UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
MERCHANT MARINER'S DOCUMENT Z-982068, and
LICENSE NO. 444 309
Issued to : Edward W. HULTZ

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2114

Edward W. HULTZ

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 31 January 1977, and Administrative Law Judge of the United States Coast Guard at New York, New York, after hearing at Philadelphia, Pennsylvania, suspended Appellant's license for three months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges in essence that while serving as operator of the tug H.C. JEFFERSON under authority of the license above captioned, on or about 15 May 1976, Appellant endangered the lives of persons aboard a 16 foot pleasure craft in East Horseshoe Range, Delaware River, by proceeding at a speed excessive under the conditions, with a wake which caused the pleasure craft to be thrown against buoy #39.

At the hearing, Appellant was represented by professional counsel and pleaded not guilty to the charge and specification.

The Investigating Officer introduced in evidence certain documents and the testimony of two eyewitnesses who has been aboard

the pleasure craft.

In defense, Appellant offered in evidence his own testimony and that of an expert witness.

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 the license issued to Appellant, for period of three months' probation.

The entire decision was served on 7 February 1977. Appeal was timely filed and perfected on 28 October 1977.

FINDINGS OF FACT

On 15 May 1976, Appellant was serving as operator of the tug H.C. JEFFERSON and acting under authority of his license while the vessel was operating in the Delaware River. While the tug was proceeding up East Horseshoe Range, a sixteen foot outboard-propelled pleasure vessel, with three adults and three children aboard, was proceeding south in the River, below Walt Whitman Bridge, at a speed of at least 25 knots.

From this vessel, H.C. JEFFERSON was observed about three quarters of a mile ahead. The pleasure boat was maneuvered toward its right hand side of the channel, was suddenly slowed as it crossed the channel line just above Buoy No. 39, was turned, and met the wake of the tug at an angle of about 45 degrees, with a resultant taking aboard of much water and a hitting against the buoy. When the vessel was taken under control it pursued the tug, overtaking it below the bridge and making identification of that vessel.

[Other matters subject to findings of fact are discussed in OPINION, below.]

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that there was no evidence

of negligent operation of H.C. JEFFERSON and evidence of great negligence in the operation of the other vessel.

APPEARANCE: Rawle and Henderson, Philadelphia. Pa., by Vernon C. Miller, Jr., Esq.

OPINION

I

Much attention was given in the course of the hearing in this case to the principle that in collision and similar cases in these proceedings the established negligence of "the other" participant in the encounter does not nullify or excuse negligence on the part of the person charged. Appellant's position is that the negligence of the recreational craft involved here is so great as to render insignificant Appellant's conduct.

It is elementary that the principle comes into use only when "defense" must be considered. Before it can be called upon to operate there must be such evidence of negligence on the part of the person charged that the explanations of defenses must be analyzed. Of the utmost importance, for this case, is whether negligence in the operation of H.C. JEFERSON was established.

II

The record in this case presents several matters which call for discussion even apart from the stated basis for appeal.

The first of these may be quickly disposed of since it is saved from error by the entirety of the proceeding. The specification as originally served upon Appellant read as follows:

> "...while the tug H.C. JEFFERSON was proceeding upbound on East Horseshoe Range Delaware River [you] did fail to sufficiently reduce the speed of the tug JEFFERSON so as to safely pass at about 100 yards distance a 16 foot motorboat owned and operated by Mr. William Dill. The wake resulting from your vessel caused Mr. Dill's boat to collide with buoy #39, resulting in extensive damage to his boat and severely endangering his life and the lives of his five passengers."

The Administrative Law Judge was properly disturbed by the "two sentence" form of what should be a single declarative allegation. Fault was also found with the specificity of the "100 yards," as amounting to a limiting assertion that "100 yards" was in fact a "safe" distance. On direction, the specification was amended to read thus, as pertinent:

> "...while the tug H,C, JEFFERSON was proceeding upbound on East Horseshoe Range Delaware River [you] did fail to sufficiently reduce the speed of the tug JEFFERSON so as to pass a safe distance off a 16 foot motorboat owned and operated by Mr. William Dill with the result that the wake resulting from your vessel caused Mr. Dill's boat to collide..."

While correction was obviously needed, and while some ambiguity might have been found, the original version left open the interpretation that "100 yards" was alleged as a predictable distance at passing with "safety" of the passing made relative to the speed of the vessel and the vessel and the generated wake. The amended version made the distance off at which the vessels would pass primarily a function of the speed of the towboat, an improper consideration for vessels proceeding in opposite directions in the same channel.

Nevertheless, what was clearly in the mind of all participants and what was in fact litigated was, first, the question whether H.C. JEFFERSON was proceeding at such speed that the wave motion created a danger to the other vessel, and then whether this action was negligent on Appellant's part.

