

70/1980

SUPREME COURT OF VICTORIA

BEDNAREK v SQUIRE & LACCO

Tadgell J

29 July 1980

MARINE - MOTOR BOAT PLYING FOR HIRE - BOAT LICENSED TO CARRY 25 PASSENGERS - MEANING OF "PASSENGERS" - REFERENCE IN REGULATION THAT 2 CHILDREN SHALL BE RECKONED AS EQUAL TO ONE ADULT - WHETHER SUCH PROVISION REFERS TO THE NUMBER OF PASSENGERS THAT CAN BE CARRIED OR TO THE CRITERIA TO BE USED WHEN MEASURING A BOAT FOR LICENSING PURPOSES - CHARGE DISMISSED BY MAGISTRATE - WHETHER MAGISTRATE IN ERROR: MARINE ACT 1958, S3; PASSENGER (SAILING, MOTOR AND STEAM) BOAT REGULATIONS 1931, RR 15, 16, 20, 21, 22(3) and 35; ACTS INTERPRETATION ACT 1958, S29.

The defendants were operators of a motor boat which plied for hire on Westernport Bay. The boats were licensed to carry 25 passengers. On two occasions they were found to be carrying 45 and 33 persons. Charges were later laid and the Magistrate accepted a defence submission that pursuant to reg 15 of the *Passenger (Sailing, Motor and Steam) Boat Regulations* 1931 ('Regs') two children under 12 years were to be reckoned as equal to one adult. The charges were dismissed. Upon appeal—

HELD: Order absolute in each case. Dismissals set aside and remitted to the Magistrates' Court for further hearing.

1. The question which arose in this case was whether the licence granted under the regulations to carry 25 passengers meant that it authorised the carriage of some combination of adults and children not exceeding 25 adults, when two children under the age of 12 years were reckoned as one adult.

2. The purpose and effect of regulation 15 are merely to prescribe a number of criteria which are to be applied, where they are applicable, by the relevant officer when a boat is being measured as a necessary preliminary to a consideration whether a licence should be granted for her. It is to be done, however, only for the purpose of making a calculation and determining the number of adults which the boat should be regarded as being capable of carrying. It by no means follows that the licence applied for should be granted for that number of passengers.

3. The expression "passengers" is not defined by the regulations but in s3 of the *Marine Act* 1958 the word "passengers" is defined to include "all persons carried in a ship except the master and crew and the owner his family and servants and except persons carried by any ship or yacht used solely for pleasure and not engaged in trade unless such persons are carried for hire." Section 29 of the *Acts Interpretation Act* 1958 provides in effect that the definition of "passengers" in the *Marine Act* 1958 applies to the interpretation of the word "passengers" in the regulations unless the contrary intention appears. No contrary intention appears in the Act or in the regulations, accordingly, the word "passengers" therein includes all persons carried on a licensed boat except those persons who are excluded by reference to the definition of "passengers" contained in s3 of the *Marine Act*.

4. There was before the Magistrate evidence that on each of the occasions in question there was on the boat a number of passengers in excess of the number of 25 specified in the licence which had been issued and each defendant was, on the occasion alleged in the information against him, the person in charge of the motor boat. Therefore, the Magistrate ought to have convicted each defendant.

TADGELL J: The motor boat "Furneaux" plies for hire on Westernport Bay. In order that that may lawfully be done it is necessary that a licence for the purpose be obtained from the Marine Board pursuant to the *Passenger (Sailing, Motor and Steam) Boat Regulations* 1931.

There was issued on 26th February 1979 a licence in the form which is provided for by Schedule XV to the regulations. The licence provides that the "Furneaux" is licensed to ply for hire and to carry passengers within specified limits subject to the provisions of the *Marine Act* and to any rules and regulations in force thereunder or to any amendment thereof.

On 21st May 1979 the informant, who is a senior constable of police and an inspector of

the Marine Board attached to the Motor Boat Squad, observed the motor boat "Furneaux" taking passengers on board at the Stony Point jetty. He observed 45 persons with their luggage and certain other cargo placed on board, and at 10.46am on that day he saw the boat leave the jetty.

