[HIGH COURT OF AUSTRALIA.]

McKENZIE AND ANOTHER . . . . APPELLANTS;
APPLICANTS,

AND

WILLIAM HOLYMAN AND SONS PROPRIETARY LIMITED . . . . RESPONDENT.
RESPONDENT,

H. C. OF A. 1939.

MELBOURNE, *May* 17.

Latham C.J., Rich, Starke, Evatt and McTiernan JJ.

Seamen's Compensation—Accident arising out of and in course of employment—Seaman assisting in rescue of fellow-seaman—Death of seaman assisting—Assisted seaman not on employer's premises—Voluntary act—Emergency—Seamen's Compensation Act 1911 (*No.* 13 *of* 1911), *sec.* 5.

The deceased was a seaman employed on the respondent's ship. On the night in question the deceased and three other men went ashore and spent some time at an hotel. At the same hotel, but not of their party, was a seaman, P., employed on the same ship. They returned to the ship separately. The deceased had been on the ship some time before P. returned. Before P. reached the gangway which connected the ship with the wharf he stumbled on the wharf and fell into the water. Fellow-seamen who were on the ship went to his rescue, and the deceased held a lantern to enable them to see what they were doing. While so engaged the deceased fell into the water and was drowned.

Held that the deceased, in doing what he did, was acting in the course of his employment and, accordingly, his death was due to an accident arising out of and in the course of the employment within the meaning of sec. 5 of the *Seamen's Compensation Act* 1911.

APPEAL under *Seamen's Compensation Act* 1911.

Bessie Isabel McKenzie and Bettie Douglas McKenzie, the wife and daughter of Sydney Ross McKenzie deceased, as dependants

of the deceased, claimed compensation under the Commonwealth *Seamen's Compensation Act* 1911 in respect of his death against his employer William Holyman & Sons Pty. Ltd.

McKenzie was employed on the ship *Woniora*, which was engaged in trading among the Australian States. On 1st August 1938 McKenzie and three other men went ashore from the ship which was lying at Devonport, Tasmania. They spent some hours in a public house and had a number of drinks. In the same public house, though not of their party, was a seaman named Parman employed on the same ship. The men returned to the ship separately between 9.30 and 10.40 p.m. They had all been drinking. McKenzie had been safely on board for some time when Parman came along the wharf. Before Parman reached the gangway, which, as it was low tide, was at a steep descending angle to the deck of the ship, he stumbled on the wharf and fell over the baulk of timber on the edge of the wharf into the water between the ship and the wharf. The alarm was immediately raised, and those who were present, including not only members of the party from the hotel but also the night watchman, endeavoured to rescue Parman. McKenzie held a lantern for the purpose of enabling those who were rescuing Parman to see what they were doing. Parman was rescued, but, while he was holding the lantern in the course of the rescue operations, McKenzie fell into the water and was drowned. His wife and daughter claimed compensation as his dependants under the Commonwealth *Seamen's Compensation Act* 1911. The arbitrator held that in rescuing Parman the men, including McKenzie, were not acting in the course of their employment and, consequently, that compensation was not payable under the Act.

From that decision the applicants appealed to the High Court.

Fullagar K.C. (with him *Stafford*), for appellants. This case falls directly within the principle of what are described as emergency cases, and it is not relevant to consider whether Parman had reached his employment. The ground is that the rendering of assistance is to be regarded as an act of assistance to the employer (*Rees* v. *Thomas* (1)). The arbitrator apparently took the view that the

(1) (1899) 1 Q.B. 1015, at p. 1017.

