

6AR1BERT Decision

1 UNITED STATES DISTRICT COURT

1 SOUTHERN DISTRICT OF NEW YORK

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3 BARRY BERRETTA,

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4 Plaintiff,

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5 v.

05-CV-10902 (MHD)

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6 TUG VIVIAN ROEHRIG, LLC,

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7 Defendant.

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8 New York, N.Y.

9 October 27, 2006

9 11:08 a.m.

10

10 Before:

11

11 HON. MICHAEL H. DOLINGER,

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12 District Judge

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13 APPEARANCES

14

14 WERTHEIMER ASSOCIATES, PC
15 Attorneys for Plaintiff
15 FLORRIE L. WERTHEIMER
16 ROBIN M. WERTHEIMER
16
17 LYONS & FLOOD, LLP
17 Attorneys for Defendant
18 EDWARD P. FLOOD
18 JON WERNER
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1 (In open court)

2 THE COURT: I have sat through the trial, considered
3 the testimony, reviewed the exhibits and considered the
4 parties' various submissions as well as the joint pretrial
5 order. And based on those, I'm prepared at this time to render
6 a decision in this case, which I'll try to do as slowly as I
7 possibly can.

8 Plaintiff was the captain of the barge Essex on
9 November 18, 2004. The event in question is referred to as a
10 makeup, which is the process of attaching a barge to a tugboat
11 so that the tug can move the barge to another location. In
12 this case the barge was owned by an entity known as K-Sea,
13 which is not a party here. The tug named Vivian Roehrig was
14 owned by defendant Roehrig. The makeup process for pushing the
15 barge involves placing the bow of the tug into a notch in the
16 center of the stern of the barge and then securing two cables,
17 also known as wires, in this case approximately 1¼-inch steel
18 cables, from the tug to the bitts on the rear starboard and
19 port side of the barge's stern.

20 Plaintiff claims he suffered a severe shoulder injury
21 as a result of negligent conduct by the crew of the tug.
22 Specifically, he claims that he was handed the loop at the end
23 of the port cable at a time when there was insufficient slack
24 for him to immediately walk the cable from near the center of
25 the barge at the stern to the far port edge of the barge, a

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1 distance of perhaps 25 feet, and to place the loop of the cable
2 over the port bitt. He supports this claim with his own
3 account of the events and with the opinion of Captain James
4 Dalles, who faults defendant for a series of failures to comply
5 with accepted and reasonable industry practices in performing
6 this operation.

7 Let me at this point briefly summarize certain of the
8 basic facts and plaintiff's theories of liability. The
9 evidence as to the actual incident includes the testimony of
10 the plaintiff as to the specific events of that evening and the
11 testimony of Messrs. James Beatty and Marty Kehoe as to the
12 standard practice on the tug.

13 The credible evidence shows the following: The tug,
14 under the command of Captain Kehoe, approached the stern of the
15 barge, which was tied up on the starboard side to a pier at
16 Port Mobil on the evening of November 18, 2004. The barge was
17 loaded with some amount of petroleum product at the time. The
18 tug placed its bow into the notch of the barge. At that point
19 the captain maneuvered the stern of the tug towards starboard,
20 thus shortening the distance of the tug's starboard cable to
21 the starboard bitt of the barge. The one deckhand who was
22 involved in this operation for the tug, Mr. Beatty, handed the
23 starboard cable to the plaintiff, who walked it to the
24 starboard bitt and attached it there. Plaintiff then walked
25 toward the center of the stern and positioned himself several

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1 feet from the notch, that is, on the port side of the notch.
2 At that point Beatty handed him the loop of the port cable. At
3 that stage the cable, which was an approximately
4 one-and-a-quarter-inch line made of steel and about 80 feet in
5 length, had sufficient slack to permit the handover to
6 plaintiff but not sufficient slack to permit plaintiff to walk
7 it over to the port bitt and affix it to the bitt. To give
8 enough slack to the port cable for that purpose, it was
9 therefore necessary for the tugboat to swing its stern toward
10 the port side. To accomplish this step, Beatty first went
11 towards the stern on the port side and in the process lifted
12 the cable over the port side and onto the tires attached to the
13 hull on that side of the vessel. He then proceeded to the
14 starboard winch at the stern and removed the so-called dog,
15 which had locked the drum in place. This allowed the starboard
16 cable to play out from the drum, thus permitting the captain to
17 move the stern of the tug towards the port side, thus ensuring
18 sufficient slack on the port cable to permit plaintiff to place
19 the cable loop on the port bitt.

