

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 112522
AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: Robert N. FISH

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2043

Robert N. FISH

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 23 October 1974, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts, suspended Appellant's license for two months on twenty four months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as operator on board M/V GOODTIME under authority of the license above captioned, on or about 4 August 1974, Appellant negligently operated the vessel so as to endanger an eighteen foot glastron boat, owned and operated by Ray E. PARKER, while in the vicinity of Swett Point on the Sasanoa River, in that he passed in a meeting situation at such a speed as to cause an excessive wake.

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 three witnesses.

In defense, Appellant offered in evidence his own testimony.

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 entered an order suspending all documents issued to Appellant for a period of two months on twenty four months' probation.

The entire decision was served on 24 October 1974. Appeal was timely filed on 13 November 1974 and perfected on 24 March 1975.

FINDINGS OF FACT

On 4 August 1974, Appellant was serving as operator of M/V GOODTIME and acting under authority of his license.

M/V GOODTIME is a 57 foot passenger-carrying "sightseeing" or "local-cruising" vessel of 29 tons, drawing 5.5 feet when loaded, usually operating out of Boothbay Harbor, Maine. On 4 August 1974, the vessel was so engaged and Appellant was the licensed operator required aboard the vessel. On that afternoon, after ascending the Kennebec River to Bath, the vessel turned into the Sasanoa River, heading southeast toward Hockomock Bay. An unlicensed operator was handling the vessel and Appellant was on the foredeck among passengers. The vessel was proceeding at a constant speed and necessarily was carrying a wake wash. At a point about two hundred yards above Buoy "2," and about three hundred yards below Spindle "21" off Swett Point, unknown to Appellant or the man at the wheel, GOODTIME was met and passed by an upbound 18 foot open glastron boat which was moving at 20 or more knots.

The operator of this boat seeing the wash of GOODTIME ahead of him, throttled his motor to idle, the boat plunged into the wake and water came over the windshield, and into the cockpit, drenching the two persons aboard. The boat was then turned and speed was resumed. It quickly caught up with GOODTIME and the owner remonstrated with Appellant, after which he turned again and once more crossed GOODTIME's wake without incident.

No casualty was sustained as a result of this meeting.

BASES OF APPEAL

This appeal has been taken from the order impose by the Examiner. It is contended that:

- (1) The failure of production of a certain letter and furnishing it to Appellant at or prior to the hearing was prejudicial error;
- (2) the finding that Appellant was personally negligent in the operation of the vessel is erroneous as a matter of law;
- (3) a violation of procedural regulations invalidated the hearing and requires reversal.

APPEARANCE: Thompson, Williard and McNaboe, Portland, Me., by
U. Charles Rimmel, II, Esq.

OPINION

I

To dispose of Appellant's second point first, it may be acknowledged that the Administrative Law Judge's conclusion that Appellant was personally responsible for the operation of the vessel does not square with another conclusion he reached, but it is not erroneous as a matter of law such as, for this reason alone, to require reversal.

Appellant had originally been charged with a second specification alleging a failure to exercise proper supervision over the unlicensed person who was actually and proximately directly and controlling the vessel at the time of the occurrence in question. The cardinal fact here is undisputed. Appellant was not at the wheel of GOODTIME but was on the forward deck among passengers. The theory of personal responsibility for the operation of the vessel is one of vicarious liability, akin to the modern concept of charging certain accessories and abettors in criminal law as principals. The specifications of failure of

supervision was dismissed on substantive grounds, for lack of proof.

It was inconsistent to hold that Appellant had not failed to supervise the unlicensed operator and to find him responsible as a principal for the fault of the one under his supervision, but Appellant cannot complain that he was entitled to a second error because a first may have been made. Since the specifications were preferred separately it is not of itself reversible legal error to make inconsistent findings.

II

Appellant's third point is without merit. He claims that the Investigating Officer did not comply with 5[137].05-10 and points to his own testimony, given near the end of the hearing, to the effect that the Investigating Officer interrogated him at some length on 13 August 1974 before advising him of the nature of the complaint made against him and formally presenting the charges, with no opportunity for him to make a statement prior to the service of charges. *Contra* this is a formal statement made by the Investigating Officer made shortly after the beginning of the hearing which recited a procedure purported to have been followed in accordance with the cited regulation.