III

Appellant elected to take the stand as his own first witness after the Investigating Officer had rested his case. He testified to the dimensions and propulsion capacity of H.C. JEFFERSON. Mentioning his years of service aboard the vessel he declared its speed at 700, 800, and 900 rpm to be eight, nine, and ten knots respectively. Asked for the speed at 1,000 rpm he replied that its maximum was 13.8, which he qualified to a statement that "...at thirteen point eight she would be full velocity...going with the

current." This was not, in form, a statement of speed at 1,000 rpm nor was it a satisfactory statement of "full speed" although it produced a finding on initial decision that "at 1,000 rpm the vessel makes a good a speed of about 13.8 knots with a fair current." (The only other evidence on this point was the testimony of Appellant's expert witness who stated the Appellant had volunteered to him that 1,000 rpm produced 13.7 knots.) Appellant testified also that 750-800 rpm gave the "best" operating speed of the vessel and that for "harbor transiting" he used 900.

When the Investigating Officer sought to interrogate Appellant on activities of the tug at the time in issue, objection was made that this was beyond the scope of direct examination. There was mention made of a requirement for the Investigating Officer to produce authority for cross-examination beyond the scope of direct and to the possibility of research on the question. A document was offered by the Investigating Officer, presumably as an "authority" on the matter, but it was rejected as "not binding." The ultimate ruling, made that day, was that although Appellant had not initially proposed to limit his testimony in any way the fact that he had indeed limited it to characteristics of the vessel precluded cross-examination beyond that area.

Two separate comments are needed on the outcome of this ruling.

IV

The Administrative Law Judge made a finding that it was Appellant's custom to proceed at 800 rpm which produces a speed of about 9 knots," and another that, "At the time in question the tug was proceeding at a speed of about 9 knots..." In addition, in the initial decision the opinion was given that "There are some obvious errors in the testimony of each of these witnesses [eyewitnesses, from the pleasure craft], such as excessive estimates of the speed of tug..." These witnesses has given estimates of 15 and 20 knots as the observed speed of the tug.

Appellant here could well, and deservedly, fail victim to his own tactics. If it be taken strictly that he had not testified to the speed of his vessel at the time in question, there is not a shred of evidence from him on that subject. If, for lack of a specific fault to be found with it, 13.8 is for the moment accepted

as the maximum possible for the tug through the water than the 15 knot estimate of the eyewitness is not unreasonably excessive, and the 15 is far closer to 13.8 than is 9. There is then substantial evidence that H.C. JEFFERSON was proceeding at its maximum speed and no evidence that it was proceeding at a lesser speed.

On this aspect of the matter, there is an additional puzzling question. Appellant had specifically testified that at nine knots H.C.JEFFERSON would create a swell of a foot and a half as a maximum at 100 yards' distance. His expert witness testified that the vessel would create a swell of two and a half feet at that distance at full speed. That witness also, testifying as to effects at a speed of 10 knots, assumed a swell of two and one half feet although he qualified this by declaring that it would not in fact be so high. Still, a finding was made that at nine knots the vessel in fact made on the occasion in question a swell of two and one half feet. No reason is given for this resolution.

Nevertheless, if findings as to speed at the time are justifiable, on the theory that they are validly inferred from the general tenor of Appellant's testimony, then the limitation of the cross-examination on the stated grounds was technically unjustified. If Appellant's testimony was in fact adequate predicate for the specific findings made then the matter had been well within the scope of direct examination and the question was open to exploration on cross-examination.

Again, when Appellant declared that a foot and half was the swell that would be caused by the tug at a certain speed, the very narrow issue of "credibility" opened the way to a question as to the swell "at the time" since it is conceivable that a truthful answer could have belied the general statement.

V

Be that as it may, the more general theory on which cross-examination was curtailed, and for practical purposes denied, merits attention.

The shibboleth, "beyond the scope," is a familiar one. The

matter is, without question, a confused area. Courts have had difficulties with the problem, partly because of imprecision in specific decisions, and the theorists have tended to emphasize the philosophic approach.

Wigmore (3rd Ed.) devotes seven sections (1885-1891) and more than thirty five pages to the matter under general consideration of "Order of Presenting Evidence." Some other writers, acknowledging a complication from "due process" rights, also stress the purely procedural interest of orderly management. McCormick (Hornbook," 2nd ed.) devotes seven sections (21-27) to the matter, and distinguishes three "rules" *(i.e.*, practices permitted more or less in the various Anglo-American jurisdictions). With due regard for the differences among the situations encountered in which a "rule" is to be applied and the predilections of the theorists, McCormick's characterization of the restriction to the "scope of direct" as "arbitrary" and "arguably burdensome" is justified.