On the following day, 22nd May 1979, the informant was also at the Stony Point jetty when he saw the "Furneaux" take on board 33 persons together with certain other cargo.

On 23 May last year the informant spoke to James Squire who told him that he was the owner of the boat, that he held a licence for the boat to carry 25 passengers and that he was in charge of her on 21 May when she left Stony Point. The informant asked Mr Squire how it was that 45 persons were allowed on board from the Stony Point jetty on 21 May. Mr Squire replied, "I thought it was only 32 with a lot of kids."

On 22 May last year the informant interviewed Mr Neil Lacco in relation to the loading of the "Furneaux" which the informant had seen occur on that day. Mr Lacco informed him that he was in charge of the boat on that day and said that he thought the boat was licensed to carry 40 passengers.

Each of Mr Squire and Mr Lacco was respectively charged on information by the informant that on the relevant day he, "being a person in charge of a licensed motor boat, to wit "Furneaux", registered No. MB104, such boat plying for hire on Westernport Bay, Hastings, did permit the number of such passengers to be in excess of the number specified in the licence granted in respect of such a boat contrary to *Passenger (Sailing, Motor and Steam) Boat Regulations 1931* Clause 35."

The two informations came on for hearing together before Mr McGowan SM sitting alone at the Magistrates' Court at Hastings on 5 September last. Evidence was given by the secretary of the Marine Board which established that a licence had been issued pursuant to the regulations and that it provided, among other things, as I have earlier summarised.

The informant also gave evidence. He described in his evidence-in-chief his observations on 21st and 22nd May as I have summarised them. In cross-examination by counsel who appeared on behalf of the defendants the informant said that he considered the number of passengers, including children, in the boat to have been dangerous. He was also asked how many passengers on the boat were adults and how many children. He said he estimated that, as to the occasion on 21st May, half to three-quarters of the passengers were children and that, as to the occasion on 22nd May, half of them were children. Counsel asked the informant how many of the children would have been under the age of 12 years. The informant answered that he could not say but that it would have been approximately half. The informant said in answer to a question by counsel that none of the children was asked his age or for any proof of his age. In re-examination the informant said that in his opinion the range of the children's ages was from 10 to 16 years.

The cases for the informant relied upon that evidence alone except that the regulations under which the information was laid were also tendered, as was a copy of the licence.

Counsel for the defendants called no witness in either case but he made submissions which relied upon an interpretation of the regulations. In the event the Stipendiary Magistrate dismissed each information upon a footing which I interpret, having regard to what is sworn in the affidavit in support of the orders to review before me, that he was not satisfied beyond reasonable doubt that the informant had made out the ingredients of the offence charged in either case.

It will be convenient to refer to some of the regulations in order to notice both the nature of the offence charged and the nature of the defence which was taken, in the event successfully, before the Magistrate.

The regulations were made in 1931 pursuant to s54(l) and (m) of the *Marine Act 1928*, or so it was submitted by counsel on behalf of the informant before me. It may be that some other provision of s54 of the *Marine Act* would also have supported the regulations, but it seems clear that sub-para (l) and (m) at least were relied upon.

Regulation 10, as it now stands, having been amended by Statutory Rule No 408 of 1974, provides by sub-regulation (2) that:

"No person shall in or on any Victorian coastal or inland waters ply for hire with any boat for the carriage of passengers or open any boat for engagement in any such waters or book any passages in any such boat be duly licensed by the Board in accordance with these Regulations to ply or be open for engagement or booking."

Sub-regulation (4) provides that:

"Every person guilty of an offence against this regulation shall be liable to a penalty of not more than \$100."

Regulation 13 provides that:

"Before any boat can be licensed, the same must be inspected by such officer or person as the Board may appoint for the purpose, and such officer or person shall, if he considers any boat suitable for the purpose of carrying passengers within the port or limits named, and properly equipped therefor, give his certificate accordingly in the form appropriate thereto, as provided in Schedule III, V, XI, and XI.A to these regulations, as the case may require; but such officer or person shall not give the prescribed certificate in respect of a boat the dimensions of which are less than 20 feet length by 6 feet breadth amidships by 2ft 6in depth amidships, unless he is satisfied that such boat has sufficient stability and freeboard when loaded to carry such number of passengers as he may determine as safe, which number shall be set out on the face of the certificate, and represent the maximum number of passengers which may lawfully be carried on such boat notwithstanding any provision to the contrary contained in clause 15(1) of these regulations."

