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H. P. HENLEY
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LAW REPORTS

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VOL. 77. No. 1] FRIDAY, DECEMBER 3, 1943 [BY SUBSCRIPTION

COURT OF APPEAL.

Wednesday, Sept. 29, 1943.

ASHWORTH v. J. McGUIRK & CO.

Before Lord GREENE (Master of the Rolls), Lord Justice DU PARCQ and Lord Justice GODDARD.

Docks Regulations, 1934—Breach of statutory duty — Signaller — Unloading of ship — Personal injuries sustained by dock labourer while receiving cargo on quay —Struck by sling containing cargo swung from hatchway to quay — Claim against stevedores—"When cargo is being loaded or unloaded by a fall at a hatchway, a signaller shall be employed, and where more than one fall is being worked at a hatchway, a separate signaller shall be employed to attend to each fall"— Duty of stevedores—Whether satisfied by employment of signaller—Alleged absence of signaller at time of accident—Onus of proof of breach—Regulation 43.

————Held, by C.A., reversing decision of Presiding Judge of Liverpool Court of Passage, that it was not a sufficient compliance with Regulation 43 that a signaller had been engaged, but that there was a continuing obligation on the stevedores to see that the signaller was actually present during the process of loading or unloading; that there was proof that no signaller was present at the time; and that therefore the stevedores were guilty of breach of statutory duty—Appeal by dock labourer allowed—Judgment for dock labourer for £400.

This was an appeal by Mr. Samuel Richard Ashworth, a dock labourer, of Arnold Street, Princes Park, Liverpool, from the dismissal by Sir W. F. K. Taylor, K.C., the Presiding Judge of the Liverpool Court of Passage, of his action for damages for personal injuries against Messrs. J. McGuirk & Co., master stevedores, of Rumford Place, Liverpool.

The action was founded on an alleged breach of Regulation 43 of the Docks Regulations, 1934, by which the duty was imposed, when cargo was being loaded or unloaded by a fall at a hatchway, that a signaller should be employed. According to the facts found by the learned Judge, on Nov. 30, 1941, the plaintiff was engaged in the work of unloading sacks of rice from the motor vessel *Danmark* by receiving them from a sling on to a stool or platform on the quay in Queen's Dock, Liverpool. While he was handing a sack to a truckman and had his back to the ship, Ashworth was struck on his back by a sling which had been lifted from the deck and hatchway of the ship and lowered on to the stool or platform on which the plaintiff was. Ashworth received serious injuries.'

In the course of his judgment, the Judge said that it was agreed by witnesses on both sides that no fresh sling should be conveyed from the ship and lowered on to the stool until the stool was cleared of the sacks from the preceding sling. That was necessary for the safety of the workman on the stool, whose attention was engaged in taking the sacks from the sling and disposing of them for trucking, and could not therefore be on the look-out for on-coming slings from the ship. It seemed essential that there should be some person on board the ship to watch the stool and to see that it was clear of sacks before a fresh sling was lowered on to it. His Lordship understood that Regulation 43 was made for that purpose and as a result of an agreement between masters and the men and their union, and it was clear from the evidence of both sides that there should be a man, termed by the witnesses "a railman," whose duty was to attach the sling to the hook on the chain from the crane, to watch that the stool was clear and then to signal to the craneman to hoist the sling, swing it over and lower on to the stool. His Lordship found that such a signal was necessary because the craneman could not see the condition of things on the stool. The question was whether during the process when the cargo was being unloaded by a fall at a hatchway a signaller was employed by the defendants.

The plaintiff had stated that a man remained at the rail until 1 30 p.m., and was then away

for three-quarters of an hour. He made a protest and shouted to the deck and people there, but got no reply. O'Brien, foreman of the shore gang, called by the defendants, said that the railman was at the rail on his job at the time of the accident and that he spoke to the railman just before the sling came over.

His Lordship continued: "I am not satisfied that the railman or a deputy was present when the sling in question came over, but on consideration of the evidence I find that the defendants did on this day and for the purposes of the process employ a man or men whose duty was to signal to the craneman to hoist the sling, and I am not prepared to hold that the defendants committed a breach of Regulation 43. I am also satisfied that before any work began the ship and shore gang were complete in number. No contention was raised by Counsel for the plaintiff as to whether the railman, who had work to do in connection with the sacks as well as to watch and to signal, could properly be regarded as a signaller within the meaning of the regulation. I think, therefore, the defendants succeed."

