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FRIDAY, MARCH 9, 1951.

[PART 1

COURT OF APPEAL.

Oct. 9, 10, 11, 1950.

SWIFT v. REARDON SMITH LINE,
LTD., AND JOSEPH RANK, LTD.

Before Lord Justice BUCKNILL, Lord
Justice SINGLETON and Lord Justice
BIRKETT.

*Negligence — Safe plant — Faulty derrick
— Defective span wire — Duty of inspection — Alleged negligence of stevedores
— Fatal accident to dock labourer
employed by stevedores (second defendants) engaged in unloading grain
in bulk from first defendants' steamship in dock at Birkenhead
— Dismantling of partition in feeder box — Use of derrick to remove
stiffener — Snapping of span wire when power applied — Collapse of
derrick — Action brought by widow against shipowners and against stevedores — Right of stevedores to indemnity
— Cause of break in span wire — Evidence of recent statutory inspection
and surveying of ship's gear by engineering firm and of condition of span
wire at time of accident — Alleged improper jerking of wire by stevedores' winchman — Liability under Docks
Regulations, 1934 — Regulations 18 (b), 20 (a), 49.*

Held, by CASSELS, J., that the span wire broke owing to its defective condition and not owing to improper jerking by stevedores' winchman; that the span wire was a rope "used in hoisting or lowering" and that there was a breach of statutory duty by shipowners under Regulation 20 (a) in that inspection would have revealed a patent

defect; that shipowners were also liable at common law in that they had failed to take reasonable care to see that the hoisting gear was safe for use; that stevedores were not guilty of common law negligence but that they were technically in breach of Regulation 49— Judgment entered for plaintiff against both defendants, second defendants being held entitled to full indemnity by first defendants.

— Appeal by first defendants — Consideration of evidence as to precautions taken by second defendants before instructing their winchman to heave on stiffener, and as to working of winch.

— Held, by C.A., that second defendants' foreman stevedore was negligent in instructing the winchman to heave on the stiffener before it had been so loosened as to make the operation a safe one, and that as a result the span wire was subjected to an excessive and improper strain; that the snapping of the span wire was in part due to that excessive strain and in part due to its defective condition; and that accordingly first and second defendants were equally to blame— Appeal by first defendants allowed— Second defendants ordered to pay first defendants' and plaintiff's costs of the appeal.

This was an appeal by Reardon Smith Line, Ltd., of Merthyr House, James Street, Cardiff, owners of the steamship *New Westminster City*, against a judgment of Mr. Justice Cassels (83 Ll.L.Rep. 402) awarding £3296 15s. to Mrs. Ivy Doris Swift, of Leasowe Road, Wallasey, Cheshire, in an action brought against them and Messrs. Joseph Rank, Ltd., of Ocean House, Brunswick Street, Liverpool. Mrs. Swift's claim was in respect of the

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Swift v. Reardon Smith Line, Ltd., and Joseph Rank, Ltd.

[C.A.]

death of her husband, Thomas Joseph Swift, who was fatally injured in an accident on Nov. 22, 1948, in the *New Westminster City*, which was discharging a cargo of grain at the quay of Messrs. Joseph Rank, Ltd., at West Float, Birkenhead. Messrs. Rank, Ltd., plaintiff's employers, were engaged in unloading the grain, which was in bulk, and the ship's derrick was being used in the dismantling of a feeder box. The feeder box had a partition across the middle formed by horizontal bars kept rigid by stiffeners composed of hard Jarrah wood $1\frac{1}{4}$ in. in thickness and nailed by $4\frac{1}{2}$ -in. nails to the horizontals. In using the derrick to remove one of the stiffeners a span wire snapped and the derrick collapsed, fatally injuring plaintiff. His Lordship entered judgment for the plaintiff against both defendants, but held that Messrs. Rank, Ltd., second defendants, were entitled to full indemnity by the shipowners, first defendants.

Mr. H. I. Nelson, K.C., and Mr. J. F. Donaldson (instructed by Messrs. Holman, Fenwick & Willan) appeared for Reardon Smith Line, Ltd.; Sir Noel Goldie, K.C., and Mr. J. S. Watson (instructed by Messrs. John A. Behn, Twyford & Reece, of Liverpool) represented the plaintiff: Mr. A. D. Gerrard, K.C., and Mr. D. Brabin (instructed by Messrs. G. F. Lees & Son, of Birkenhead) represented Messrs. Joseph Rank, Ltd.