No challenge was made at the time to the validity of this statement and no issue was made toward the close of the hearing as to the apparent discrepancy between the Investigating Officer's recital and Appellant's own description of the meeting between them. Had some deviation from the exemplary regulation tended to prejudice Appellant the hearing itself provided that occasion for him to seek a remedy. The fault, if such there was, was not jurisdictional and in the absence of a showing of or a proffer to show prejudice there can be seen no failure of process, only a technically construed afterthought.

III

Before reaching the discussion of the other grounds asserted, it is well to consider a flaw that is self-evident, although not specifically mentioned, in the post-findings proceedings. The Administrative Law Judge took the case under advisement at the

conclusion of the hearing held in Portland, Maine, and announced that if he found a specification proved he would advise the parties by letter so that the appropriate record for formulating an order could be placed before him.

On notice of the finding, the Investigating Officer disclosed that Appellant had no prior record of disciplinary action under R.S. 4450, but he also forwarded a letter to give some "background" to the case. This letter, from one Robert P. Picucci, contained, among other things, a reference to alleged "excessive wake" production by GOODTIME, apart from the single encounter which was the subject of the hearing. The Investigating Officer's letter also recounted complaints assertedly made about Appellant by the Coast Guard officer-in-charge at Appellant's home port. The letter also urged that the finding demonstrated that Appellant had deliberately falsified his testimony and that his false statements under oath should be considered as a matter in aggravation in formulating the order.

Appellant's counsel protested this procedure and claimed, with respect to the asserted complaints by the officer-in-charge at Boothbay Harbor, that official had just advised him that he had made no such assertions. Neither here nor even at the hearing itself is the place to consider the truth or falsity of this matter. The question should never have arisen to provoke debate on the merits of the contentions.

The Administrative Law Judge did not advert to the improperly urged "principle" that a finding made against a person who has testified in his own behalf brands his statements as perjured and hence to be considered as a matter in aggravation of the offense found in the assessment of an appropriate order, but he did consider the fact of "complaints" made on other occasions outside the hearing. He said:

"His [Appellant's] fault is further aggravated by the fact that I am now informed that others have recently complained about similar negligence by the respondent at other times and places."

Since it was not literally the fact that the Administrative Law Judge was "now informed" that constituted the aggravation but

rather the substance of the alleged complaints themselves, it is apparent here that a post-hearing finding on uncharged and unlitigated offenses has been made to Appellant's detriment. The order, on the basis of this alone, must be vacated. Whether reassessment of the order would cure the error depends upon the resolution of Appellant's other grounds for appeal and consideration of the record as a whole.

IV

Appellant's principal basis for appeal is founded on the treatment of the Picucci letter.

Prior to, and again at the outset of the hearing, Appellant asked that any exculpatory statement from any person who has a potential witness, held by the Investigating Officer, be provided to him. The Investigating Officer declared that he had no such statement and the Administrative Law Judge, on the strength of that declaration, denied Appellant's motion to produce. The Picucci letter, which had been received by the Investigating Officer prior to the hearing, was revealed by him after findings, as previously noted. After this, Appellant filed another motion, to dismiss the charges for "Government Misconduct for Failure to Produce. . ."

Of this, the Administrative Law Judge stated in his decision that both parties had argued speed from time and distance, that such matters had not been helpful to him in determining the facts, and that the complaints in the Picucci letter rendered it not "exculpatory evidence."

The Investigating Officer had vigorously supported his contention of excessive speed both during the hearing and, in more detail, after findings, by reference to the time and distance covered by GOODTIME's operation. He took the total time from departure from Boothbay Harbor to the meeting of the two vessels, a period of two hours and fifty minutes, to support an alleged speed of about twelve miles an hour, as against an estimate of

about six knots testified to by the operators of GOODTIME (one of them a witness against Appellant). On the merits of the case Appellant presented no evidence of time and distance run, but the Picucci letter, part of which deals with the date in question, places Appellant's vessel, at about 1530 on that date, in the Kennebec River making an estimated speed of about "fifteen knots." On time and distance run between this observation and the encounter with the witness Parker's boat we find an average speed of about six knots.