Judgment was accordingly entered for the defendants, with costs; and the plaintiff appealed.

Mr. Edward Wooll, K.C., and Mr. A. D. Pappworth (instructed by Messrs. J. H. Milner & Son, agents for Messrs. Silverman & Livermore, of Liverpool) appeared for the appellant; Mr. H. I. Nelson (instructed by Messrs. Smiles & Co., agents for Messrs. H. G. C. Day & Co., of Liverpool) represented the respondents.

Mr. Wooll submitted that there was a breach of the regulation. The obligation was to employ a railman continuously. In this case there was no such employee on the job at the time of the accident.

Mr. Nelson denied that there was any breach of the regulation, and submitted that the Judge's findings on the evidence were correct. There was a complete gang at work at the time, and if one member was temporarily away that did not amount to a breach of the regulation. He contended that it would be going to extremes to make the employers liable if a signaller forgot to, or did not, signal every individual sack that went over the side.

JUDGMENT.

Lord GREENE, M.R.: By Regulation 43 of the Docks Regulations, 1934 (S.R. & O., 1934, No. 279), it is provided that

> When cargo is being loaded or unloaded by a fall at a hatchway, a signaller shall be employed, and where more than one fall is being worked at a hatchway, a separate signaller shall be employed to attend to each fall.

In the present case the learned Presiding Judge found that the defendants did on the day in question and for the purposes of the process, which was an unloading process as described in the regulation, employ a man or men whose duty was to signal to the craneman to hoist the sling. He also found that before any work began the ship and shore gangs were complete in number. By that I understand him to mean that not merely had the defendants employed a man to perform this duty, but that the man was actually present at the job with the rest of the gang before the work began. Those findings of fact are not in any way criticised, nor indeed could they be; but the learned Presiding Judge, basing himself on those findings, held that on the facts as so found no breach of the Regulation had been committed. He construed the regulation as meaning that the duty imposed by it would be discharged, provided a man was under a contract of employment to do the work indicated in the regulation, whether or not at any given moment he was present on the job. In the present case there was a further issue of fact, about which I shall say a word in a moment, as to whether or not the man who was employed as a signaller was or was not present at the time of the accident.

Now, the learned Presiding Judge's construction of the regulation appears to me, with great respect, to be much too narrow. I do not read the words "shall be employed" as meaning merely that the duty of the employer is discharged as soon as he has engaged a man to do that work. I read those words as meaning that the signaller is to be actually at work on that particular job specified in the regulation at the time when the act of loading or unloading is taking place. Nice questions were raised in argument as to what the position might be if a signaller was present and gave the wrong signal through carelessness or inattention or committed some act of that kind. Any case of that character can be dealt with when it arises. We are not here concerned with the case of a man who was actually engaged in that work but was doing it inefficiently; we are dealing with the case of a man who, on one view of the facts, was not there at all, but had absented himself from the post of duty at the relevant time.

In my opinion, the obligation which is imposed upon the employer by this regulation cannot be satisfied unless for each act of loading there is present on the job a signaller, which means, of course, a duly qualified signaller and a properly instructed signaller. The conception of a continuous and absolute obligation on employers under safety regulations enacted under statute is very common and familiar. It is familiar in the case of the fencing of machinery, and where a precaution which the statute requires to be taken is one involving a human as distinct from a mechanical factor, I cannot myself see why a narrow construction should be put upon the regulation so as to absolve the employer from all liability provided he has contracted with somebody to

do the work. It seems to me to be very much more consonant with the purpose of regulations of this kind that the duty imposed upon the employer should not merely be to enter into a contract with a man to do the work, but that he should be under the duty of keeping that man there doing that work, and that if the man is not there the obligation is not performed. It seems to me, therefore, that the words " shall be employed " in this regulation must not be regarded as being satisfied by the mere existence of a contract of employment, but that the word " employed " is used there rather in the sense of the man being actually engaged in the operation than being employed contractually to carry it out. That, in my opinion, is the true construction of this regulation, and accordingly I must respectfully disagree with the view which the learned Presiding Judge took.

