

The Rule of Human Jettison in *Queen v. Dudley and Holmes*

Do either *Holmes* or *Dudley* give guidance in deciding the guilt or innocence of the spelunkers? The Court in *Queen v. Dudley* did not seem to think any method of selection would be fair. As the judge in that case somewhat rhetorically asked: "By what measure is the comparative value of lives to be measured?" But the Court in *Holmes* agreed that if a lifeboat is overburdened with passengers and likely to sink on the high seas, some passengers may be jettisoned on the condition that they are selected fairly. Passengers, the Court believed, took precedence over crew, if there were more crew than might be necessary to operate the boat. But if more sacrifices were called for, then, the Court believed, "lots must be cast." Does *Holmes* suggest a verdict in the Case of our Spelunkers, for in that case a roll of the dice determined Roger Whetmore's fate, i.e. lots were cast? Perhaps you are unhappy with this opinion expressed in *Holmes*. If so, Benjamin Cardozo, who later became a Supreme Court Justice, seems to be with you:

"Where two or more are overtaken by a common disaster, there is no right on the part of one to save the lives of some by the killing of another. There is no rule of human jettison. Men there will often be who, when told that their going will be the salvation of the remnant, will choose the nobler part and will make the plunge into the waters. In that supreme moment the darkness for them will be illumined by the thought that those behind will ride to safety. If none of such mold are found aboard the boat, or too few to save the others, the human freight must be left to meet the chances of the waters. Who shall choose in such an hour between the victims and saved? Who shall know when the masts and sails of rescue may emerge out of the fog?"¹

Judge Edmund Cahn seems to be of a similar opinion:

"I am driven to conclude that otherwise — that is, if none sacrifice themselves of free will to spare the others — they must all wait and die together. For where all have become congeners, pure and simple, no one can save himself by killing another. In such a setting and at such a price, he has no moral individuality left to save. Under the terms of the moral constitution it will be *wholly* himself that he kills in his vain effort to preserve himself. The "morals of the last days" leave him a generic creature, only; in such a setting, so remote from the differentiations of mortal existence, every person in the boat embodies the entire genus. Whoever saves one, saves the whole human race; whoever kills one, kills mankind."²

Neither Cardozo or Cahn, however, make mention of a lottery or a collective decision such as the one that was made by the Spelunkers to determine who would be killed by a throw of the dice. Does what Cardozo or Cahn say help?

— See Katz, *Bad Acts and Guilty Minds*, Chicago, see pp. 8-81

¹ Benjamin Cardozo, *Law and Literature*, Harcourt Brace & Company (1931), p. 113.

² Edmund Cahn, *The Moral Decision: Right and Wrong in the Light of American Law*, Indiana University Press (1955, p. 71.