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Northern Queen, Inc. v. Kathryn Kinnear 298 F.3d 1090 (9th Cir. 2002) (Decided Aug. 7, 2002)

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registration, that he could not recall the name of the vessel's owner and that the vessel had an expired Idaho registration sticker to be sufficient to constitute reasonable suspicion. Other less persuasive factors included the defendant's story about the boat being on a test run, despite the tools being in new condition and the defendant's unsoiled appearance; that the inspector knew that the vessel was on a course typically used by smugglers and that the inspector knew that duffel bags of the type seen on the vessel were typically used in smuggling operations.

Finally, the court considered whether or not the delay exceeded the permissible limits of an investigative detention. The court concluded that the investigation was minimally intrusive and that the investigation was conducted quickly and efficiently. Given the mobility of the ship, the proximity to the international border, the court found the additional 15-20 minute delay caused by the background check to be incidental when weighed against the United States' interest in "the prevention, detection and suppression of violations of laws in the United States". For Fourth Amendment purposes, the court found that "[the] detention was minimally intrusive until reasonable suspicion ripened into probable cause for the search and arrest of the smugglers."

The defendant does not dispute that the Coast Guard had sufficient probable cause to search the vessel after the results of the background check were made known to the Coast Guard. Therefore, the appellate court reversed the district court order granting the defendant's motion to suppress and remanded for a new trial.

George Schneider

LIMITATION OF LIABILITY ACT AND THE PRIMARY DUTY RULE

The owner of a vessel is absolutely liable for injuries arising from the vessel's unseaworthiness; the Limitation of Liability Act is an exception to absolute liability, and the owner of the vessel will be relieved of liability if the three prongs of the primary duty rule are satisfied.

Northern Queen, Inc. v. Kathryn Kinnear
298 F.3d 1090 (9th Cir. 2002)

(Decided Aug. 7, 2002)

Northern Queen, Inc. ("Northern Queen") was a small, family-owned corporation which had two principal shareholders: Blake Kinnear ("Kinnear"), the president, managing, agent, and captain who owned 22 percent of the corporation shares, and Kinnear's mother, Linda Kinnear, the corporation's secretary/treasurer who owned 77 percent. Kinnear's minor daughter owned one percent of the shares. Northern Queen's primary asset was the fishing ship LIN J ("the vessel").

In March of 1999, the vessel participated in the crab season in the northwest section of the Bering Sea. On March 9, 1999, Kinnear sent e-mails to his mother and wife indicating that the weather was turning bad and ice was becoming a concern. On March 15, 1999 crabbing was interrupted due to worsening weather. The vessel spent the next two days gathering pots. By March 17 the vessel had gathered 62 crab pots, which

contained about 55,000 pounds of crab. On the evening of March 17, 1999 Kinnear sent an email to the cannery notifying them that he expected to be back in 30-36 hours due to icing and slow going. In his next email, 12 hours later, Kinnear again stated that icing was still causing problems, but this time there was mention of an intermittent bilge alarm from the lazarette. He also stated that they were not able to pump water out. Kinnear planned to make a stop at St. Paul, six hours away. However, six hours after Kinnear's last email, the vessel sent out a distress call indicating that it was capsizing. Shortly thereafter it sank, killing everyone aboard.

After its vessel sank, Northern Queen brought an action seeking to limit its liability to Kinnear's estate ("Estate") for the accident, pursuant to the Limitation of Liability Act, 46 USC §§181 *et. seq.* ("Limitation Act"). The United States District Court for the Western District of Washington entered judgment in favor of Northern Queen limiting its liability under the primary duty rule. Although the district court determined that Northern Queen was not entitled to exoneration or limitation under the Limitation Act, due to the vessel's unseaworthiness at the time of the accident, under the affirmative defense of the primary duty rule, because Kinnear, as the vessel's captain had knowledge of the vessel's unseaworthiness and failed to correct it, Northern Queen was not liable to his estate. Kinnear's estate appealed.

On appeal there were two issues presented to the court: first, whether the district court erred in finding that Kinnear had failed to take adequate measures to prevent or correct the accumulation of water in the lazarette, and second, whether the district court erred in concluding that Northern Queen had satisfied all the elements of the primary duty rule.

In addressing the first issue the Court of Appeals was asked to review the district court's findings of fact. The standard of review applied by the court in such cases is highly deferential. In this instance the court relied on *Allen v. Iranon*, 283 F.3d 1070, 1076 (9th Cir. 2002), wherein the court stated it would accept a lower court's finding of fact unless there are "definite and firm convictions that a mistake has been committed." During the trial the parties had stipulated that the vessel capsized due to excessive ice build-up and the water in the lazarette, and to the fact that the vessel's average speed was five to six knots. Although the estate conceded as to the duties of the vessel captain, it argued that there was not enough evidence presented to support the district court's findings. The estate argued that although the vessel did carry 62 pots of crabs, there was no evidence that this compromised the vessel's safety. The estate also argued that with regard to the lazarette, Kinnear had recognized that there was a problem, and that there was no evidence provided that he did not try to correct it. The estate also offered a witness, Greene Cowan ("Cowan"), who testified to typical industry practice to carry no more than 25 pots in such conditions, and therefore with 62 pots on board access to the lazarette would be impossible. Based on Cowan's testimony, which the district court determined to be credible, the lower court found that the capsizing of the vessel was attributable to decisions made by Kinnear. The district court found that it was likely that the vessel was traveling too fast to allow for the removal of ice build-up, and that the presence of 62 crab pots prevented remedying of the situation in the lazarette. The Court of Appeals found that the estate presented no evidence that indicated that the district court was mistaken in its conclusion, and found no error.