Mr. NELSON said that there was no appeal as to the amount of the award. Mr. Justice Cassels found that both defendants were to blame because of a breach of statutory duty, but that the real cause of the accident was the negligence of Reardon Smith Line, Ltd. Messrs. Reardon Smith were the owners and managers of the ship, and Swift was employed by Messrs. Joseph Rank, Ltd., as a dock labourer. The cause of the accident was the breaking of a span wire on one of the ship's derricks. The wire held the derrick boom in position and when the wire broke the boom fell and struck Swift on the head. The derrick had been erected by the shipowners for use by the dock labourers.

Lord Justice SINGLETON: Are you asking this Court to say that the Judge was wrong in finding that the rope was defective?

Mr. NELSON: I am asking the Court to say that there was no negligence by the shipowners which caused the accident, and that in fact if the evidence is examined it does not prove that the rope was defective.

Lord Justice BUCKNILL: It was the shipowners' rope and the burden was on them to show that it was a proper rope to lift a weight of three tons.

Mr. NELSON: I do not think that the onus lies on the shipowners unless it could be said that, if a rope breaks, the necessary inference is that it was defective. Negligence by the shipowners must be proved, and I submit that the evidence is overwhelmingly against negligence. I submit that the Judge would have so found if he had applied the right test. It is common ground that, in one sense, there was something wrong with the rope. It was a worn rope, but it is not negligent to use a rope which is part worn. The Judge did not ask himself the vital question: Does the evidence prove that the rope was so worn that it was unsafe for the purpose for which it was supplied? There is the clearest possible evidence that, three months before the accident, the ship's winches and derricks and all their attachments had been taken down, thoroughly overhauled and tested, as required by statute.

COUNSEL (continuing) said that the question was: What was the cause of this accident? His submission was that on the evidence there was only one possible inference, and that was that the accident was caused by an overload being applied through the winch to the head of the derrick boom and that that caused the fracture of the rope.

Lord Justice BUCKNILL said that one of the questions in the case was: Did the second defendants' servants loosen the stiffener of the feeder box sufficiently to make it safe for the derrick to pull it out?

COUNSEL submitted that the evidence as a whole was not sufficient to justify a finding that the method used to remove the stiffener was a proper or safe method. He also submitted that there was wrongful use of the ship's apparatus, and that the winch was misused by the second defendants.

Mr. GERRARD said that the Judge rejected a suggestion that there was a jerk, and found that the steam power of the winch was applied gently. It was accepted that if the power was put on slowly the winch would not be overloaded. The evidence was that the plank was nailed with $4\frac{1}{2}$ -in. nails to nine cross pieces. All those who were present at the time of the accident had said that there was not a jerk, and the evidence of the winch driver was that the winch had only a half-turn of steam. There

was, Counsel submitted, evidence from which the Judge was entitled to draw the inference that the amount of pull put on the derrick before the rope snapped was not an overload. An experienced man driving the winch put on the steam very slowly, and the moment there was tension the rope broke.

Replying to Lord Justice Birkett, COUNSEL said that the system used to remove the stiffener was to prise it off as far as was considered necessary, and then to apply the derrick. The second defendants were working as stevedores within the safe working load of the apparatus with which they were supplied by the shipowners. There was evidence that the rope was defective at the place where it broke. The Judge had found, on very cogent evidence, that there was not an overload. The test of liability, Counsel submitted, was: Did the second defendants take reasonable care in the sense that they refrained from doing that which was likely to cause harm to other people?

Sir NOEL GOLDIE said that the plaintiff was bound to succeed against one or other of the defendants, and he did not propose to address the Court on the question of liability.

Mr. NELSON, replying for the shipowners, said that the ship's gear had been tested about three months prior to the accident, and the evidence was that ropes did not deteriorate rapidly.

Judgment was reserved.

Thursday, Jan. 11, 1951.

JUDGMENT.

Lord Justice BUCKNILL: This is an appeal by the first defendants, Reardon Smith Line, Ltd., from a judgment of Mr. Justice Cassels in favour of the plaintiff against both defendants.

The plaintiff sued as widow and administratrix of T. J. Swift, deceased, who died from injuries received on Nov. 22, 1948, while employed by the second defendants, Messrs. Joseph Rank, Ltd., in discharging a cargo of grain from the first defendants' ship *New Westminster City* at the second defendants' quay, West Float, Birkenhead. The Judge found that both defendants were liable, assessed the total damages at

£3296 15s., and directed that on the third-party proceedings between the two defendants the second defendants were entitled to be indemnified by the first defendants against the damages and costs awarded to the plaintiff and their own costs of defending the action.