In cases under 46 CFR 5 we are dealing not with the rules of criminal procedure nor even with those of civil procedure. It has been often stated, in a reasoning *a fortiori*, that if a practice is permitted under the Federal criminal or civil rules of procedure it is permitted here, but in the other direction it has been held that limitations placed by Federal criminal or civil practice or by States are not controlling. Generally speaking, if a practice is permitted in some recognized jurisdiction and no specific limiting rule has been laid down for administrative procedure by judicial review, the practice ought to be allowed here.

In Wisconsin, what McCormick calls "the wide-open rule" has been adopted, at least in civil procedure. In *Boller v Confrances*, (1969), 42 Wisc. 2nd 170, 166 N.W. 2nd 129, it was said:

> "This test, which leaves the admission or exclusion [on cross-examination] to the discretion of the trial judge, is infinitely preferable to the artificial and meaningless rule that excludes all evidence whether it should then logically come into the record or not, simply because it is `beyond the scope.'"

In the same decision, it was also said:

> "The rule against questioning any witness 'beyond the scope of direct examination' has no intrinsic merit and does not demonstrably assist in the search for truth."

In *Mahon v Reading Co.,* CA 3 (1966), 367 F. 2nd 25, it was recognized that when a party to a civil suit elects to testify "he may be cross-examined freely on any matter relevant and material to the issues." It is true that the court was here dealing with a "diversity" jurisdiction case and was, under the Federal Rules of Civil Procedure, applying a State rule. It is purely fortuitous that it was a Pennsylvania rule and that the hearing in this case took place in Pennsylvania. What is important is that it is acknowledged in several respected jurisdictions that a party to an action who elects to testify may be cross-examined fully on anything relevant to the issues, and this even in a jurisdiction like Pennsylvania which otherwise, to non-party witnesses, appears to apply the limitation of "scope of direct examination."

In a case like the instant one, where that party has not been granted, for good cause, a prior limitation upon his appearance as a witness, he is open fully to cross-examination on matters material and relevant without regard to an artificial "scope of direct" limitation. Whether the Appellant here, had he earlier sought to limit his appearance as a witness, would have merited permission to furnish evidence that could have been adduced from other sources need not be resolved.

The spirit of even the Federal Rules of Civil Procedure (FRCP 43(a)) is for admissibility, and artificial barriers to fact finding have no place in administrative proceedings.

VI

In dealing with this case on the record made and accepted the Administrative Law Judge has tacitly accorded Appellant both a "best case" and a "worst case" view of the evidence. With respect to the height of swell, after rejecting the "excessive" estimates of the persons in the small craft, he has used a "worst case" of two and a half feet. As to the speed of the tug, from one approach

9 knots is the "worst case" since it increases the time in which some action could be taken if any was called for, while from another approach 13.8 knots is the "worst case" since it leads immediately to an inference of a greater wake condition.

If a speed of nine knots is accepted for the tug and a speed of at least twenty five knots is allowed for the pleasure craft, the relative speed is thirty four knots. If the distance of sighting of the tug by the pleasure craft is placed at about 1500 yards, as the Administrative Law Judge did accept (with the record justifying no conclusion that Appellant is chargeable with having seen the other craft at a greater distance off), the time from first sighting to projected passing is no more than 78 seconds. If some reaction time is permitted, to observe the aspect of the smaller vessel and evaluate quickly its direction and intent, and the engine of the tug is then immediately stopped, the already generated wake of the tug will be encountered by the approaching vessel only seconds later that it actually was encountered in the instant case.

Thus, to hold Appellant negligent on the evidence here is to hold that, without more, it is negligent to operate a tug like H.C. JEFFERSON in the middle of East Horseshoe Range, Delaware River, at any time at a speed of 9 knots.

This is not possible on this record and in this case. If the testimony of the expert is accepted on the height of wave at the maximum speed of H.C. JEFFERSON and the eyewitness testimony is rejected, probably properly, as excessive, there is no firm foundation for a finding as to the wake at 9 knots' speed. There is insufficient evidence that the operation of H.C. JEFFERSON, in and of itself and irrespective of the operation of the other vessel, was such as to impose an unsafe condition on others properly using the river.

Consideration has been given to substituting, as found fact, a speed of 13.8 knots for the tug, a substitution permissible on the state of the evidence. This would authorize, certainly, a finding of the maximum possible wake height. It would also, of course, necessitate a lessening of the available time interval for a needed action to be taken, since the relative speed would be 38.8 knots. With a requirement for a speculative balancing of variants,

I am not inclined on this record to risk a holding that as a mater of law a speed of 13.8 knots id *ipso facto* negligent for and operator of H.C. JEFFERSON at the time and place in question.

A remand of the case would serve no useful purpose in view of the time elapsed for the process of initial decision and furnishing of a transcript to Appellant.

ORDER

The order of the Administrative Law Judge entered at New York, New York, on 31 January 1977 is VACATED, the decision is SET ASIDE, and the charges are DISMISSED.

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

Signed at Washington, D.C., this 1st day of March 1978.

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***** END OF DECISION NO. 2114 *****

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