

Admiralty Practicum

Volume 1988
Issue 1 *Winter 1988*

Article 4

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Fifth Circuit, 3 June 1988, 845 F.2d 1347**

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JOHNSON v. OFFSHORE EXPRESS, INC.
United States Court of Appeals, Fifth Circuit, 3 June 1988
845 F.2d 1347

Vessel owner held liable under the Jones Act for failing to provide proper equipment to enable a seaman of limited height and experience to make upper bunks.

FACTS: Barbara Johnson (Johnson) the plaintiff-appellee, was hired by Offshore Express Inc. (Offshore) the defendant-appellant on or about April 22, 1983 and was assigned to the M/V Champion Express. Johnson held an able bodied seaman's license but due to her short stature and limited experience, it was agreed she would perform duties inside the enclosed areas of the cabin only.

On April 27, 1983 while the vessel was moored to an offshore drilling platform in four to six foot seas, the mate told the plaintiff to make the upper bunks in the passenger quarters. The plaintiff asserted that while she was making an upper bunk, a shift by the vessel caused her to fall approximately six feet to the deck. She testified that she was making the upper bunk while kneeling on the mattress with her legs dangling over the edge. No one saw the accident, although a cook in the next compartment heard a disturbance and found Johnson lying on the deck in obvious pain.

After the initial hospitalization following the accident, Johnson complained of severe headaches, back pain and urinary problems. Johnson began medical treatment with Drs. Craco and Llewellyn. The doctors performed back surgery on her in order to relieve compression of nerve roots, believed to have been brought on by trauma of the fall. Johnson remained in the hospital following the surgery and showed signs of significant improvement in physical and occupational therapy, but her condition began to deteriorate. Johnson exhibited among other things, a ten degree hip flexion and curvature of the spine. She was diagnosed as suffering from arachnoiditis, a complication of the initial back surgery, which necessitated a second correctional operation. Johnson was then transferred to the Touro Pain Center where Dr. Morse, a psychiatrist and neurologist concluded that various complications which she exhibited could have been caused by psychiatric disorders.

Johnson filed suit in U.S. District Court for the Eastern District of Louisiana. She advanced claims against Offshore for Jones Act negligence and unseaworthiness under general maritime law. The court awarded Johnson damages of \$37,180 for past lost wages; \$123,708 for future lost wages; and \$370,000 for past and future pain and suffering and \$185,000 for past, present and future disabilities and disfigurement. The court in a subsequent proceeding credited Offshore with payments for past maintenance and cure of \$10,056. Offshore made a motion for a new trial on February 23, 1987 based on fraud, misrepresentation and misconduct during the previous trial. These allegations stemmed from Johnson's participation in a smuggling conspiracy six months after the trial, showing significant improvements in her physical condition. The motion was denied.

ISSUES: (1) Whether Offshore was liable under Jones Act negligence and unseaworthiness, for failing to provide proper equipment to enable a seaman of limited height and experience to make upper bunks?

(2) Whether the court abused its discretion by not granting a new trial under Federal Rule of Civil Procedure, 60 (b)?

ANALYSIS: The Fifth Circuit Court of Appeals affirmed the liability finding of the district court against Offshore. Determinations of negligence and unseaworthiness in Admiralty are factual questions and are binding on appeal, unless clearly erroneous. *Landry v. Oceanic Contractors, Inc.*, 731 F.2d 299, 302 (5th Cir. 1984).

The court recognized that a finding of Jones Act negligence is determined under a different standard of causation than an unseaworthiness claim. *Smith v. Trans-World Drilling Co.*, 772 F.2d 157, 162 (5th Cir. 1985). The court concluded that only the slightest evidence of negligence is sufficient to sustain a finding of Jones Act liability. *Theriot v. J. Ray McDermott & Co., Inc.*, 742 F.2d 877, 881 (5th Cir. 1984). The district court determined that Offshore was negligent in ordering Johnson, knowing her physical limitations, to make upper bunks in four to six foot seas without an assistant. The Court of Appeals found sufficient evidence to support lower court's conclusion that a lurch of the vessel was the cause of Johnson's fall. Johnson's safety expert testified that it was impossible for her to make up the bunk standing on the folding step or sideboard. The equipment provided on the bunk was proper to get people into the bunk to sleep but not suitable for making it up. Offshore pointed out a safer method was available but failed to show Johnson knew or was told about the technique. Offshore offered testimony that Johnson had declined an offer of assistance by the Engineer, but this was in controversy. The court found the uncontradicted testimony, evidencing the failure of the mate to give Johnson an assistant, convincing.

The Court of Appeals upheld the finding of liability due to the claim of unseaworthiness. A vessel cannot be found seaworthy unless its equipment is reasonably suited for the purpose for which it was intended. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). The court noted that a more demanding standard of causation is present in an unseaworthiness claim. The proximate cause is established by proving the unseaworthy condition played a substantial part in bringing about or actually causing the injury. *Alvarez v. J. Ray McDermott & Co., Inc.*, 647 F.2d 1037 (5th Cir. 1982). The court found, that the vessel lacked adequate manpower and the proper equipment for a five foot seaman to make up an upper bunk. Expert testimony, which showed the bunk configuration to be the normal industry practice, was not sufficient to establish seaworthiness in light of the foregoing findings. See *June T. Inc. v. King*, 290 F.2d 404, 406 (5th Cir. 1961). The court noted a sufficient ladder or platform could have been provided to safely perform the task. Offshore's contention that an alternative method of making up the bunk was available, did not break the causal link, because no testimony established Johnson was aware of this method. The court for these reasons found that the unseaworthiness holding was not clearly erroneous.

The Fifth Circuit found the district court's denial of the motion for a new trial to be a proper use of the court's discretionary powers. The first ground Offshore asserted for the new trial motion was, newly discovered evidence, under Rule 60 (b)(2). Newly discovered evidence, however, must be evidence of facts existing at the time of the original trial. *N.L.R.B. v. Jacob E. Decker and Sons*, 569 F.2d 357, 364 (5th Cir. 1978). The district court correctly found that Offshore did not meet this requirement. The second grounds for Offshore's new trial motion was fraud and misrepresentation. The appellate court did not find the evidence of fraud presented to the district court to be clear and convincing. The possibility that Johnson's physical condition improved after trial was not a valid basis for a new trial. The court concluded that Offshore's allegations did not establish that the district court abused its discretion in denying the motion on the basis of fraud.

Edward F. Kenny '90