What the Administrative Law Judge said was true in a certain respect to a limited extent. Evidence of total time and distance run is not conclusive as to rate of speed at any given moment of the run. But to declare that the whole consideration was not helpful misses the principal point. Appellant had no opportunity at all at the hearing to present evidence which was, to say the least, less remote from the episode in question than that used by the Investigating Officer. Clearly, if the Investigating Officer could see benefit to his case from the total time and distance run, he should have seen a benefit to Appellant from the counter-evidence of a shorter time and lesser distance which yields an average rate of half that which he was arguing. It does not matter that by hindsight the Administrative Law Judge probably would not have been swayed by the evidence either way. If it was proper and desirable for the Investigating Officer to use certain material as a basis for argument it was also proper for Appellant to have the opportunity to confute it.

Also, whether the Administrative Law Judge later, or the Investigating Officer at the outset, considered the letter "Exculpatory" does not control. The net effect of the letter and the testimonial impact it represented should have been left to the evaluation of Appellant and his counsel, whose decision it would be, the general subject having been opened by the Investigating Officer, to attempt to rebut or not. Further, the instruction on such matters, issued first in 1965 and repeated in Administrative Law Judge Circular 1-73, does not deal only with "exculpatory" evidence but any statements held by the Investigating Officer from any witness whom he did not intend to call at the hearing, whatever the tenor of the evidence. The quibble that the letter was not a "statement" will not suffice for a distinction here for, whether it was solicited by the Investigating Officer or not, it is a writing signed by the declarant in the possession of that officer, on its

face it deals with activities of GOODTIME on the date and near the hour in question (more pertinently than material on which the Investigating Officer did rely for his position), and the letter was in fact, although improperly under the circumstances, used as evidence. To distinguish within the terms of the instruction on the subject on the grounds that the evidence of Picucci was used by the Investigating Officer and thus came within the class of statement to be produced on the appearance of the declarant, at which time it was presented to Appellant, is to compound the error.

In addition to requiring the reassessment of the order, the misuse of the Picucci letter would be reason to remand for new proceedings with either the time and distance question not raised or the election open to Appellant to call Picucci as a witness. It must be considered, however, whether a remand is justifiable in light of the whole record.

V

There is one considerable factor involved in evaluation of the decision in this case. The Administrative Law Judge refers to the construction of Appellant's vessel and comments on its operating characteristics, such "as to, when operating at her cruising speed, leave a wake as high as 3 or 4 feet. . ." During the course of argument, Appellant's counsel mentioned that the party would be happy to have the Administrative Law Judge make an observation aboard the vessel underway so that its characteristics could be viewed. After the close of the hearing, when notice had been given that the charges had been proved, Appellant's counsel asked for a reopening and reconsideration. Among the stated purposes for the request was the viewing of Appellant's vessel in operation in the area of the encounter. The request to reopen was, for all purposes, denied. Since the request for the "viewing" was untimely it was not error to deny it. However, the denial, under the circumstances, leaves a gap in the record and in the basis for the decision. The basis for the comments on the operating characteristics of the vessel is eyewitness testimony as to the incident in question, varying according to observer. There was testimony as to the operation of the pleasure boat from the two persons aboard. Specific findings were made on the speed and size of the wake of Appellant's vessel. As to the pleasure craft, the

only similar finding was that it was "proceeding at about 20 knots." This was the lowest possible speed that could be ascribed to it since the occupants of the boat described the speed as 20-25 and 25-30 knots. It was also found that the engine of the pleasure craft was cut to idling on approaching the wake. The first wave was found to break over the bow of the craft, drenching the occupants and leaving water in the cockpit.

Appellant alone testified as to the characteristics of a craft of general type, based upon his experience as a dealer and gave an opinion, although it is noted he disclaimed any knowledge of the presence of that vessel at that particular time, that had such a vessel, moving at 20 or more knots, not been suddenly slowed before meeting the wake it would have passed without trouble, but that the cutting of the motor as described would have caused a vessel of that design to nose down into any kind of sea with a consequent crashing of water over the bow. This was the only evidence heard on the question of the "characteristics" of a small pleasure craft of the type operated by the complainant, and the administrative law judge chose not to discuss the matter in his opinion.