H. C. OF A. 1939.

McKENZIE v. WILLIAM HOLYMAN & SONS PTY. LTD.

emergency principle did not operate unless the rescued was engaged in a common employment with the worker. This is not necessarily so (*Menzies* v. *M'Quibban* (1), per Lord *McLaren*; *Willis, Worker's Compensation*, 30th ed. (1936), p. 64; *London and Edinburgh Shipping Co.* v. *Brown* (2)). In *Culpeck* v. *Orient Steam Navigation Co. Ltd.* (3) an assistant baker, who was injured when protecting lady passengers from insults, was entitled to recover. These cases show that the arbitrator did not apply the correct test. Admittedly the emergency must arise out of the employment or the risk must be one which is connected with the employment; but it is wrong to confine it to a fellow-worker actually engaged in the employment. *Jones* v. *Tarr* (4) is explained by the fact that there the risk did not arise out of the employment, and it must be borne in mind that the risk arose far from the place of employment. In the other cases the emergency arises out of the employment because there is a risk to a person with whose safety the employer is concerned and the person who rescues the other is really acting in the employer's interest.

[McTIERNAN J. referred to *John Stewart & Son (1912) Ltd.* v. *Longhurst* (5).]

[Counsel referred to *Parker* v. *Ship Black Rock (Owners)* (6)].

[LATHAM C.J. In *Charles R. Davidson & Co.* v. *M'Robb or Officer* (7) Lord *Haldane* distinguishes *John Stewart & Son (1912) Ltd.* v. *Longhurst* (8).]

All the cases have been considered by the Court of Appeal of Northern Ireland in *Todd* v. *MacCallum* (9). This case should not be determined on any technical debate as to whether Parman had reached or resumed his employment. It is relevant to consider whether Parman was an employee but not whether he was in the course of his employment.

Wilbur Ham K.C. (with him *Winneke*), for the respondent. Parman's drunkenness caused complete cessation of his employment

(1) (1900) 2 Fraser 732, at p. 736.
(2) (1905) 7 Fraser 488.
(3) (1922) 15 B.W.C.C. 187.
(4) (1926) 1 K.B. 25.
(5) (1917) A.C. 249, at pp. 252-253.
(6) (1915) A.C. 725, at p. 731.
(7) (1918) A.C. 304.
(8) (1917) A.C. 249.
(9) (1932) N.I. 130; 25 B.W.C.C. Supp. 155.

(*Frith* v. *Louisianian* (*Owners of S.S.*) (1); *Thomson* (*William*) *& Co.* v. *Anderson or Scrimgeour* (2)). Parman was not in the course of his employment. He was on a public wharf, and it is not until he gets on to the gangway that he resumes his employment. He was a stranger to the common employment. If a stranger fell between the wharf and the ship, the crew could not attempt a rescue and claim compensation for any injuries received. The arbitrator followed the method of approach in *Jones* v. *Tarr* (3). This is an *a-fortiori* case.

[LATHAM C.J. Suppose what happened had happened in the presence of the master and the master had ordered McKenzie to help; would McKenzie have been guilty of a breach of duty if he had refused? Is that not a test?]

He is bound to obey all lawful commands of his master, but in fact the master was not there and the master gave no order. What McKenzie did was not for the purpose of his master unless it was in the interest of the employer to save, in any circumstances, the life of a fellow-employee. It is conceded that, if the emergency occurred away from the ship, that could not be a liability. If the seaman on leave is returning and the method of access is by some public wharf, he has not returned until he is on the ship's gangway or some other means of access which has been provided. All the cases are distinguishable on the ground that the worker is obliged to use another ship or dock over which the public are not entitled to go (*Northumbrian Shipping Co.* v. *McCullum* (4)). The rule laid down is perfectly definite. Any other is uncertain. [Counsel referred to *Kitchenham* v. *Owners of S.S. Johannesburg*; *Leach* v. *Oakley Street & Co.* (5).] A seaman is only bound to obey commands in navigation of a ship and the preservation of order and need not obey orders to save lives (*McLaughlin* on *Merchant Shipping*, 7th ed. (1932), p. 150; *Abbott* on *Shipping*, 14th ed. (1901), p. 238). One must not confuse humanitarianism and duty. In this case the master gave no order: he was not there. All so-called emergency cases are cases in which the interest of the employer is the primary test (*Charles R.*

(1) (1912) 2 K.B. 155, at p. 158.
(2) (1921) 91 L.J. P.C. 87.
(3) (1926) 1 K.B. 25.
(4) (1932) 25 B.W.C.C. 284; 147 L.T. 361; 101 L.J. K.B. 664.
(5) (1911) 1 K.B. 523; (1911) A.C. 417.