But another point is raised, and it is this. It is said, with truth, that, the plaintiff's case being based on breach of statutory duty, it was for the plaintiff to establish affirmatively that a breach of the regulation had been committed, and, therefore, that it was for him to satisfy the trial Judge that a signaller was not engaged in the function of signalling at the time of the accident. The learned Presiding Judge said this in his judgment: " I am not satisfied that the railman or a deputy was present when the sling in question came over." I may say that the railman was the person whose duty it was to act as signaller, and no question was raised as to that practice. He then goes on: " but on the consideration of the evidence I find," and then follows the passage I have already quoted. It is said that what the learned Judge meant was something of this kind: " It is not necessary for me to decide one way or the other whether the railman or a deputy was present; I am not satisfied that he was and I am not satisfied that he was not; it is not necessary for me to decide that because on the construction of the regulation which I favour, and on the fact that I find that a railman was under contract to perform the work, the liability of the defendants is not established." That, in effect, it is said was what the learned Judge meant.

In my view, the learned Judge's mind was working in a different way. I do not think that he was thinking when he used these words of the question of burden of proof, and I cannot bring myself to think that in using the phraseology that he did he was in some sort of error as to the side on which the burden of proof of breach of statutory duty lay. I read these words, when he says he is not satisfied that the railman or a deputy was present, as meaning that the presence of the railman or a deputy had not been proved, and in the context it is equivalent to saying that on the evidence it is not established that a railman was present. That being so, it seems to me that what the learned Judge really meant was this: there was no railman present so far as the evidence assists me, but that does not matter because a railman was in fact under contract to do the work, and his absence at the moment is therefore immaterial on the true construction of the regulation. That seems to me to be the true view as to what the learned Judge meant, and I am confirmed in forming that opinion when I look at the evidence, which is really, as it seems to me, all one way. It is true that a foreman gave some evidence, which does not strike one as being very satisfactory, as to the presence of the railman at the crucial moment, but certainly the weight of the evidence and the probabilities are strongly in favour of the plaintiff's case. If the railman was present he must have entirely failed in his duty to give a signal or the craneman must have committed a breach of duty in disregarding the signal if it were given, and the probabilities are that the reason why the plaintiff was hit was that there was no railman there. That seems to me the probability. Therefore, the view that I take as to what the learned Judge means is one which I must confess seems to me to be completely in accordance with the weight of the evidence which was before him. That being so, the position is that the regulation was not complied with, and that really disposes of the whole point in the case except the question of damages.

In my opinion, the appeal on the question of liability ought to be allowed.

Lord Justice GODDARD: I agree. I think obviously on the evidence the learned Judge must have intended to find that there was no signaller present at the time of the accident and that, therefore, at that time, the work of unloading was being carried on in the absence of a signaller. That being so, it seems to me that Regulation 43 must be construed as a protection for the plaintiff. If we gave the construction to it which I think the learned Judge gave, it really would afford no protection at all. I agree with my Lord that it is not necessary to decide here and now what would have happened if a signaller had been appointed and he had negligently given a wrong signal or had negligently omitted to give the signal that he ought to have done when he was there present for the purpose of giving the signal. That is not what arises in this case. In this case work was allowed to continue when no signaller was present. Therefore, I think, giving a reasonable construction to this regulation which would afford a protection to the workman, we ought to hold that there was a breach of the regulation for which the employers were responsible.

Lord Justice DU PARCQ: I agree with what has been said by my Lord and my brother Goddard, and I am sure it will not be thought that I am in any way disrespectful to the learned Judge if I add no words of my own to what they have said.

The plaintiff's appeal was accordingly allowed and £400 damages awarded.

ADMIRALTY DIVISION.

Monday, Oct. 18, 1943.

THE "SEDULITY."

Before Mr. Justice BUCKNILL, sitting with Captain A. H. RYLEY and Captain W. R. CHAPLIN, Elder Brethren of Trinity House.

Salvage—War—Air attack—Services rendered by motor vessel Charles M. to motor vessel Sedulity in North Sea—Sedulity attacked by enemy aircraft—Engines and steering gear deranged—Charles M. lashed alongside after unsuccessful attempts at towage by hawser—Damage to Charles M. during towage—Protection given by balloon and guns of Charles M.—Towage across sands to less dangerous position—Additional risk to Charles M. from enemy action while encumbered by tow—Right of naval gunner to participate in award—Salved values: £40,970—Award: £2800 (including £1500 damage to Charles M.)—Tender of £3000—Defendants awarded costs after date of tender.