The fatal injury to the deceased man was due to the breaking of a span wire, or topping lift wire, which secured the upper end of the derrick boom at No. 4 hatch to the samson post. In consequence, the boom fell down on to the hatch coamings and the derrick block struck the head of the deceased who was working on the port side of what is called a feeder box, which had been erected between the 'tween deck and the shelter deck. This box was made of timber and formed a funnel from the shelter deck to the 'tween deck. At the port of loading it was filled with grain which was able to pass down below the 'tween deck into the deep tank and thereby fill up any empty spaces there and prevent the cargo in the deep tank shifting.

The feeder box was a little larger than the hatch. The hatch was 12 ft. 11 in. fore and aft and 21 ft. athwartship, and the depth between shelter deck and 'tween deck was about 11 ft., according to the evidence of Mr. Harvey, the chief officer of the ship. It does not seem to accord with the length of the plank produced. The height of the hatch coamings was about three feet. The box was made of planks of Australian Jarrah wood and was divided into two sections by a fore and aft partition, also made of planks of Jarrah wood, called shifting boards. The evidence was that there was some eleven planks in this partition, laid horizontally upon one another. The two topmost planks were in the hatch coaming and corresponded with its length fore and aft, and the remaining nine boards were a little longer than the hatch. The partition stood upon a steel platform three feet wide and placed fore and aft in the 'tween deck, on each side of which were apertures through which grain passed easily into the tank from the box; it was mainly kept in position by two stiffeners, that is, planks of Jarrah wood placed vertically against the partition, one on its port side and the other on its starboard side.

The accident to the deceased man occurred during the work of trying to remove the port stiffener. According to the evidence, the practice was sometimes to nail the stiffeners to the shifting boards and

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sometimes to fix them in position by means of shores and wedges. The shifting boards were usually made of soft wood, much softer than Jarrah wood.

The port stiffener in the case was produced in Court. In its present state it is 8 ft. 7 in. long, but about 8 in. has been sawn off its lower end for experimental purposes. It is $8\frac{1}{2}$ in. broad and $1\frac{3}{4}$ in. thick. This stiffener was nailed to each of the shifting boards with two $4\frac{1}{2}$ -in. nails, and one can see 18 nails or nail holes in the plank over a length of about $6\frac{1}{2}$ ft. There is also a nail hole in the section produced of the part sawn off. There are no nail holes in the top 20 in. of the plank, from which I infer that it was not nailed to the top two shifting boards in the hatch coaming. There was no evidence as to the width or thickness of the shifting boards, and the evidence as to the construction of the fore and aft partition seems to me meagre and somewhat unsatisfactory. The way in which it was nailed as regards that part which has been sawn off is also left in doubt.

On the day of the accident, the owners of the ship handed over the derrick and winch to the servants of the second defendants, and these men first used them to remove the athwartship hatch beam of No. 4 hold, which weighed between three quarters of a ton and one ton. Then, in order to get the grain out of the feeder box, an excavator was put in its port section and it started to work. Some of the men also began to remove the centre partition. In order to do this it was first necessary to remove the two stiffeners.

Mr. Kielty, the leader of the men employed on this work, gave evidence which the Judge accepted. He said he had been working in the docks since 1930. He and two or three other men removed the two top shifting boards of the partition by means of a crowbar which he obtained from the second defendants' stores. He then tried to take the stiffeners out. He first tried to prise away the port stiffener but was unable to move it, and he then started to prise away the starboard stiffener. This was not nailed to the shifting boards but was secured in position by shores from the starboard hatch coaming and also by two blocks at its foot on the fore and aft platform on the 'tween deck. Finding a certain amount of play in the starboard stiffener, he then got hold of the chain which was fast to the end of the fall of the derrick, and the winch then lifted it out on the shelter deck without any difficulty. Kielty then