The second issue addressed by the court was whether Northern Queen had satisfied all the elements of the primary duty rule. The Court of Appeals cited *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836-37 (9th Cir. 1989) (citing *Reinhart v. United States*, 457 F.2d 151 (9th Cir. 1972)) noting that under the primary duty rule, "a seaman-employee may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employment."

The Court of Appeals discussed three factors that must be satisfied in order for an employer to relieve itself from liability under the primary duty rule. The first factor is that the seaman must have consciously assumed a duty as a term of his employment. The estate argued that despite the fact that Kinnear was the captain of the vessel and that his duty was to operate the vessel safely, his duty was general in nature, rendering the primary duty rule inapplicable. The court disagreed. The court noted that the duty of a captain is highly specific. It is the captain who was ultimately making all pertinent decisions, based on his experience and amount of skill. It was his duty to provide for the safety of the crewmembers and the well being of the vessel, and to respond to any outside factors accordingly. The court concluded that on the day of March 17, 1999, Kinnear did not respond appropriately to the worsening weather conditions and the alarm in the lazarette, which led to the loss of the vessel with all hands on board. The court found that Northern Queen had satisfied the first element.

The second factor addressed by the court was whether the dangerous condition that injured the seaman had either been created by the seaman or could have been controlled or eliminated solely by the seaman in the proper exercise of his employment duties. The estate argues that Kinnear alone could not have corrected or eliminated the dangerous condition that faced the vessel on March 17. The court again disagreed. The court stated that decisions such as the speed and course of the boat, and the number of crab pots that could be stored on board are in the realm of the captain's authority and his alone. The court concluded that the decisions made by Kinnear were the factors that caused the vessel to capsize and subsequently sink. The court stated that Kinnear's decision to proceed at the speed of five to six knots with 62 crab pots under such weather conditions more likely than not caused the icing. The number of pots on board also prevented access to the lazarette and made it impossible to fix the problem there. The court stated that it was in Kinnear's power alone to address the icing problem and the lack of access to the lazarette, as he could have chosen to go slower and to dump some of the crab pots.

The third factor the court examined was the issue of whether the seaman knowingly violated a duty consciously assumed as a condition of the employment. The Court of Appeals cited *Bernard v. Maersk Lines, Ltd.*, 22 F.3d 903, 907 (9th Cir. 1994) in stating that the primary duty rule does not apply to a momentary lapse of care by an otherwise careful seaman. Instead, there must be conscious disregard for the seaman's duties. The estate argued that Kinnear's actions could be seen as constituting an innocent miscalculation and not conscious disregard. The court disagreed once again. The court stated that the emails that Kinnear sent made it clear that he was aware of the icing conditions and bilge alarms in the lazarette. The court found that Kinnear's actions actually contributed to the build up of ice and inaccessibility of the lazarette, and that these actions were inconsistent with the typical behavior of captains under such conditions. Thus, the court concluded that Kinnear had violated his duties as captain.

According, the Court of Appeals affirmed the lower court's findings that Kinnear failed to take adequate measures to prevent or correct the accumulation of water in the lazarette and that Northern Queen had satisfied all the elements of the primary duty rule.

The dissenting opinion in this case agreed with the majority on most issues except for its treatment of the third prong of the primary duty rule. The dissent felt that the record supported the finding that Kinnear had been negligent, not that he had knowingly violated his duty, and did not agree with the finding that Northern Queen had satisfied the primary duty rule.

Mariya Link

**AN INJURY SUFFERED ON SHORE MUST BE CAUSED BY A DEFECTIVE APPURTENANCE
OF A SHIP ON NAVIGABLE WATERS UNDER THE ADMIRALTY EXTENSION ACT**

**Summary judgment was properly granted for the defendants against the plaintiff
who suffered a back injury while unloading groceries and supplies for an oil
platform from the back of an improperly loaded box.**

Dahlen v. Gulf Crews, Inc.

281 F.3d 487 (5th Cir. 2002)

(Decided February 4, 2002, cert. denied 123 S.Ct. 261 (2002))

Plaintiff Peter Dahlen ("Dahlen"), an employee of Island Operating assigned to work as a barge operator for the Forest Oil Corporation's ("Forest") platforms in the Gulf of Mexico was told on July 6, 1995 to pick up a grocery order. The order had been placed with Universal Ogden Services ("Universal") by Forest on July 5th for 3 platforms, West Cameron 44, High Island 116, and High Island 820. The groceries had been loaded into an eight-foot square metal cube called a "grocery box". They were transported by truck from Universal to a dock in Sabine Pass, Louisiana, then loaded onto the *M/V Billy Jay*, which was owned by Gulf Crews, Inc. and Gulf Marine Services, Inc. (collectively, "Gulf") had been time chartered by Forest to be taken to its offshore platforms. Dahlen was told to go to West Cameron 44 to perform routine maintenance and unload the groceries. When he opened the box, he found that the supplies for West Cameron 44 had been loaded in the back of the grocery box. Because the box only had one door, Dahlen had to take everything out to get the West Cameron 44 groceries out and then replace the supplies for the other platforms. Dahlen claimed that this caused him to suffer a back injury, for which he had to return to shore the following day. Eventually he had to undergo lumbar fusion surgery to stabilize his back.

Dahlen filed suit for negligence on May 2, 1996 in Louisiana state court, naming Gulf, Universal, and Forest as defendants. The defendants removed the action on May 28, 1996 to federal court based on federal question jurisdiction under the Outer Continental Shelf Lands Act ("OCSLA"). Gulf and Universal were granted motions for summary judgment based on the grounds that they owed no legal duty to Dahlen. Forest was granted summary judgment based on the claim of platform liability, but was denied