There is undeniable a class of case in which theoretical considerations must fall in the face of clear and definitive fact testimony, and it is not error to rule out the expending of attention on possibilities which the known factors finally contravene. In this case, however, more is required because of the nature of the complaint. There is no fixed rigid standard against which the conduct of Appellant can be measured. It is not as though he had, for example, demonstrably exceeded the speed limit testified to in Boothbay Harbor. What we have here is a question of relativity. Unlike the collision situation where personal fault, under the rules of the road, can be ascribed to one or both with the fault of one not exonerating the other, we have here a pure test of reasonableness "under the circumstances." The conflicts in eyewitness testimony must, as in any other case, be resolved by the trier of facts, but exploration, too, of the handling of the complainant's boat must be undertaken, since the question of Appellant's conduct involved here is whether he reasonable could have expected "to endanger" the other vessel by "an excessive wake."

I wish to make clear here that no rule of "contributory" negligence or "comparative" negligence is a standard guide here, nor is there an "absolute" fault scale available for judgement. Whether the pleasure craft was in fact endangered is one question; if it was, there remains another question of whether "an excessive wake" caused the danger. The latter requires that two courses of conduct be evaluated, both Appellant's and that of the operator of the other vessel.

A wake may be "absolute" in a sense, when it causes, directly and immediately, damage to a shore installation. With respect to another vessel, however, a wake is much the same as any sea encountered, differing only in origin and in being of brief duration rather than a continuing phenomenon. It is a matter of official notice that the element of danger in a vessel's progress in a seaway is largely determined by the characteristics of its hull, its speed, and its handling by its operator or pilot.

It cannot be said as a matter of law that a speed of 20-25, or even 30-35, knots is too much a vessel headed into a swell or sea or wake, nor that throttling down quickly or maintaining speed is the best or even an approved method of approaching a wake. The question of the characteristics of the complainants' boat and the prudence of its operation, if not raised by the allegations themselves such as to impose a burden to prove that Appellant's speed caused "excessive" wake, was raised by the testimony of Appellant himself when he declared that on the basis of certain experience and knowledge of the hull design his opinion was that whatever discomfort was encountered by the complainants was brought about by the imprudent operation of their vessel.

VI

The lack of consideration to evaluation of the complainants' own activities as possibly the determining factors for any discomfort they sustained diminishes the substantiality of the eyewitness testimony reproduced at the hearing. On testing reasonableness of Appellant's action, depending upon the spread of estimated speeds available for the complainants' vessel, it is seen that vessel (which according to the two persons from GOODTIME who testified, was never seen from GOODTIME) may well, because of the shape of the channel, have been within visible range from not more

than half a minute to as little as twelve seconds before the vessels passed each other. At twenty knots that vessel is covering one third of a mile a minute; at thirty, a half mile. Whether Appellant's speed was excessive depends in part upon what he could reasonably expect to encounter. No consideration was given to the question of whether the complainants' action was itself reasonable in bursting into the narrow section of the river at the speed it had reached with so little time available to perceive ordinary hazards ahead. Under the terms alleged and the conditions that were shown to prevail some more accurate account of GOODTIME's activity is preferable and attention must be given to the quality of operation of the other vessel. The question of speed of Appellant's vessel (integral but not essential to determination of fault) was inadequately treated both by the reserving of the Picucci letter and by the argument of the Investigating Officer that computations established an overall average speed which proves to be significantly higher than the data available yields. Possibly also unduly prejudicial to Appellant was the permitting of the Investigating Officer to argue as fact certain statements alleged to have been made to him by Appellant (in themselves tending toward bias against Appellant) which had not only not been established on the record but were expressly, on this record, disproved.

CONCLUSION

It is concluded that prejudicial errors occurred in the conduct of this case, that the evidence is not of the quality needed to establish the specific facts alleged, and that no prospect exists for anticipating a better case fairly presented.

ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts, on 23 October 1974, is VACATED, the findings are SET ASIDE, and the charges are DISMISSED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 10th day of Dec. 1975.

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