again tried to loosen the port stiffener from the shifting boards. At this time the starboard section of the feeder box was practically full of grain, but a large portion of the port section had been discharged. The evidence was conflicting as to how much grain was there. Kielty said about two feet of grain was left, but one of the ship's witnesses said about five feet. Kielty, who was standing on the grain in the starboard section of the box, said that he tried from his side to insert the crowbar between the port stiffener and the shifting boards. He was asked by the Judge whether he had any difficulty in prising the stiffener off, and he said that he had no undue difficulty. The biggest part of the job was when he was standing in the feeder box and the grain was leaving his feet. He had no gear to get at the board. If he saw a space he put the crowbar in and eased the stiffener a bit, and then he tried the other side and eased it a bit there. Eventually when he got the top of the stiffener eased a bit he tried the lower part until it got beyond his reach. He said that he worked down about three shifting boards in all, attempting to prise the stiffener back. That took them to five or six boards from the bottom of the partition. In the ninth board at the very top the nails were actually clear of the board, but with regard to the other nails "the lower you went they were not drawn out so far."

When Kielty had decided that the time had come to bring the mechanical power of the derrick into action, he got hold of the chain at the end of the fall, fastened it round the top end of the stiffener and told McDonnell* to heave steadily. At this time he said that the head of the derrick was out at an angle of about 30 deg. from the stiffener, so that the pull had an outward tendency from amidships. McDonnell then started the winch. Mr. Miller, Superintendent of the Mechanical Engineering Laboratory of Liverpool University, said that the load on the span wire increases as the lift on the fall is out of the vertical. Very shortly afterwards the derrick boom fell on to the deck because of the breaking of the span rope.

On these facts the plaintiff alleged as against the first defendants that they negligently and in breach of their statutory duty under the Factories Act provided a defective derrick in that the span wire was corroded and unfit for use. They also alleged as against the second defendants a

* The winchman.

breach of their statutory duty under the Factories Act, and also negligence in that they caused the derrick to be loaded beyond the safe working load because they tried to hoist the stiffener when it was nailed to the shifting boards. After a hearing lasting three days the learned Judge came to the conclusion that (1) the span rope was defective; (2) the winch was not loaded beyond its proper working load; (3) both the defendants were guilty of a breach of the Factories Act by reason of the use of the defective span rope.

On appeal the arguments dealt with the following questions: (1) Did the evidence establish that the span rope was defective? (2) Did the first defendants commit a breach of the Factories Act? (3) Did the servants of the second defendants fail to take reasonable care to see that the stiffener was sufficiently loosened from the horizontal planks before starting to heave on it with the winch? (4) If so, did such lack of reasonable care cause or contribute to the accident? (5) Was the winch worked improperly?

The allegation made by the plaintiff in the statement of claim with regard to the rope was that

the topping lift wire was corroded and the hemp core dry and useless so that the wire was not fit for use as a topping lift wire but was liable to and did carry away.

The facts as regards the rope and its condition were shortly as follows. It was a wire rope three inches in circumference, about thirty feet long and of uncertain age. Mr. George Harvey, chief officer of the ship for two years before the accident, gave his evidence on commission, but the Judge apparently regarded him as a reliable witness. At the time when he gave his evidence he was no longer in the employment of the owners of the ship. He said that the ship's derricks and derrick tackle were examined and tested four months before this accident (on July 15, 1948) at Wallsend by the Wallsend Slipway & Engineering Company. The derrick was tested when topped up to about 45 deg. (the same angle at which it stood on the day of the accident) and a load was applied of 3.75 tons. He himself saw the test carried out. The derrick span wires were last oiled between Oct. 12 and 15, 1948, while the ship was bound from Fremantle to Aden. After the test at Wallsend the derrick in question was used to discharge cargo at Alexandria

and then to load slings of Jarrah wood at Fremantle and for lifting off the deep tank lids. Mr. Harvey said that the breaking strain of a new 3-in. wire would be about 25 tons. During the trial of this case each end of the broken wire was tested and showed a breaking strain of 19 tons at one end and 18½ tons at the other. But, as Mr. Harvey pointed out, the wire broke where it was bent round the sheave of the mast-head block of the samson post. That would be the place where the greatest test of the rope's strength would be applied. Also, the same piece of wire is always in the vicinity of the sheave of the block when the derrick is in use.

After the accident he examined the rope. He said that the heart or hemp core of the rope was good, but that the wire strands of which it was composed had broken and been drawn apart to a certain extent. In his opinion the rope was in a serviceable condition. But at the inquest he said that the rope was not in a good condition, the wire was partly rusted, and the rust had got right inside the rope. At his monthly inspection he noticed that some of the wires of the rope were rusted away, and the crew oiled them. He was surprised when he inspected the broken wire to see that it was rusted. He saw slight bruising of the rope where it passed through the shackle when he examined it in July, August and September. He thought that that was done when the derrick was lifted higher than 45 deg. and that that might have caused the strands of the rope to break.