20 According to plaintiff, when first given the cable,
21 which he described as very heavy, he tried to move it towards
22 the port bitt but found that he could not do so because of
23 insufficient slack. He was therefore compelled to hold the
24 cable for perhaps as long as two minutes until the tug had
25 shifted to port, allowing him to place the cable on the bitt.

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1 In the time while he held the cable, he felt a pop in his
2 shoulder and some pain, although it was not enough to prevent
3 him from completing his task or finishing his two-week tour,
4 and indeed it did not lead him to file an accident report until
5 four weeks later. He testified that his shoulder became
6 progressively more painful over a number of days or weeks, and
7 he finally filed an accident report and consulted his family
8 doctor, who prescribed an MRI. That test revealed a full
9 rotator cuff tear, which led to surgery and a recommendation by
10 his surgeon that he avoid heavy lifting in the future, since
11 this was the second tear of that rotator cuff. As a result, he
12 could not return to his old job and has been unable to find
13 equivalent employment elsewhere.

14 Plaintiff claims, with the support of Captain Dalles,
15 that he should not have been given the cable to hold until
16 there was enough slack on the line to permit him to walk it out
17 to the bitt.

18 In elaborating on this basic point, Captain Dalles
19 finds four areas in which he says the tugboat crew failed to
20 act with reasonable care.

21 First, he criticizes the crew for not ensuring
22 sufficient slack in the port cable to reach the port bitt
23 before the start of the makeup operation. I note that Captain
24 Dalles did not mention this item in his pretrial report.

25 Second, Captain Dalles states that the captain failed

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1 to meet his obligations by using only one deckhand in the
2 makeup operation instead of two.

3 Third, he criticizes the captain for assertedly
4 failing to monitor the operation to ensure that no handover of
5 the cable to the plaintiff took place until the dog had been
6 released on the starboard winch.

7 Fourth, he further criticizes the captain for not
8 monitoring the handoff of the cable to the plaintiff and thus
9 failing to order the return of the cable to Mr. Beatty when the
10 cable proved too short to be put on the bitt.

11 In closing statements, plaintiff has added one other
12 item to the list of assertedly negligent acts or omissions that
13 proximately caused his injury. He contends that the tugboat
14 deckhand, Mr. Beatty, was negligent because he tossed the port
15 cable into the water on his way to the starboard winch, thus
16 adding to the pressure on the cable segment that plaintiff was
17 then holding.

18 Let me at this point just briefly summarize the legal
19 standards that we're dealing with here. The parties do not
20 dispute that plaintiff's claim is one for maritime negligence,
21 since plaintiff is suing the owner of a vessel on which he was
22 not employed. Hence, he must demonstrate: one, that one or
23 more crew members of the tug were responsible for acts or
24 omissions that reflect a failure to use reasonable care, that
25 is, a deviation from the conduct that would be expected from a

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1 reasonable person in their respective positions; and two, that
2 such act or omission was the proximate cause of plaintiff's
3 injury. We conclude that plaintiff has not met his burden.

4 In assessing plaintiff's claim, let me first make a
5 few initial comments. In determining the weight of the
6 evidence, I have accepted in large measure plaintiff's account
7 of what he perceived and went through, especially insofar as
8 his account is consistent with the testimony of the defendant's
9 witnesses as to the standard procedures on the Vivian Roehrig
10 and similar vessels.

