

[HIGH COURT OF AUSTRALIA.]

SPIRATOS APPELLANT ;
 APPLICANT,
 AND
 AUSTRALASIAN UNITED STEAM NAVIGA- }
 TION COMPANY LIMITED . . . } RESPONDENT.
 RESPONDENT,

Seamen's Compensation—Accident arising out of or in the course of employment— H. C. OF A.
Seaman disappearing from ship at sea—Whether accident or suicide—Presump- 1955.
tion against suicide—Evidence suggestive of suicide—Rebuttal of presumption {
—Seamen's Compensation Act 1911-1953 (No. 13 of 1911—No. 10 of 1953), ADELAIDE,
s. 5. June 16, 17;

A seaman disappeared from a ship at sea and was presumably drowned. MELBOURNE,
 There was no direct evidence as to whether the occurrence was accidental or July 18.
 a case of suicide. The seaman was a competent and experienced able seaman.
 At the time of his disappearance the weather was fine, the wind light, and the
 sea slight. The ship was deeply laden and steady. There appeared to be no
 place on her from which it was at all likely that a man might fall overboard
 accidentally. There was evidence that the seaman was worried over a business
 transaction. When told of his disappearance, his widow said, "Why ? Why ?
 Why did he do it ?"

In a claim by the widow for compensation under the *Seamen's Compensation Act 1911-1953*,

Held, that, giving due weight to the presumption against suicide, the evidence as a whole did not justify an affirmative finding of death by accident, and accordingly the widow had failed to discharge the onus resting upon her.

The effect of the presumption against suicide discussed.

Observations on whether the right of appeal under the *Seamen's Compensation Act 1911-1953* is on questions of law only or on questions both of law and fact.

Decision of the Local Court of Port Adelaide, affirmed.

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Irene Spiratos, the widow of Theotokis Spiratos deceased, on behalf of herself and two infant daughters, as dependants of the deceased, claimed compensation pursuant to s. 5 of the *Seamen's Compensation Act* 1911-1953 in respect of his death, against his employer, the Australasian Steam Navigation Co. Ltd.

Spiratos was employed on the s.s. *Caloundra*, which left Port Adelaide on 27th August 1953, bound for Sydney. At 10 p.m. on 28th August, he was relieved of duty at the wheel for a customary "half-hour break". He should have returned to duty on the bridge at 10.30 p.m., but he failed to do so. A search was made of the ship, but Spiratos could not be found. The ship was then turned about and a search of the sea was made, but this also was without result. Spiratos was presumed to have been drowned.

Spiratos was a competent and experienced able seaman. At the time of his disappearance, the weather was fine and the sea slight. The wind was a light breeze. The ship was deeply laden and steady. The construction of the ship was such that, in the circumstances existing at the time of Spiratos' disappearance, it appeared that the possibility of a man going overboard by accident was remote. It appeared that, at the time of his disappearance, Spiratos was very worried over a transaction in which he was involved in connection with a cafe business. When the news of his disappearance was conveyed to his widow, she said "Why? Why? Why did he do it?" There was also other evidence of remarks by Spiratos suggesting that he was despondent, as well as evidence to the effect that he was normal in his conversation and behaviour.

On the arbitration arising from the widow's claim for compensation, the arbitrator (a special magistrate sitting in the Local Court of Port Adelaide) held that she had failed to prove that Spiratos' death was the result of an accident and, consequently, she was not entitled to compensation.

From that decision the widow appealed to the High Court.

T. E. Cleland (with him *M. E. E. Cleland*), for the appellant. The happening which caused the seaman's death occurred in the course of his employment. A seaman, while at sea, is continuously engaged on his employment. There is no evidence from which it could be inferred that the seaman had committed suicide. There is, in the absence of evidence to the contrary, a presumption that he did not commit suicide. The appellant is not obliged to suggest the particular circumstances in which the accident may have

occurred. [He referred to *Bender v. Owners of Steamship Zent* (1); *Marshall v. Owners of Steamship Wild Rose* (2); *Owners of Ship Swansea Vale v. Rice* (3); *Nelson v. Mutton* (4).] H. C. OF A.
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F. E. Piper Q.C. (with him *S. H. Skipper*), for the respondent. The onus of proving that the death arose from accident remains on the appellant throughout the case. The presumption against suicide is effective, if there is no evidence at all as to what happened (*Harvey v. Ocean Accident & Guarantee Corporation* (5)). If there is evidence before the court tending to show what happened, then the presumption does not conclude the matter. [He referred to *Kerr v. Ayr Steam Shipping Co. Ltd.* (6); *Proctor v. Owners of S.S. Serbino* (7); *Simpson v. London, Midland & Scottish Railway Co.* (8); *Emanuel v. Emanuel* (9).] In the present case, it is difficult to see how the seaman could have got into the water unless he committed suicide, and there is, in addition, some evidence pointing to suicide. That is enough to weigh the balance in favour of suicide. The accident did not arise in the course of employment. The legislature cannot have intended that a seaman, while on his ship, is insured against any kind of accident whatever (*Pearson v. Fremantle Harbour Trust* (10); *Harris v. Associated Portland Cement Manufacturers Ltd.* (11)).