On this evidence, and on the evidence of other witnesses called for the plaintiff who roundly condemned the rope, the Judge said (83 Ll.L.Rep. at p. 405):

I have come to the conclusion that that rope was a defective rope. It was defective because it had had considerable wear, and its weakest place was where it went through the masthead block, and that was where it broke . . . Where I think the shipowners have failed in their duty which they owe to anybody who had to use that gear when the ship got into port was in their failure to discover, by means of adequate and efficient inspection, that that rope had come to the end of its useful days and was not to be relied upon by reason of a weakness which had developed where it goes round the mast-head block.

The learned Judge then dealt with the question whether the accident was not due

to the condition of the rope at all but was really due to the misuse of the derrick gear by the men who were working it. The learned Judge came to the conclusion that there was no jerk on the fall rope which exposed the span rope to an excessive strain, and he accepted the evidence of those working the winch that very little power was exerted on that occasion by the winch.

For reasons which I set out hereafter I do not agree with the opinion of the learned Judge as to the power exerted by the winch on this occasion. That being so, I do not know how far the Judge when coming to his decision that the rope was defective was influenced by the fact that according to his finding it broke when exposed to quite a moderate strain. It seems to me, however, on a careful consideration of the evidence, that this Court ought not to interfere with the findings of fact by the Judge that this rope was defective and that the shipowners were negligent with regard to its condition.

I will now deal with the third question, whether Kielty failed to take reasonable care to see that the stiffener was sufficiently loosened before telling the winchman to heave on it.

Examination of the stiffener does not show any signs of prising with a crowbar of sufficient force to loosen $4\frac{1}{2}$ -in. nails which had been driven through the stiffener and some $2\frac{1}{2}$ inches into planks of Jarrah wood. Macdonald, the foreman of the stevedores, said that the stiffener was prised away from the top two boards to which it was nailed, but there is no indication of nails being driven into the top 20 inches of the stiffener, so that these two boards could be removed without any difficulty when the starboard stiffener had been taken away. It may be that Jarrah wood is so hard that the insertion of a crowbar between two boards and the operation of prising them apart would not leave a mark on both, or it may be that Kielty who was standing on the grain in the starboard partition had not a secure foothold and was unable to do the work efficiently with a crowbar. Moreover, I do not think that a man standing on the grain on the starboard side of the feeder box could work a crowbar effectively so as to insert it laterally between the port stiffener and the partition. It seems to me that all he could do effectively would be to try to push the crowbar vertically down between the stiffener and the boards of the partition.

The learned Judge in his judgment dealt with this aspect of the case in the following way. He said (*sup.*, at p. 404):

There were 11 horizontals altogether: two stretched the distance at the top between the coamings, and the other nine went downwards towards the end of the stiffener, and the top one, the ninth one, came under the overhang of the hold, under the deck. In order to get this out, the stiffener for the first two had been eased from them, and those two horizontals had been lifted out. Then there came more crowbarring on to the ones that were left, and I accept the evidence which has been given which shows that the stiffener had been eased down as far as the fifth or sixth of these horizontals. They could not go much lower because the grain was there, but the effect of easing the stiffener down as far as the fifth horizontal was that the stiffener would then be eased, though perhaps only to a slight extent, but still I think eased even as far as the lower horizontal; and then, following a practice which I accept as being in operation both before this accident and after this accident in the Birkenhead docks, the derrick fall rope with the chain sling at its end was wrapped round the top end of the stiffener. It was done in what I regard as a very workmanlike way, and I accept what Mr. Kielty has said, that he wrapped it round the top and then the rope or the chain was held by him while it was loosely round the top of the stiffener, and held by him while it was gradually raised until it was tight and had a secure hold. The winch was then worked to the extent of an upward lift and a slight side movement, so that the effect of that movement would be to ease and finally drag out the stiffener where it was being held by the nails to the lower horizontals.

With great respect to the learned Judge, I venture to criticize this statement in two respects. First, I do not think that Kielty's evidence went so far as to say that the stiffener was eased to the lower horizontal, by which I understand the learned Judge to mean the bottom shifting board. Where I think Kielty showed a lack of reasonable care was in not going into the port side of the box and looking at the lower nails to see how far they had been drawn backwards and loosened. In the course of the argument it was suggested