Regulation 15 sets out certain matters which must be taken into account, by those responsible for licensing a boat, before a licence is issued. [*His Honour set out part of Reg 15 and continued*] ... By way of proviso or qualification to regulation 15 it is provided that:

"The foregoing procedure is subject to the measuring officer or other person as aforesaid being satisfied that the boat will be sufficiently stable with the full number of passengers on board; if the officer or such other person has any doubt on this point he shall submit full particulars, in writing, to the Board, which may determine the number of passengers in respect of which a licence may be issued. For the purpose of this regulation two (2) children under twelve (12) years of age shall be reckoned as equal to one (1) adult."

Regulation 35 is the regulation under which the two informations were laid. It provides that:

"In the case of a boat plying for hire, or let out for hire or valuable consideration, if the owner or person having charge of the same shall permit such boat to be used in the conveyance of passengers, the number of such passengers being in excess of the number specified in the licence granted in respect of such boat, he shall be deemed guilty of a breach of these regulations, and punishable accordingly, and the licence for such boat may be suspended or cancelled."

The submission before the Magistrate which was made on behalf of the defendants relied upon the last sentence contained in what I have called the proviso or qualification to regulation 15, and was to this effect: Having regard to that last sentence, it was incumbent upon the informant in each case to give evidence as to how many children on board the boat had on the occasions in question been over the age of 12 years. The argument was that, since the prosecution had failed to do that, it had failed to establish that there was an excess of passengers for the purpose of regulation 35 and that there was in the circumstances proved insufficient evidence upon which to convict. As I have said, the Magistrate accepted that submission and each information was dismissed.

The grounds of the order to review were as follow:

1. That upon the uncontradicted evidence for the informant the learned Magistrate should have found that the Motor Boat was carrying more passengers than the number for which it was licensed.
2. That notwithstanding the provisions of regulation 15 of the *Passenger (Sailing, Motor and Steam)*

Boat Regulations 1931, it was not open to the Magistrate to reckon two children under 12 years of age as equal to one adult for the purposes of a prosecution under regulation 35 of the said regulations.

3. That for the purposes of regulation 35 of the said regulations the Magistrate should have applied the definitions of "passengers" set out in Section 3 of the *Marine Act* 1958."

It appears to be implicit in the argument which was apparently submitted on behalf of the defendants to the Magistrate that the word "passengers", as used in regulation 35 under which the defendants were charged, is to be construed by reference to regulation 15 so that a "passenger" means either one adult or two children under the age of 12 years.

The question which arises is whether a licence which is granted under the regulations to carry, for example, 25 passengers means that it authorises the carriage of some combination of adults and children not exceeding 25 adults, when two children under the age of 12 years are reckoned as one adult.

If the licence and the regulations under which it is granted are to be construed in that manner, there could be carried, for example, 12 adults and 26 children under the age of 12 years, a total of 38 persons; or for example again, 5 adults and 40 children under the age of 12 years, a total of 45 persons; or perhaps one adult and 48 children under the age of 12 years, a total of 49 persons; or, on the same view 50 children under the age of 12 years. If the maximum permitted number of persons who might lawfully be carried as passengers were variable, depending on the number of children under the age of 12 years who were included in the boat's complement, regulation 35 would no doubt be a very difficult one indeed to administer. It would not only be difficult in many cases for authorities who are called to police it: it would in many cases be difficult for those in charge of vessels to know whether the regulation was being contravened by them or not. There would be cases, which I would assume to be not infrequent, where a boat's complement included a blend of adults and children, when neither the authorities nor the boat operators could know (if the regulations were interpreted in the manner which was contended for on behalf of the defendants) whether regulation 35 was being infringed without making detailed enquiries in order to ascertain as a fact the ages of children who made up the complement.