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T. E. Cleland, in reply. The accident arose in the course of employment (*Fitzgerald v. W. G. Clarke & Son* (12); *Dover Navigation Co. Ltd. v. Isabella Craig* (13)).

Cur. adv. vult.

THE COURT delivered the following written judgment:—

July 18.

This is an appeal from a decision of the Local Court of Port Adelaide, constituted by a special magistrate, on a claim for compensation under the *Seamen's Compensation Act 1911-1953* (Cth.). The claim was made, on behalf of herself and two infant children, by Irene Spiratos, the widow of Theotokis Spiratos, a seaman employed by the respondent company, who disappeared from s.s. *Caloundra* at sea on the night of 28th August 1953 and must be presumed to have been drowned. The claim was rejected by the magistrate.

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| (1) (1909) 2 K.B. 41. | (8) (1931) A.C. 351. |
| (2) (1909) 2 K.B. 46; (1910) A.C. 486. | (9) (1945) 2 All E.R. 494, at p. 496. |
| (3) (1912) A.C. 238. | (10) (1929) 42 C.L.R. 320. |
| (4) (1934) 8 A.L.J. 32. | (11) (1939) A.C. 71, at pp. 84, 85. |
| (5) (1905) 2 I.R. 1, esp. at p. 30. | (12) (1908) 2 K.B. 796. |
| (6) (1915) A.C. 217. | (13) (1940) A.C. 190. |
| (7) (1915) 3 K.B. 344. | |

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Under s. 5 of the *Seamen's Compensation Act* compensation is payable in respect of the death of Spiratos if that death was occasioned "by accident arising out of or in the course of his employment". The burden of proving that it was so occasioned rests upon the claimant. In the present case, if it could be taken as established that the death was occasioned by "accident", it seems to us that no difficulty would arise with regard to the connection of the accident with the employment. It could readily be inferred that it arose out of, if not in the course of, the employment. But death by suicide is not death by accident. And the magistrate was of opinion that there was in this case such a possibility or probability of suicide as to make him unable to find affirmatively that the death of Spiratos was occasioned by accident.

The burden of proving death by accident rests, as we have said, on the claimant. She is assisted at the outset by a presumption against suicide: see, e.g. *R. v. Huntbach: Ex parte Lockley* (1). But this means no more than that, if nothing relevant were proved except that the deceased disappeared from a ship at sea, the only proper inference would be that he fell overboard accidentally. If other relevant facts are proved, these must be taken into account along with the presumption, and the question at the end of the case is not whether the presumption has been rebutted in the sense that the death has been proved not to have been accidental, but whether, having regard to the evidence and to the presumption, there is a real balance of probability that the death was accidental. The position in such cases is explained by Lord Lindley in delivering the judgment of the Privy Council in *Ajum Goolam Hossen & Co. v. Union Marine Insurance Co. Ltd.* (2). After referring to the presumption of unseaworthiness, which arises from the entirely unexplained loss of a ship at sea, his Lordship said: "If nothing more were known, unseaworthiness at the time of sailing would be the natural inference to draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon, and which a Court ought to act upon if unassisted by a jury. But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship are proved, those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed, such unseaworthiness cannot be properly treated as established, and the defence founded upon it must fail" (3).

(1) (1944) K.B. 606.

(2) (1901) A.C. 362.

(3) (1901) A.C., at p. 366.

It is in the light of this principle that the evidence in the present case must be examined.

The *Caloundra* left Port Adelaide at 3 p.m. on 27th August 1953, bound for Sydney. Spiratos was in the evening watch (8 p.m. to midnight), and on 28th August was at the wheel on the bridge from 8 p.m. to 10 p.m. At 10 p.m. he was relieved at the wheel for a customary "half-hour break". It was his duty to return to the bridge at 10.30 to assume look-out duty. When he did not appear on the bridge at 10.30, the officer on watch sent a cadet to look for him. The cadet reported that he could not find him, and the seaman at the wheel was then sent to search for him, the cadet taking the wheel in the meantime. At 11.10 p.m. the seaman reported that he had been unable to find Spiratos, and the officer on watch, "fearing that something was amiss", called the master to the bridge. The master had all deck personnel called, and a thorough search of the entire ship was made under the direction of the chief officer, but Spiratos was not found. At 11.20 the vessel was turned about, and her course was retraced, with extra lookouts placed, floodlights trained on the water, and lifeboats cleared away. A thorough search was made, which was continued until 8 a.m. on the 29th, but it was vain, and at that hour the ship resumed her interrupted voyage.

If nothing more had appeared than what is stated above, it might well have been said that the only proper course was to apply the presumption against suicide with the result that the claim for compensation would succeed. There was, however, other evidence.