This was an action in which the owners, master and crew of the motor vessel *Charles M.*, of London, claimed salvage remuneration from the owners of the motor vessel *Sedulity*, her cargo and freight, for services rendered to that vessel in and after an attack by an enemy aircraft in the North Sea on Feb. 1 and 2, 1942. Defendants admitted that salvage services were rendered, but they disputed the claimants' estimate of the danger and their valuations.

Mr. Owen L. Bateson (instructed by Messrs. J. A. & H. E. Farnfield) appeared for the plaintiffs; Mr. Waldo Porges (instructed by Messrs. Holman, Fenwick & Willan) represented the defendants.

The *Charles M.* is a steel screw motor vessel of 403 tons gross, 141.5 ft. in length and 27.4 ft. in beam, fitted with motor engines of 300 b.h.p. and manned by a crew of eight hands all told, including one naval gunner. At the time of the services she was on a voyage from Blyth to Norwich, laden with a cargo of 545 tons of coal. Her value at the time of the services was £21,250; that of her cargo was £1,021 14s. 7d.; and that of her freight was £517 4s. 7d., making a total of £22,789.

The *Sedulity* is a steel screw motor vessel of 490 tons gross and 249 tons net register, 164 ft. in length and 27 ft. in beam, fitted with motor engines of 90 b.h.p. At the time of the services she was in the North Sea on a voyage from Great Yarmouth to Goole, laden with a cargo of 575 tons of sugar and manned by a crew of ten hands all told including two naval ratings. Her value at the time of the services was £17,550; that of her cargo was £22,938; and that of her freight was £482, making a total of £40,970.

According to the plaintiffs' case, shortly before 3.30 p.m. on Feb. 1, 1942, the *Charles M.*, while in the North Sea, sighted the *Sedulity* distant about a quarter of a mile and bearing right ahead. The wind at the time was south-easterly, a gentle breeze, there was slight snow and the tide was slack water. Very shortly afterwards an enemy aeroplane coming from the south and flying very low crossed ahead of the *Charles M.* and attacked the *Sedulity* with cannon fire and bombs. The *Charles M.*, which was flying a balloon, immediately closed with the *Sedulity* to help her against the attack and the raider made off. The *Sedulity*, however, received a direct hit as a result of which her engines were stopped and her steering gear was put out of action. Also one of the crew had been seriously injured. The master of the *Charles M.* thereupon offered his assistance and the master of the *Sedulity* ultimately agreed to accept the services of the *Charles M.* to tow the *Sedulity* to Wells Bar Buoy and anchor there for the night and then tow her back into Great Yarmouth. Accordingly, 120 fathoms of 2½-in. wire were put out on the *Charles M.* and 90 fathoms of 6-in. bass rope were bent on to it. The towing hawser was then made fast on the *Sedulity* and at about 3.45 p.m. the *Charles M.* began to tow the *Sedulity* astern, heading S. mag. The *Sedulity*, however, being unable to steer, sheered about so much that the rope parted. It was then decided to tow with a bridle; a rope from the *Sedulity* was made fast from the starboard quarter and the wire with a rope from the port quarter; but owing to the head wind which was increasing and the sea which was then running the ropes parted again and another 4-in. manilla rope and a mooring wire from the *Charles M.* were again made fast and towing was re-commenced. However, all the tow ropes parted once more and, as the engines of the *Sedulity* could not be worked, at about 5 p.m. the *Charles M.*, making fast with her remaining ropes and wires, lashed up with her starboard side alongside the port side of the *Sedulity* and towed the *Sedulity* to a position a little north of the Wells Bar Buoy. At about 7 p.m. the *Sedulity* finally anchored in about seven fathoms of water. The *Charles M.* then cast off and anchored in the vicinity and in such a position that with the help of the wind the balloon which she carried also protected the *Sedulity*. Subsequently the *Charles M.* tried to get into communication with the shore at Wells by means of morse lamps and rockets, but without success.

At about 6.30 a.m. on Feb. 2, the *Charles M.* again proceeded alongside the *Sedulity*. The weather was deteriorating and the sea was rough. The *Sedulity* had made temporary repairs to her steering gear but her engines were still out of action. The best remaining ropes of the *Charles M.* were then knotted up and the *Charles M.* took the *Sedulity* in tow.