H. C. OF A. 1939.

McKENZIE v. WILLIAM HOLYMAN & SONS PTY. LTD.

Davidson & Co. v. *M'Robb or Officer* (1); *St. Helen's Colliery Co.* v. *Hewitson* (2); *Parker* v. *Black Rock (Owners)* (3); *Craig* v. *S.S. Calabria* (4)). These cases established that Parman was a stranger to the employment (*Henderson* v. *Commissioner of Railways (W.A.)* (5); *Pearson* v. *Freemantle Harbour Trust* (6); *Whittingham* v. *Commissioner of Railways (W.A.)* (7); *Stewart* v. *Metropolitan Water, Sewerage and Drainage Board* (8)). [As to the emergency principle he referred to *Mullen* v. *Stewart* (9).] There are no authorities to support the contention for the applicants. The fact that the master might have stepped outside his authority and ordered the deceased to rescue Parman cannot affect the position. The applicants cannot rely upon what the master might have done. There has been a definite rule fixed by the House of Lords, and it is too late to alter it, as to when a seaman resumes his employment. The Court of Appeal has laid down the rule that the man sought to be rescued must be engaged in the common employment. The arbitrator has found facts in favour of the respondent, and the court should not disturb the award.

[EVATT J. referred to *Dermody* v. *Higgs & Hill Ltd.* (10).]

The following judgments were delivered :—

LATHAM C.J. This is an appeal which is brought to this court by virtue of the provisions of rule 3 of the Second Schedule of the *Seamen's Compensation Act* 1911 of the Commonwealth.

In pursuance of the jurisdiction conferred by that Act, Judge *Wasley*, of the Victorian County Court, heard an application for an award by the widow and daughter of Sydney Ross McKenzie deceased. They claimed compensation on the ground that the death of McKenzie arose out of and in the course of his employment by William Holyman & Sons Pty. Ltd., respondent to this appeal.

McKenzie was a fireman and was a seaman within the definition of the word " seaman " contained in sec. 3 of the Act, and the Act was applicable in the case of his employment. He was employed on the ship *Woniora*, which was engaged in trade and commerce

(1) (1918) A.C. 304.
(2) (1924) A.C. 59, at pp. 71, 72.
(3) (1915) A.C. 725.
(4) (1914) 7 B.W.C.C. 932.
(5) (1937) 58 C.L.R. 281, at p. 295.
(6) (1929) 42 C.L.R. 320.
(7) (1931) 46 C.L.R. 22.
(8) (1932) 48 C.L.R. 216.
(9) (1908) 1 B.W.C.C. 204.
(10) (1937) 4 All E.R. 379, at p. 381.

among the States of Australia. On 1st August 1938 McKenzie and three other men went ashore from the ship, which was lying at Devonport. They spent some hours in a public house and had a number of drinks. In the same public house, though not of their party, was a seaman named Parman employed on the same ship. After enjoying themselves for a time they returned to the ship but did not return in a group; they returned individually at times varying, according to the evidence of the watchman, from about 9.30 to, perhaps, 10.40 p.m. They had all been drinking. There is evidence that Parman was drunk—very drunk. McKenzie had had some drink, and the evidence of some witnesses is that even after the drinking he was perfectly sober, though there is other evidence that he was "happy" and "genial" and that he was under the influence of drink to some extent.

McKenzie, however, came on board safely and had been on board for some time when Parman came along the wharf. Before Parman reached the gangway, which, as it was low tide, was at a steep descending angle to the deck of the ship, he stumbled on the wharf, and fell over the baulk of timber on the edge of the wharf into the water between the ship and the wharf. The alarm was immediately raised, and those who were present, including not only members of the party from the hotel but also the night watchman, endeavoured to rescue Parman. There is, not unnaturally, some divergence in the detail of the accounts given of the incident. Parman was secured by a line passed down from the ship and around his body, and McKenzie held a lantern for the purpose of enabling those who were rescuing Parman to see what they were doing. It would appear that McKenzie was awkward in what he was doing, as he was pushed out of the way by some of those engaged in the rescue work.