11 As for the plaintiff's expert, I have not given his
12 opinion great weight for a variety of reasons, most of which I
13 will address in a moment, but principally because the contrary
14 testimony of defendant's witnesses, notably the crew or former
15 crew members, the nonparty witness William Sullivan and
16 defendant's expert Captain Brown, seemed, in both logic, weight
17 and consistency, to be more persuasive as to industry practice.
18 Moreover, I note that the testimony of Captain Dalles suffered
19 from the fact that his account reflected both in his trial
20 testimony and in his report deviated from the facts to which
21 plaintiff and the other witnesses all testified. In addition,
22 I found some of his explanations of the asserted failings of
23 the tug crew to be unsupported by a clear rationale as to why
24 the procedures that he pressed for would have been helpful and
25 practical.

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1 Let me now turn to the specific arguments pressed by
2 plaintiff. We start with plaintiff's contention that the
3 captain failed to determine before the start of the operation
4 that there was enough slack in the port cable to permit it to
5 be placed on the port bitt. He rests this argument on the
6 assertion that since Captain Kehoe previously dealt with the
7 Essex, he should have known how much slack will be required and
8 ensure that it was available in advance. Significantly,
9 plaintiff's expert did not even mention this asserted omission
10 in his pretrial report. That alone would have been grounds for
11 exclusion of his testimony on that point, if defendant had
12 sought such relief. In any event, it underscores the absence
13 of credible support for this contention. The credible
14 testimony of defendant's expert Captain Douglas Brown as well
15 as the testimony of nonparty witness William Sullivan, that of
16 Mr. Beatty, who is not only an experienced deckhand but also
17 now working for a nonparty company, and the testimony of
18 Captain Kehoe, establishes the operating procedure on the
19 Vivian, on the tug Vivian Roehrig and also establishes that
20 this procedure was an accepted approach in the industry to the
21 process of making up. They made clear that premeasurement of
22 the cable's slack was impractical not only because a tug such
23 as the Vivian Roehrig would deal with a number of
24 different-sized barges every day but because the length of
25 cable that would be needed for a given barge would vary

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1 significantly, depending upon whether the barge was empty or
2 partly filled or entirely filled, and depending as well on what
3 the nature of the product was that the barge was carrying.
4 Indeed, even different types of petroleum products would vary
5 in weight and hence would alter the height of the barge as it
6 sat in the water. Since the tug crew would not know these
7 details in advance, there was no reasonable basis for such
8 preoperation measurements. In addition, the testimony
9 suggested that the most efficient means of adjusting the length
10 of the cable to fit the distance from the tug to the two bits
11 of the barge was by using the tugboat to maneuver its stern to
12 starboard and to port. To do otherwise would require the
13 tugboat crew to pull the cable from the winch on either side,
14 an awkward operation even when the dog is released. Instead,
15 the procedure utilized by Captain Kehoe and apparently
16 routinely by a number of other tugboat operators for
17 similarly-sized tugs and barges relied on maneuvering the stern
18 to reduce the distance between the first cable and the first
19 bitt and then extending that cable by turning the stern in the
20 other direction, thus reducing the distance between the end of
21 the second cable and the second bitt.

22 As for plaintiff's complaint about the fact that he
23 was handed the port cable before the dog had been removed from
24 the starboard winch, we find, based on the cited testimony,
25 that this was standard procedure not only on the Vivian Roehrig

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1 but on the vessels of various other tugboat operators in the
2 New York harbor. The winch is at the stern of the tugboat and
3 the deckhand must locate himself there to release the dog. The
4 efficiency of the operation is enhanced by first giving the
5 bargeman possession of the cable so that when the dog is
6 released and the tug starts to turn, the bargeman may promptly
7 start to walk the cable towards the bitt, thus making it clear
8 to the tugboat captain how much additional slack is needed and
9 therefore how much further the tug must turn.

10 Moreover, plaintiff's complaint on this score also
11 fails to persuade because he has not demonstrated that if he
12 had been handed the cable immediately after the dog was
13 removed, he would not have been injured. The procedure by
14 which the tugboat deckhand left the bow and journeyed to the
15 starboard winch to release the dog appears to have taken only a
16 brief amount of time. One estimate was about 10 seconds. That
17 is, the deckhand moved rearward on the port side, pulling the
18 cable over the side onto the tires as he went, arrived at the
19 starboard winch and released the dog. It appears that the bulk
20 of the time required to give sufficient slack to the cable was
21 consumed by the tug actually turning its stern to port, a
22 process that took, by at least one estimate, perhaps one to two
23 minutes. The evidence does not demonstrate the injuries
24 sustained by plaintiff was attributable to his holding the
25 cable during the brief interval until the dog was released. If

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1 anything, it likely occurred during the longer period while the
2 tugboat swung around.