To find that mere clumsiness or inconvenience will attend a piece of legislation in the matter of its administration or application is not, of course, necessarily enough to persuade a court that the legislation ought not to be interpreted in a way which would be attended by clumsiness or inconvenience. It might be an indicator of a different interpretation but it would not be conclusive.

Although one is struck by the extreme difficulty which would attend the administration of the regulations (and the due compliance with them by those who are obliged to comply with them) if the interpretation urged on behalf of the defendants were correct, I do not think it is necessary to rest a decision upon that. In my opinion a meaning of the word "passengers", where appearing in the regulations is otherwise discernible. I think the meaning appears by reference not only to the plain words in the regulations, but by reference to the evident policy upon which they are founded.

One finds in regulation 16 a requirement that each boat which is licensed under the regulations shall have painted on it in prominent letters the maximum number of passengers it is licensed to carry. [*His Honour then referred to Regulations 20, 21 and 22(3) and continued*] ... The regulations to which I have referred indicate, in my opinion, that one of their prime purposes is to achieve a degree of safety for passengers who are carried in licensed boats which ply for hire. It is evident, I think, that if the interpretation which is sought to be placed upon the word "passengers" in regulation 35 were right, it would be an interpretation which would equally apply to the word "passengers" in each of the other regulations to which I have referred.

In order that the regulations may be properly administered, and in order that those who are required to observe them may comply with them, it is plainly necessary to know with certainty how many passengers a boat is licensed to carry and how many passengers are to be certified as being the maximum number which may be carried. I think that is a very good reason for treating the word "passengers" as not being restricted in meaning by the last sentence contained in regulation 15 in the manner for which counsel for the defendants contended.

In any event, that sentence itself, according to its expressed language, does not purport to cast upon the word "passengers" where it is used elsewhere in the regulations, and in particular where it is used in regulation 35, a meaning which is restricted or qualified by reference to what is said in the sentence. Such operation as the sentence has is confined in terms as being for the purpose of regulation 15.

In my opinion the purpose and effect of regulation 15 are merely to prescribe a number of criteria which are to be applied, where they are applicable, by the relevant officer when a boat is being measured as a necessary preliminary to a consideration whether a licence should be granted for her. It is to be done, however, only for the purpose of making a calculation and determining the number of adults which the boat should be regarded as being capable of carrying. It by no means follows that the licence applied for should be granted for that number of passengers.

Regulation 13 requires those inspecting a boat before a licence is issued to take into account a number of other criteria and to certify by reference thereto the number of passengers which the boat may safely carry. That number represents the maximum number which may lawfully be carried on the boat. Those other criteria are required to be taken into account "notwithstanding any provision to the contrary contained in Clause 15(1) of those regulations." In my opinion it is not right to construe regulation 35 – or indeed any regulation other than regulation 15 – by reference to that last sentence contained in regulation 15.

The expression "passengers" is not defined by the regulations themselves. In s3 of the *Marine Act 1958* the word "passengers" is defined to include "all persons carried in a ship except the master and crew and the owner his family and servants and except persons carried by any ship or yacht used solely for pleasure and not engaged in trade unless such persons are carried for hire." Section 29 of the *Acts Interpretation Act 1958* provides in effect that the definition of "passengers" in the *Marine Act 1958* applies to the interpretation of the word "passengers" in the regulations unless the contrary intention appears. In my opinion no contrary intention appears in the Act or in the regulations, so I think it is right to say that the word "passengers" therein does include all persons carried on a licensed boat except those persons who are excluded by reference to the definition of "passengers" contained in s3 of the *Marine Act*. That definition, not being exclusive, also leaves room, of course, for the application of the word "passengers" defined in accordance with ordinary English usage.

On either view, in my opinion, there was before the Magistrate on the hearing of each of these informations evidence that on each of the occasions in question there was on the "Furneaux" a number of passengers in excess of the number of 25 specified in the licence which had been issued for her. There was also evidence upon which the Magistrate could not but find – that each defendant was, on the occasion alleged in the information against him, the person in charge of the motor boat. In my opinion, therefore, the Magistrate ought to have convicted each defendant.

I order that the order of the Magistrates' Court in each case be set aside. I direct that each case be remitted to the Magistrates' Court at Hastings to be further dealt with in accordance with these reasons for judgment.