There is some divergence in the evidence as to whether McKenzie fell from the edge of the vessel into the water or whether he was standing straddled between the sponson of the ship and a stringer of the wharf, a stringer being a timber of the wharf placed horizontally on the face of the wharf. However, it is clear that while he was holding the lantern in the course of these rescue operations of his shipmate he fell in and was unfortunately drowned. His wife

H. C. OF A. 1939.

McKENZIE v. WILLIAM HOLYMAN & SONS PTY. LTD.

Latham C.J.

and daughter claim as his dependants under the *Seamen's Compensation Act*. His Honour Judge *Wasley* found for the defendant. In stating his reasons for the award which he made, he devoted a great deal of attention to the position of Parman, who, he finds, was very drunk. He states in his reasons that Parman fell into the water solely because he was drunk. The evidence is that Parman had not reached the gangway of the ship when he fell in. He was at least four, and perhaps six, feet away from the gangway. The learned judge considered with care whether or not Parman (or his dependants, if Parman had been killed) would have been entitled to recover under the Act, and in considering this question he considered cases which dealt with the problems which arise when a workman is returning to his place of employment but has not reached it or has only just reached it. During one period a workman is merely a member of the public, and he is subject to risks as a member of the public. When he is upon or about his employer's premises, including the means of access to those premises—which are to be regarded as portion of the premises as distinct from a public place, such as, for example, a road or public wharf—questions arise as to the liability of the employer under an Act such as this. His Honour held that, if Parman had been injured and had brought proceedings, he could not have succeeded, the reason being that he had not reached the means of access provided by the employer but was at the time simply a member of the public who had had an accident upon a public wharf, and that employers are not liable under this Act for such an accident. His Honour, after a reference to the case of *Jones* v. *Tarr* (1), which deals with acts done by a workman in a rescue in an emergency, said that "in rescuing Parman the men were not acting in the course of their employment and I find accordingly that McKenzie was not acting in the course of his employment within the meaning of sec. 5 of the *Seamen's Compensation Act*." Accordingly, the conclusion that the employer is not liable in the case of McKenzie is based upon the view that the employer would not have been liable if Parman had been injured or had met his death on this occasion.

(1) (1926) 1 K.B., at p. 37.

The arguments presented on behalf of the defendant have been largely based on the contention that Parman had not reached the area of his employment when he fell into the water. He fell from the quay, not from the ship, and therefore, it is urged, the accident to him could not be said to have happened to him in the course of, or to arise out of, his employment. The argument is that Parman's accident arose out of his own concerns and that he was therefore in the same position as if he had been on a public road, and reference is made to *Charles R. Davidson & Co.* v. *M'Robb or Officer* (1) and similar cases. It is contended for the defendant that the ship was not a life-saving establishment and that the master of a ship is not entitled in a general way to give orders to the crew for the saving of the lives of persons, more particularly if those persons are not acting in the same employment at the time as the members of the crew. Parman, it is said, is therefore in the position of a complete stranger, and, as there would have been no liability to Parman if injured, there can be no liability to the dependants of McKenzie, who lost his life.

In my opinion the answer to the question whether or not there would have been liability to Parman and his dependants is not decisive of the question whether or not there is a liability to the dependants of McKenzie in this case. Parman or his dependants may or may not have been entitled to compensation, but the questions whether McKenzie, in doing what he did, was acting in the course of his employment and whether the accident arose out of and in the course of his employment are not answered by the answer to a similar question asked in the case of Parman. Without attempting to lay down an exhaustive rule, I think it may be said, consistently with all the authorities, that, if the act out of which the injury arose is sufficiently connected with the business of the employer to entitle the employer to direct the particular employee to do the act in question if the emergency had arisen in the presence of the employer, then the fact that the act is done voluntarily by the employee without any order or direction from the employer does not remove the act from the course of employment of the employee.