3 Plaintiff's related complaint about the failure to use
4 a second deckhand is also unpersuasive. The theory he
5 apparently espouses is that a second deckhand could have stood
6 at the stern by the starboard winch while Mr. Beatty handed
7 plaintiff the cable and thus more promptly had released the
8 dog. Plaintiff's counsel added a further elaboration on this
9 point, saying that the second crew members would then have gone
10 forward to the port block and tackle to which the port cable
11 was attached and could have operated it in some manner to ease
12 the weight of the cable held by plaintiff.

13 The first problem with these contentions is that the
14 standard practice not only with Roehrig but also with other
15 tugs has been to use only one deckhand for this operation.
16 Indeed, Roehrig's contract with Local 333 allows the company to
17 use only five-man crews, including two deckhands for the
18 two-week tours required on the vessels such as the Vivian
19 Roehrig. It also permits four-man crews, including only one
20 deckhand, for day trips. These requirements and the watch
21 schedule thus allow for only one deckhand to be on duty at any
22 one time, in six-hour intervals. This structure presupposes
23 that a second deckhand will not be made available for such
24 routine tasks as a makeup, which occurs typically at least
25 several times a day.

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1 Moreover, the evidence does not suggest so pressing a
2 need for such a second deckhand as to disregard these accepted
3 arrangements. The procedures followed by the Vivian Roehrig
4 are, as noted, not untypical in this industry for
5 similarly-sized tugs and barges, and in any event, plaintiff
6 has not shown that the use of a second deckhand would have
7 meaningfully changed the outcome here. As noted, if the second
8 deckhand had been stationed at the starboard winch, this might
9 have saved a small amount of time between the handoff of the
10 cable to the plaintiff and the moment when he was able to put
11 it on the bitt. There is no evidence that saving those few
12 seconds would have avoided his injury.

13 As for the possibility of a second deckhand then going
14 forward to the block and tackle, the credible testimony was
15 that this mechanism, which was principally through use when the
16 tug retrieved the cable, does not need the presence of a crew
17 member when the cable was being played out. To the contrary,
18 the cable apparently simply moved out on its own through the
19 mechanism, which served to reduce the weight of the cable as it
20 was held by the bargeman.

21 Plaintiff's next two complaints are that the captain
22 failed to monitor the procedure or, more particularly, that he
23 did not prevent Mr. Beatty from handing over the cable to
24 plaintiff before the dog was released, and that he did not
25 order Beatty to take the cable back once it became clear that

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1 there was not sufficient slack to put the cable on the bitt
2 without further maneuvering by the tug. The factual premise
3 for this argument is plaintiff's testimony that when holding
4 the cable, he did not see the captain through the window on the
5 bridge and hence inferred the captain was not focusing on what
6 was going on at the bow.

7 The first problem with this set of arguments is that
8 it is not at all evident that because plaintiff did not notice
9 the captain at a moment when plaintiff contends that he was
10 struggling to hold onto the cable means that the captain was
11 not there doing his job. Moreover, the premise for the
12 argument that the cable should not have been handed over before
13 release of the dog is not shown by the credible evidence to be
14 commonly accepted practice in the industry. And for reasons
15 noted, the transfer of the cable before release of the dog does
16 not appear otherwise to be an unsafe or unreasonable practice.

17 The related criticism, that the captain should have
18 ordered a return of the cable to the tug, is also unconvincing.
19 The procedures followed on the Vivian Roehrig may be the most
20 efficient approach and are generally accepted in the industry,
21 that is, to leave the cable with the bargeman, who is to hold
22 it while the tug starts to swing over, and is then to start to
23 walk the cable toward the bitt as he acquires slack from the
24 turning of the tug. This ensures more precision in determining
25 the length of the cable and avoids excessive slack, which could

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1 lead to the cable falling into the water and thereby increasing
2 the pull on the cable segment held by the bargeman and possibly
3 pull on the line.