Both vessels proceeded and at about 8 45 a.m., when the vessels were about two miles W.N.W. of Cromer, the *Sedulity* reported that her engines were working. The *Charles M.* then cast off. The two vessels thereafter proceeded in company to Cromer, where in answer to signals sent from the *Charles M.* by international code and rockets a lifeboat came out and took off the wounded man. The *Charles M.* and the *Sedulity* thereafter went on together and arrived off Yarmouth Pier at about 3 p.m. As the *Sedulity* was, however, unable to enter alone, the *Charles M.* left her, proceeded into the harbour and reported to the naval control. Naval tugs were accordingly sent out to fetch the *Sedulity* in, and at about 4 p.m. the *Charles M.* moored at Yarmouth Quay and her services terminated.

Plaintiffs alleged that by reason of their services the *Sedulity* was saved from a position of considerable danger and was placed in safety. The gunfire from the *Charles M.* and her balloon assisted in driving off the enemy aeroplane before more serious damage was done and afforded some protection to the *Sedulity* thereafter. But for these services, which were promptly and skilfully rendered, the *Sedulity* would have drifted helplessly and would have been in great danger from enemy action. She could not work her engines, her steering gear was out of order and she was quite helpless. Further, if the weather had deteriorated she would have run serious risk of sustaining serious damage and becoming a total loss with her cargo.

In rendering these services plaintiffs said that the *Charles M.*, her master and crew, were exposed to some danger. During towage the vessels bumped heavily and the *Charles M.* sustained damage to her starboard side. Most of the ropes and wires of the *Charles M.* were broken and/or lost and have had to be replaced. During the whole of the services the master and the crew of the *Charles M.* were never below. The *Charles M.* and her crew were constantly exposed to risk of attack by the enemy.

According to the defendants' case, when the *Charles M.* came up she was requested to tow the *Sedulity* towards Wells with a view to landing an injured seaman. This object could not be achieved, however, until the *Sedulity* arrived off Cromer. The defendants did not admit that the sea at any material time became rough, although there was at times some swell. On all occasions when the hawsers parted connection was re-established without difficulty. The defendants denied that the *Sedulity* or her cargo were at any time in danger of being totally lost. If the services of the *Charles M.* had not been available the *Sedulity* could have let go her anchor or anchors and after executing repairs to her engines and steering gear could have proceeded to Great Yarmouth without assistance. When the *Charles M.* came up, the enemy aircraft had released five bombs and had made off. The defendants did not admit that the *Charles M.* was in any way instrumental in driving off the aircraft. While the vessels were in company the *Charles M.* had the additional protection of the *Sedulity's* four anti-aircraft guns. Defendants did not admit that the *Charles M.* or her master or crew were subjected to any danger by reason of the services.

During the course of the argument, Mr. PORGES contended that the naval gunner was not entitled to salvage.

Mr. Justice BUCKNILL: What did the Merchant Shipping (Salvage) Act, 1940, say of the new right of His Majesty's ships to salvage?

Mr. PORGES answered that since the Act His Majesty's ships could claim salvage, whereas, before the Act, the right was limited to King's tugs equipped for salvage purposes.

Mr. Justice BUCKNILL: Can a naval officer in charge of one of His Majesty's ships claim salvage for protecting a British merchant ship from enemy attack?

Mr. PORGES answered that naval officers could not claim salvage without the permission of the Admiralty. The new Act had not altered that.

Mr. Justice BUCKNILL: If this had been a destroyer the crew would not be given salvage for beating off the aeroplane.

Mr. PORGES said he supposed they would not be given permission to claim.

Mr. Justice BUCKNILL: It seems to me a little surprising that any claim for salvage can be made for beating off an attack in time of war.

Mr. PORGES: It can hardly be said, of a public servant, that it would fall outside his duty.

Mr. Justice BUCKNILL: In the case of a civilian the case would be different.

Mr. PORGES: If he were a fire-watcher or fire-fighter it would be his duty to put out an incendiary bomb even on board a ship and he would not be entitled to claim salvage for it.

Mr. Justice BUCKNILL: If the captain of the *Charles M.* had not rendered salvage but had gone off and taken his balloon with him, it could not be said that he had failed to perform any legal duty. "England expects every man to do his duty," the Judge added, "but it is a question here whether it is a duty. There would be no infringement of duty in taking the *Charles M.* out of range. If, on the other hand, the master takes his ship near to the aeroplane to get a decent shot he is entitled to salvage, but not the man (Mr. Porges says) who fires the shot. I think the proper course will be for me to make an apportionment to the crew and leave it to them to fight it out among themselves. I