(1) (1918) A.C. 304.

H. C. OF A. 1939.

McKENZIE v. WILLIAM HOLYMAN & SONS PTY. LTD.

Latham C.J.

In this case if the employer had been on the spot when Parman had fallen into the water and had ordered McKenzie to hold the lantern and help in rescuing Parman, then in my opinion McKenzie would have been bound to obey that order, and, if he had fallen into the water or lost his life in the course of doing so, liability would have attached to the employer. The fact that McKenzie was holding the lantern and helping in the rescue without any express order from the master of the vessel or otherwise from his employer does not remove the act from the scope of his employment. In holding the lantern and in attempting, even if awkwardly, to help in the rescue he lost his life. For the reasons which I have stated his death was an injury arising out of and in the course of his employment. In the case of *Culpeck* v. *Orient Steam Navigation Co. Ltd.* (1) it was held that a baker employed upon a ship was subject to an implied duty to protect lady passengers from insult though there was no specific term to this effect in his contract of employment. He was held to be entitled to compensation for injury received while and because he was performing this duty. If a member of a ship's company is entitled, without any specific instruction from his employer, to try to prevent insult to lady passengers, it would appear that such an employee is at least entitled to assist in the rescue of lady passengers from death, and that such a duty would extend beyond the lives of passengers to the lives of his shipmates.

For this reason I am of opinion that the death of McKenzie arose out of and in the course of his employment and that the appeal should, accordingly, be allowed.

In my opinion the appeal should be allowed with costs. The award should be set aside. The appellants should have the costs of the hearing before the arbitrator, and other costs should be dealt with by the arbitrator. The matter should be remitted to the arbitrator to hear and determine.

RICH J. In "emergency" cases it is difficult to answer the question, "Am I my brother's keeper?," or to set a limit to altruistic efforts. The decisions are numerous and the facts infinitely different. I think we should not be "curious and almost subtil, astuti"—to

(1) (1922) 15 B.W.C.C. 187.

use Lord *Hobart's* words in *Earl of Clanrickard's Case* (1)—to invent tests by which cases of this kind may be determined. I am content to say that on the evidence it was a necessary or reasonable act for the deceased to perform and sufficiently connected with the business of his employer. For this reason I think that the learned arbitrator was bound to come to the conclusion that the accident arose out of and in the course of the deceased's employment.

The appeal should be allowed.

STARKE J. All that I desire to say is that McKenzie's act was a reasonable act to do in all the circumstances appearing in the evidence and that it was not so far removed from the employment contemplated by the employer and the seaman as to exclude it from the course of the seaman's employment.

I agree that the appeal should be allowed.

EVATT J. This case is of some importance, and I desire to add a few words.

The error of law of the learned County-Court judge was caused by his paying too much attention to the question whether the rescued seaman Parman was in the course of his employment when he fell into the water. No doubt the circumstances attending Parman's fall into the water are not irrelevant—indeed, they are of importance—but the one question is whether McKenzie was in the course of *his* employment when, helping in the attempt at rescue, he was himself drowned. Admittedly his normal working hours had not commenced, and in that sense he was "off duty."

I think that the learned judge was perhaps misled by applying too literally the too rigid test suggested by *Warrington* L.J. in *Jones* v. *Tarr* (2) where he said:—"If so, the emergency which occurred was not an emergency to a fellow-workman, but an emergency to a person who at this moment was a stranger to the common employer. It cannot, I think, be said—I do not think it was argued—that an emergency to a stranger to the employment could be such as would justify, or as would render the action of the workman in that emergency, an action which was in the course of his employment."

(1) (1616) Hob. 273, at p. 277; 80 E.R. 418, at p. 422.
(2) (1926) 1 K.B., at p. 37.

H. C. OF A. 1939.

McKENZIE v. WILLIAM HOLYMAN & SONS PTY. LTD.