4 The added complaint suggested by plaintiff's counsel
5 that the tug deckhand, Mr. Beatty, tossed the cable into the
6 water when he walked back to the stern while plaintiff held the
7 cable, is unsupported by the credible evidence. The procedure
8 was for the deckhand to toss the cable over the side onto the
9 tires that sat around the outside of the hull of the tug. We
10 have no indication that Mr. Beatty deviated from that standard
11 practice. Although it is possible that a portion of the cable
12 ended up in the water on this occasion, that would be likely to
13 occur only because plaintiff was attempting to pull the cable
14 over to the bitt before he had sufficient slack, thereby
15 pulling away from the hull the portion of the cable that rested
16 on the tires.

17 We emphasize that our conclusion that the procedures
18 used on this one occasion did not deviate from the standard
19 practice for the Vivian Roehrig as described by Beatty and
20 Kehoe is supported by several other facts. First, when
21 plaintiff prepared his accident report, he offered a
22 description of the events that coincided with the description
23 of the standard operating procedure offered by the crew
24 members. That is, he said, "I was holding the eye of the push
25 cable with both hands while deckhand from tug threw the entire

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1 length of cable over side of tug -- was waiting for tug to
2 swing over to port side so I could put the cable eye on after
3 bitt -- strained both shoulders."

4 Furthermore, as testified to by Mr. Sullivan, K-Sea
5 had a standard instruction that its crew members were to report
6 any deviations from safety procedures on vessels with which
7 they dealt, and plaintiff never reported such a deviation.

8 Our best estimate as to what occurred here was that
9 plaintiff was required to hold the cable for a period of one to
10 two minutes; that during that time he apparently tried to pull
11 the cable towards the bitt, thus putting additional strain on
12 the cable and on his shoulder, and that the pressure caused a
13 renewed injury to the shoulder that he had injured in the same
14 manner approximately 10 years before.

15 The cable is approximately 80 feet long and its total
16 weight is apparently around 232 pounds. Since plaintiff would
17 have been holding only a small portion of that cable, the bulk
18 of which rested on the tug and then on the tires of the
19 tugboat, plaintiff was carrying a weight that was initially
20 substantially less, although we have no way to reliably
21 estimate the effective weight.

22 We also note that plaintiff had several options for
23 reducing even the weight that he was carrying since he could
24 have placed the loop of the cable onto a nearby stanchion and
25 possibly could have partially rested it, the cable, while still

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1 holding it on a set of safety wires that he was standing behind
2 on the stern of the barge. We do not suggest that defendant
3 argues that plaintiff was negligent in not using these
4 available means of alleviating his problem but rather observe
5 that their availability further underscores the fact that the
6 procedure utilized, even if not ideal, cannot properly be
7 described as constituting actionable negligence by defendant.
8 Rather, it appears that plaintiff, in carrying out an arduous
9 task, succumbed to a vulnerability in his shoulder.

10 One final point: Plaintiff worked for many years in
11 the maritime industry and was, by all accounts, both competent
12 and careful. His injury, which appears to be attributable to
13 certain of the rigors of the job and the apparently underlying
14 shoulder problem, was serious, and it placed him in a very
15 difficult situation of a middle-aged man with limited career
16 options and vanishing benefits. These circumstances may well
17 raise questions as to the adequacy of available social services
18 and our statutory safety net. Regrettably, the correction of
19 these difficulties is not available through litigation when the
20 provable facts and application of neutral legal principles do
21 not demonstrate a basis for holding defendant legally
22 responsible for the plaintiff's injuries or loss of employment.

23 In sum, judgment will be entered for defendant,
24 dismissing the complaint.

25 Is there anything else at this stage that we should

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1 deal with?

2 MR. FLOOD: Not from the defendants, your Honor.

3 THE COURT: Very well. Thank you all very much.

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