Spiratos was a competent and experienced able seaman. At the time of his disappearance the weather was fine, and the sea slight. The wind was force 2-3 (light breeze) and on the starboard quarter. The ship was deeply laden. The chief officer said that she "would be a steady ship with no appreciable roll". The ship has a "continuous high bulwark" around the weather deck, and a thorough inspection of her by the magistrate appears to have discovered no place on her from which it was at all likely that a man might fall overboard accidentally. In their report to their owners the master and the chief officer expressed the opinion that "the possibility of the man going overboard by accident was remote". This report, as such, was probably not admissible in evidence, but it aptly expresses the reasonable inference to be drawn from the evidence as to the construction of the ship and the circumstances existing at the time of the disappearance of Spiratos. Some evidence to support a contrary conclusion was given by a seaman named Cuming, who was not at the material time a member of the crew but had

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sailed on previous voyages in the *Caloundra*. This evidence, however, is obviously unsatisfactory on its face, and it was not accepted by the magistrate.

The matters so far considered go a long way towards weakening the effect of the presumption against suicide. But there is other evidence which, while hardly sufficient to support an actual finding of suicide, does affirmatively suggest that the case may well be one of suicide. It appears that Spiratos was very worried over the result of a business transaction in which he had recently engaged. The details of this transaction are not entirely clear, though the agent who negotiated it was called as a witness for the claimant. But it seems that Spiratos and a man named Mavratzakis had bought a cafe business with the freehold of the premises on which it was carried on. The price was £2,600, of which sum Spiratos provided £600 and his partner £400, the balance of £1,600 being borrowed on first mortgage. The money put into this transaction represented the whole of Spiratos' savings. It is a reasonable inference that the business did not prosper. At any rate after a very short time Spiratos sold out to his partner, taking a second mortgage for the amount of his interest. A little later the partner in his turn sold out and left. Spiratos was thus left with a liability of £1,600 on the first mortgage, while his chance of recovering a due contribution to that liability, and also the money which he had put into the business, depended entirely on a former partner who had "sold out and gone away". Enough appears to show that he had serious cause for worry, and he appears in fact to have been seriously worried over the position. When the news of his disappearance was conveyed to his widow, the claimant, she said:—"Why? Why? Why did he do it?" She also said that he had been worried over the business and was "disgusted and fed up". There is also the evidence of a man named Tziotis, a compatriot and shipmate of Spiratos, who told of a conversation between himself and Spiratos on the day when the latter joined the *Caloundra*. He had heard that Spiratos had "left the sea and bought a business ashore." They spoke of this, and Tziotis said that Spiratos appeared to be "very sad at having to go back to sea". There is a good deal of other evidence to the effect that Spiratos was normal in his conversation and behaviour, but this, of course, does not weaken the evidence as to his state of mind.

It is for the claimant to establish death by accident. This means that she must induce in the tribunal a belief that death did occur by accident—not as a matter of certainty but as a matter

of definitely preponderant probability. "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality" (per *Dixon J.* in *Briginshaw v. Briginshaw* (1)). Looking at the whole of the evidence in this case, and giving all due weight to the presumption against suicide, we do not think that an affirmative finding of death by accident could be justified. Having regard to the circumstances surrounding the disappearance of the deceased and the evidence as to his state of mind, one might even be inclined to say that there is a slight preponderance of probability against accident. But, however this may be, an affirmative finding of accident is not, in our opinion, possible. We think that the magistrate reached a right conclusion on the evidence before him.

We have not thought it necessary to refer to a number of interesting English cases, which were very properly cited to us in argument, and which have arisen on facts more or less similar to those in the present case. They are collected and discussed in *Simpson v. London, Midland & Scottish Railway Co.* (2) but Viscount *Dunedin* in that case himself said:—"It is no use trying to decide a case by looking at decided cases and then inquiring which case most resembles the present on the facts. Decided cases are only useful so far as they lay down principles" (3). The principles applicable in the present case have seemed to us to be clear enough.

We asked counsel during the argument whether the right of appeal in this case was a right of appeal on questions of law only, or whether the appeal was a re-hearing with all questions of fact and law open. Counsel agreed that an appeal lay as to all questions of fact or law, but they did not refer to any provision of the *Seamen's Compensation Act*, the assumption presumably being that the Local Court at Port Adelaide was a State court exercising federal jurisdiction, from which an appeal lay to this Court under s. 73 of the Constitution. We have since looked at the relevant provisions of the *Seamen's Compensation Act*, which are contained in s. 5 (3) and cl. 2 and 3 of the second schedule. The position does not appear to us to be clear, but appeals have been entertained by this Court in similar cases: see *Nelson v. Mutton* (4) and *McKenzie v. William Holyman & Sons Pty. Ltd.* (5). In neither of these cases

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(1) (1938) 60 C.L.R. 336, at p. 361.

(2) (1931) A.C. 351.

(3) (1931) A.C., at p. 357.

(4) (1934) 8 A.L.J. 32.

(5) (1939) 61 C.L.R. 584.

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was it suggested that the appeal was incompetent or that the right of appeal was limited to questions of law. Assuming an unlimited right of appeal to exist, we are of opinion that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Cleland, Teesdale, Smith & Harris.*

Solicitors for the respondent, *Scammell, Skipper & Hollidge.*

B. H.