Evatt J.

The learned judge held accordingly that, because he fell into the water before reaching the gangway, Parman was at this moment a " stranger to the common employer " and so, therefore, McKenzie could not recover. I am unable to agree. I regard this case as a true emergency case, where the test to be applied is not susceptible of easy definition. Better than *Warrington* L.J.'s too rigid test is that stated by *Pollock* M.R. in the same case (1), i.e., whether the emergency was " foreign to the employment." Still better, I think, is that suggested by *Mackinnon* L.J. in the recent case of *Dermody* v. *Higgs & Hill Ltd.* (2); the issue raised is whether the act of the worker claiming compensation was " done to deal with or avert an emergency threatening his employers' interests " (3). Best of all, I think, is the principle suggested by Lord *Maclaren* in *Menzies* v. *M'Quibban* (4), viz., " Impliedly each workman, besides having to perform the special work for which he is hired, owes something to the community of fellow-workers, and must be helpful according to his experience where necessity arises."

Lord *Maclaren's* words well describe the emergency function which McKenzie was performing when he met with his death. He was not to know, and he did not care, that Parman's fall was not in the course of his employment. It was enough for him that his shipmate was in grave danger of drowning at the side of the ship. If the master had been present and had ordered McKenzie to assist, clearly McKenzie's action would have been taken in the course of his employment. There is uncontradicted evidence that, if the master had been present on board, he would have ordered all on deck (including McKenzie) to assist in the rescue. The emergency was not " foreign " to the employment of McKenzie, but closely associated with it.

Therefore, while accepting all the learned judge's findings of fact, I hold as a matter of law that McKenzie's death was caused by " personal injury by accident arising in the course of his employment." Obviously if it arose " in the course of " his employment it also arose " out of it." For his death was due to McKenzie's encountering the very type of risk which was involved in giving assistance to Parman.

I agree that the appeal should be allowed.

(1) (1926) 1 K.B., at p. 31.
(2) (1937) 4 All E.R. 379.
(3) (1937) 4 All E.R., at p. 382.
(4) (1900) 2 Fraser, at p. 736.

McTIERNAN J. I agree that the appeal should be allowed.

The question was raised whether Parman, at whose rescue the deceased man McKenzie was assisting when he lost his life, had reached the place where the risks of his employment lay. But in the claim made by McKenzie's dependants the relevant and decisive facts are that Parman and McKenzie were seamen employed on the same ship and that Parman fell into the water alongside the ship when returning to it and McKenzie was on the ship, the place of his employment. The issue whether he lost his life in an accident arising out of and in the course of his employment does not depend upon whether it was one of the duties of his actual employment to assist in rescuing persons falling into the water alongside the ship. It is well settled that the word "employment" in the Act is not to be confined to actual work. An accident is one arising out of and in the course of the employment if it is met with in the course of doing something reasonably incidental to the employment (*Lancashire and Yorkshire Railway* v. *Highley* (1)). It was reasonably incidental to the deceased's employment as a member of the crew to assist in saving the life of another member of the crew who fell into the water in the sight of the ship and to go to the position where he went with the lantern and where he fell into the water. The case falls within the principle under which it is held that an accident which happens to a workman in the course of doing something in an emergency which he may reasonably have thought it a duty of an employee to do arises out of and in the course of doing something incidental to the employment. Instances of the application of this principle are *Culpeck* v. *Orient Steam Navigation Co. Ltd.* (2) and *Menzies* v. *M'Quibban* (3).

Appeal allowed with costs. Award set aside. Appellants to have the costs of the hearing before the arbitrator. Other costs to be dealt with by the arbitrator. Matter remitted to arbitrator to hear and determine.

Solicitors for the appellants, *Maddock, Jamieson & Lonie.*
Solicitors for the respondent, *Green, Dobson & Middleton.*

H. D. W.

(1) (1917) A.C. 352.
(2) (1922) 15 B.W.C.C. 187.
(3) (1900) 2 Fraser 732.