The barges were never rendered incapable of movement, and in fact already retained the capacity of motion. Given all this, the Court of Appeals concluded that the barges were in fact "vessels" as defined by maritime law.

The upshot of this ruling was that Lee's remedies were properly cognizable under LHWCA, since they occurred aboard a vessel. But was LHWCA his sole remedy, excluding all other forms of relief? To that question the Court next turned its attention.

By necessity, this remaining question implicated the doctrine of preemption. Properly rooted in the Supremacy Clause of the federal Constitution,<sup>10</sup> the principle entails the preemption of state law either by the express provision of federal statute, via implication found in congressional enactments or via conflicts between federal and state statutes.<sup>11</sup> As to the first, Congress may explicitly state its intent to preempt when it promulgates law, and as to the second, it can achieve preemption by implications in the structure and purpose of what it enacts. Finally, even absent an express congressional command, federal law preempts state edicts if the latter actually conflicts with the former.<sup>12</sup>

Applying that doctrine to Lee, the Court of Appeals found that LHWCA clearly states its remedy shall be exclusive of all other remedies against the vessel, except for such other remedies as made available under the Act. By this language, Judge Jones opined, Congress made clear its intent that actions against a vessel be brought solely within the confines of LHWCA. Once again, the earlier ruling that the barge met the definition of a "vessel" was crucial. By finding that this plaintiff was injured on a construct that qualified as a "vessel," the preemption doctrine was unavoidably triggered. Once in play, preemption confined Lee's relief to the federal LHWCA, and precluded state law based-relief, such as the strict liability claims found under New York Labor

Law § 240(1) and § 241(6). Therefore, for reason of the doctrine of preemption, the plaintiff here was foreclosed from bringing the state claims he wished, and had to be satisfied with the LWHCA claim exclusively.

At the end of the day, it was the decision of the Court of Appeals that Lee sustained his injuries aboard a “vessel,” as defined under law. The situs of his injuries having been so determined, it could only follow that his remedies were likewise delimited to seeking compensation under the federal scheme of LHWCA. Per force, the doctrine of preemption then forbid him from pursuing any other non-federal remedies, in this case, any relief afforded under New York labor or common law was now unavailable. And so New York’s highest court entered this newest landmark into the law books.

As posited at the outset of this article, we noted that this new decision would not be of limited interest only to maritime lawyers, nor should it be. Having analyzed the holding, let us substantiate that assertion a bit more. First, we reiterate the obvious; downstate New York, specifically the island of Manhattan, Staten Island and Long Island, have untold miles of waterfront. We include, without detailed specification, the inland waterways, passages, and bodies of water that similarly qualify for our purposes. “Vessels” of all shapes and sizes ply these navigable waters. Incalculable numbers of individuals and businesses interact with these “vessels” every day. Therefore, to define a man-made construct as a “vessel” has serious implications for what law to apply if that interaction turns into some kind of incident or injury.

This is particularly so with modern trends to utilize “vessels” in commerce. In Lee we confronted electricity producing barges connected to the land-based power grid. But they are not alone. What about “floating” restaurants, museums, and other attractions? And what about “floating casinos”? As point in fact, we already have significant case law (developed from widespread litigation) as to whether admiralty or traditional remedies are applied to cases of injuries sustained aboard such contrivances, based upon the question of are they or are they not “vessels” as defined by law. Lee addresses the very factual questions underlying those determinations, such as: is the “vessel” capable of movement? Was it ever in fact ever moved? Is it permanently moored or connected to land? Can its landlines be severed without difficulty or is it an impossible proposition? All the foregoing goes to the determining the threshold question of whether the contrivance is a “vessel,” and therefore the remedies that follow. As commercial enterprises, for various reasons pushed off expensive landholdings, use the waterfronts and waterways, the question again becomes of increasing import.

Finally, Lee serves the salutary purpose of reaffirming the preemption doctrine.<sup>13</sup> While admittedly not the central issue in this case, the invocation of the principle in this controversy is an important reminder that in the clash of federal versus state law, the federal enactment generally wins. Nonetheless, the review of the basic principles, to wit, explicit preemption, preemption by implication, and preemption to remove conflict, serve as an important lesson. In an increasingly complex tangle of national versus local promulgations, we continue to have reason to call upon the preemption doctrine to clarify

some of the muddle, and define the limits of the causes of action available in any particular case. Lee is a helpful touchstone in that regard.

In conclusion, the New York Court of Appeals in Lee has not only provided a new landmark to properly define a “vessel” for purposes of liability law, it has likewise clarified the borders between federal maritime law and state law, and finally reminds us of the significance of the preemption doctrine in modern usage.

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<sup>1</sup> 46 U.S.C. § 30104, et seq. (recodified 2006).

<sup>2</sup> 33 U.S.C. § 902, et seq.

<sup>3</sup> See Director v. Perini North River Associates, 459 U.S. 297 (1983) (explaining history of LHWCA, in particular its 1972 turn landward broadening the scope of covered maritime workers).

<sup>4</sup> 33 U.S.C. § 905(a).

<sup>5</sup> 33 U.S.C. § 933(a).

<sup>6</sup> 13 N.Y.3d 382, 920 N.E.2d 350 (November 23, 2009).

<sup>7</sup> N.Y. LABOR LAW § 240(1) and § 241(6). See Rooney v. Port Authority of New York and New Jersey, 875 F.Supp. 253 (S.D.N.Y. 1995).

<sup>8</sup> 55 A.D.3d 124, 126 (1<sup>st</sup> Dept. 2008).

<sup>9</sup> See Stewart v. Dutra Construction Co., 543 U.S. 481, 489 (2005), quoting 1 U.S.C. § 3.

<sup>10</sup> See U.S. CONST. Art. IV, cl. 2.

<sup>11</sup> See N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995).

<sup>12</sup> See Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

<sup>13</sup> See Sabino, “Preemption Doctrine Voids N.Y. Air-Passenger Rights Bill,” New York Law Journal p.4, cl.4 (July 25, 2008).