

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE No. 545 675
Issued to: Gene D. PAYNE

DECISION OF THE VICE COMMANDANT ON APPEAL
UNITED STATE COAST GUARD

2325

Gene D. PAYNE

This appeal has been taken in accordance with Title 46 U.S.C. 239(g) and 46 CFR 5.30-1.

By order dated 14 July 1982, an Administrative Law Judge of the United States Coast Guard at Norfolk, Virginia, admonished Appellant upon finding him guilty of negligence. The specification found proved alleges that, while serving as Operator on board the M/V ISABEL A. McCALLISTER, under authority of the captioned license on 1 February 1982, Appellant did, at or near the City of Portsmouth in the Commonwealth of Virginia on the Elizabeth River, negligently fail to safely navigate said vessel in such a manner as to preclude it from alliding with the Elizabeth River Portsmouth Marine Terminal Bouy NR4 (LLP 332).

The hearing was held at Norfolk, Virginia on 22 April and 14 July 1982.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence the testimony

of four witnesses and eleven documents (a chart, a drawing and nine photographs).

In defense, Appellant offered in evidence three documents and the testimony of two witnesses.

At the end of the hearing, the Administrative Law Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order admonishing Appellant.

The entire decision was served on 19 July 1982. Appeal was timely filed on 12 August 1982 and perfected on 6 December 1982.

FINDINGS OF FACT

On 1 February 1982, Appellant was serving as operator of the Tug ISABEL A. McALLISTER, O.N. 294920 and acting under the authority of his license while the vessel was on the Elizabeth River at or near Portsmouth, Virginia.

ISABEL A. McALLISTER (hereafter ISABEL) is a steel-hulled, diesel-powered tug with single screw and is equipped with a kort nozzle. Her smoke stack is located directly behind the wheelhouse and blocks any view from the wheelhouse of an object directly astern and low in the water. On the evening of U February 1982, the crew aboard ISABEL included James E. W. Pritchard, operator; Gene D. Payne, Mate; Bernnon Cedric Davidson, Engineer; and Frederick M. Borentz, deckhand. ISABEL was assigned to work with the Tug FRANCES K. McALLISTER (hereafter FRANCES) to assist in undocking the M/V COLUMBUS CANTERBURY from the Portsmouth Marine Terminal, at Berth #3 in Portsmouth, Virginia. The Portsmouth Marine Terminal is a public pier and terminal located on the western shore of the Elizabeth River in the vicinity of Norfolk Reach. The docks are reached by passing through a bottleneck channel, 300 feet across into a basin. The channel and basin are marked by two unlighted, black can buoys, #3 and #5, on the southeastern perimeter and three unlighted red nun buoys #2, #4, #6 on the northwestern perimeter. Captain Pritchard is a qualified docking pilot and a member of the Association of Tidewater Pilots. Prior to the unlocking of COLUMBUS CANTEBURY, ISABEL and FRANCES had been lying at Lambert's Point docks, Pier P in Norfolk on the

Elizabeth River for crew change. On the evening of 1 February 1982, at about 1830, Mr. Pritchard was assigned to COLUMBUS CANTERBURY to act as docking pilot during her undocking maneuver from berth #3 into the stream. Upon receiving instructions to undock COLUMBUS CANTERBURY, Captain Pritchard took ISABEL to the Portsmouth Marine Terminal, entering the docking basin on the range. As the tug proceeded to the channel he and Appellant discussed the location of buoy NR4 since the Appellant was assigned as Operator of the tug during the undocking maneuver. Buoy #4 is an unlighted red nun buoy. It is located in 24 feet of water and is anchored by cement sinker connected to a 50 foot length of chain. The buoy itself is ten feet tall but five feet and three inches of its height is submerged. The undocking evolution began at about 1850 with Captain Pritchard aboard COLUMBUS CANTERBURY as docking pilot and Appellant in control of ISABEL. It was necessary to bring the ship out of the basin stern first into the Port Norfolk Reach. Captain Pritchard deployed FRANCES to COLUMBUS CANTERBURY's bow ordering Captain Lupton to make up to the bull nose of the ship. He deployed ISABEL to the starboard quarter and ordered Appellant to make up with his bow to the ship's stern, and used the ship's bow thruster and ISABEL and FRANCES to spring COLUMBUS CANTERBURY away from the dock. He then used the ship's engine to back out of the basin and asked Appellant to pick out the buoys, first #6 and then #4 and light them with his search light. ISABEL lay along side, engine idling, pulled by COLUMBUS CANTERBURY. As COLUMBUS CANTERBURY entered the bottleneck stern first, Captain Pritchard determined that the ship was lying across the range. He walked to the port wing of the bridge to check buoy #3 and found that he was approaching it closer on his port quarter than he desired. He knew that he would have to use both tugs to swing to straighten up in the channel and avoid overrunning buoy #3 or grounding stern first near there. Appellant radioed Captain Pritchard that buoy #4 was passing down ISABEL's port side, close aboard at a distance of 10 -15 feet and requested permission to stop his engines until the buoy cleared. Captain Pritchard agreed and Appellant stopped his engines. Shortly thereafter Captain Pritchard inquired of Appellant whether he was clear of the buoy and indicated that from his vantage point on COLUMBUS CANTERBURY he appeared to be clear. Appellant could not see the buoy from the wheelhouse at that time, since it lay a short distance directly astern of the tug. The deckhand was in the wheelhouse and his view was also blocked by the stack. Appellant replied that he was clear of the buoy and upon order started to back down. Within 10 seconds

Appellant heard and felt a vibration in his wheel. He immediately stopped his engine, restarted for an instant in an effort to clear the wheel and stopped again. He realized that the buoy was probably caught in the wheel and notified Captain Prichard. Later examination showed that the buoy and chain had been sucked into the Kork nozzle by the propeller. Buoy #4 was substantially destroyed and is a total loss.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that when carrying out the pilot's order to back, Appellant acted reasonably in relying on the pilot's advice that the buoy was clear and that under the circumstances Appellant's execution of the pilot's order should be excused as an error in judgement.

APPEARANCE: Seawell, Dalton, Hughes, and Timms, Norfolk, Virginia, by Philip N. Davey, Esq.

OPINION

I

Appellant's contention that he acted reasonably in relying on the pilot's advice that he could back down because the buoy was clear is without merit, as is his contention that his execution of the pilot's order should be excused as an error in judgement. Negligence is defined at 46 CFR 5.05-20(a)(2) as "the commission of an act which a reasonably prudent person of the same station under the same circumstances would not commit or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances would not fail to perform." When the allusion of a moving vessel with a fixed or moored object occurs, there arises a presumption adverse to the person in command of the vessel that the act amounted to negligence. As I said in Decision on [Appeal No. 2288 \(GAYNEAUX\)](#) "...the rationale for such a presumption has been well developed by several commentators and its applicability to R.S. 4450 hearings well established..." See Decisions on Appeal Nos. [2284 \(BRAHN\)](#), [2199 \(WOOD\)](#), [2173 \(PIERCE\)](#). The operator of a tug such as the ISABEL is required

by Cast Guard regulations, 46 CFR 157.30-45, to be in control of the vessel at all times and is thus responsible for its maneuver. There is no question based on the facts that the allusion between ISABEL and Buoy NR4 occurred on the date and at the place described. In view of the fact that the buoy was a moored aid to navigation, the presumption of negligence with respect to allisons applies here. Beyond the establishment of the presumption, however, the evidence also reveals that Appellant's actions exhibited a failure to exercise due care in maneuvering his tug under these circumstances. The undocking maneuvers with COLUMBUS CANTERBURY had commenced and Appellant had recognized that he was approaching the buoy. He radioed Captain Prichard and advised him that he wished to stop his engines to clear it. The docking pilot agreed and accordingly the Appellant stopped his screw. As the buoy passed the tug approximately 10 feet astern, the docking pilot positioned on starboard side at the stern of the large vessel indicated that the buoy looked clear and asked Appellant if he thought it was safe to back down. Both Appellant and the deckhand, who also served as a lookout, were in the wheelhouse and their view was obstructed by the stack. Although both had seen the buoy previously and it appeared to have passed clear, neither one could see it at the moment. Appellant neither sent the deckhand nor personally checked the exact location of the buoy but replied that he was clear and, upon order from the docking pilot, backed down. Appellant's failure to check the exact location of the buoy was negligence. His failure to use the deckhand to check his position also contributed to the mishap. Appellant contends that it is the docking pilot and not himself who caused the mishap and that as tug operator he was only acting as agent of the pilot and thereby under strict obligation to follow his orders carefully. He continues that he was following the orders of the pilot who had previously indicated that it was safe to back down. This argument is simply not supported by the facts on record here nor by the applicable law. The operators called as expert witnesses by the Investigating Officer unanimously agreed that the operator has a duty to warn the pilot of any danger to the tug and that the operator alone is responsible for the safe navigation of his vessel. The record shows that Appellant indicated that he was clear of the buoy and thought he could back down. He made that decision without information on the exact location of the buoy which he, as operator of the vessel was charged with knowing or finding out. He could have utilized his deckhand to obtain the data but failed to do so. The Facts also establish that, rather than demanding blind

obedience, the docking pilot asked Appellant whether he could safely maneuver. Appellant was not ordered to back down according to his testimony until after he himself told the docking pilot that the maneuver could be accomplished safely. It was Appellant's negligence in failing to perceive the danger involved rather than the order of the pilot which resulted in the mishap. Appellant assumed the buoy was clear, failed to send the deckhand astern to check its exact position, and began to back down at a point too close to the buoy. This action resulted in the allusion and is attributable to him as operator of the tug.

II

The argument that the negligence should be excused as an error in judgement is also without merit. Although it is true that mere error of judgement is not negligence, error of judgement is distinguishable from negligence. On an occasion when an individual is placed in a position, not of his own making, where he must choose between two apparently reasonable alternatives, and the individual responds in a reasonable fashion using prudent judgement in choosing an alternative that hindsight shows was a poor choice under the circumstances, he is not negligent. But hindsight is not the measure of compliance. See Decisions on Appeal [2116](#) (SORENSEN), and [2173](#) (PIERCE). Even if hindsight were a measure of compliance, I would still find no merit to Appellant's argument. Appellant was placed in a position of his own making when he chose to back down without knowing the exact location of a buoy which he did know to be close aboard. He chose an unreasonable course of action and his plea for exoneration because of an error in judgement cannot be allowed.

CONCLUSION

Appellant did not act reasonably in the circumstances presented and his action cannot be excused as an error in judgement. The decision of the Administrative Law Judge is supported by substantial evidence and probative nature.

The order of the Administrative Law Judge dated at Norfolk, Virginia, on 14 July 1982 is AFFIRMED.

B. L. STABILE
Vice Admiral U.S. Coast Guard
VICE COMMANDANT

Signed at Washington, D.C., this 29th day of September 1983.

***** END OF DECISION NO. 2325 *****

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