

UNITED STATES OF AMERICA
UNITED STATES COAST GUARD vs.
LICENSE NO. 10809
Issued to: Lauren LEESE

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

2054

Lauren LEESE

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 9 July 1975, an Administrative Law Judge of the United States Coast Guard at San Francisco, California, suspended Appellant's seaman documents for three months on six months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as an Operator on board F/V AMERICA, under authority of the license aboved captioned, on or about 23 February 1975, Appellant, while the vessel was in Berkeley Marina, Berkeley, California, failed to take adequate precautions to prevent the spilling of a harmful quantity of oil into the navigable waters of the United States. An additional charge of misconduct, specifying that Appellant violated section 311(b) (3) of the Federal Water Pollution Control Act Amendment of 1972 in permitting a harmful quantity of oil to be discharged into the navigable waters of the United States, was dismissed as "duplicitous and unnecessary" by the Administrative Law Judge.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence the oral testimony of three witnesses; pertinent documents of the vessel; and a bottle containing an oil sample.

In defense, Appellant offered no evidence.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant suspending all documents, issued to Appellant, for a period of three months on six months' probation.

The entire decision and order was served on 12 July 1975. Appeal was timely filed and perfected on 16 January 1976.

FINDINGS OF FACT

On 23 February 1975, Appellant was serving as Operator under authority of his above-captioned license, aboard the F/V AMERICA, a Coast Guard documented and inspected vessel, licensed for passenger service in the Coastwise Trade. As Operator and Master (of record), Appellant was in charge of the vessel at all times relevant herein. The F/V AMERICA was carrying passengers at all times relevant herein

In the afternoon of that day, the F/V AMERICA returned to the Berkeley Marina, Berkeley, California, and was observed by Marina attendants to be discharging a dirty substance. Approaching the F/V AMERICA by skiff, the two attendants observed a petroleum substance emerging from above water level, through a hull fitting on the starboard side of the vessel and discharging into the Marina waters, which are part of the navigable waters of the United States. The oil formed black spots on the water and was subsequently washed away by the current. There also appeared a visible "sheen" in the area of the discharge and alongside the vessel. The attendants obtained a sample of the discharge by partially filling a bottle with the oil as it drained from the vessel.

A Coast Guard Pollution Investigator was called and upon

arrival that day, took a sample from the F/V AMERICA's bilge. He concluded that the sample was similar to the one obtained by the Marina attendants.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. Because of the disposition of this case, it is unnecessary to recite the specific arguments raised by Appellant.

APPEARANCE: E. A. Dawley, Esq. of Oakland, California.

OPINION

Appellant was charged with negligently failing to prevent the discharge of a harmful quantity of oil into the navigable waters of the United States. Negligence is defined by pertinent Coast Guard regulations at 46 CFR 5.05-20 (a) (2):

...the commission of an act which a reasonably prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonably prudent person of the same station, under the same circumstances would not fail to perform.

In order to prove the charge, it is necessary for the Coast Guard to prove that Appellant's conduct in some manner failed to conform to the standard of care required by a reasonably prudent Operator under the same circumstance as confronted the Appellant. It is not necessary that Appellant take every possible precaution to prevent the discharge of oil. He need only exercise that quantum of care required of the reasonably prudent person under similar circumstances. See Commandant Decision 1982 (GOLTEN); Commandant Decision 20011 (GIMBERT). A mere finding that a discharge occurred and that Appellant was operator was of the vessel at that time is sufficient to prove the charge of negligence. I conclude that the record is void of substantial evidence to prove negligence on the part of Appellant.

The bulk of the evidence offered by the Investigating Officer

was the testimony of two eyewitnesses to the discharging event; a sample of the discharged substance, obtained by one of the eyewitnesses; and the testimony of the Pollution Investigator who obtained an oil sample from the vessel's bilge and subsequently found a similarity between those samples. The evidence showed that the F/V AMERICA did discharge oil into the navigable waters of the United States, But it showed nothing more. It shed no light on what Appellant, himself, did or did not do in preventing the discharge.

Whether Appellant acted as a reasonably prudent operator in failing to take adequate precautions to prevent the discharge is the key issue in this case. In answer to that question, for lack of evidence as to what caused the spill, the Judge stated in the Decision and Order, at 33, that the facts of this case created a presumption of negligence and that the burden shifted to Appellant to prove otherwise. Such a presumption may be appropriate in the case of a vessel's grounding (Commandant's Decision NO. 1968 - JOHNSON); or in the case of an oil spill, where the cause of action is in admiralty against a vessel for damages (*Department of Fish and Game v. S. S. Bournemouth*, 318 F. Supp. 839 (C. D. Cal. (1970))); but not in the present action against Appellant's license, where the evidence shows nothing more than the occurrence of a discharge. A discharge of oil may or may not be caused by negligence. Negligence must be proved, not merely presumed, in the present case. See Commandant Decision 2013 (*BRITTON*). The burden of proof remained with the Investigating Officer.

Nor was failure to meet that burden cured by the introduction of the doctrine of *res ipsa loquitur*, which is essentially similar to the presumption concept. One of the criteria of that doctrine is that the injury must be such that, in the ordinary course of events, it does not occur if the person charged uses proper care. See *San Juan Co. v. Requena*, 224 U.S. 89, 99, 32 S. Ct. 399,401 (1912); *Johnson v. U.S.*, 333 U.S. 46,48-49,68 S. Ct. (1948); *Department of Fish and Gamu v. S.S. Bournemouth*, 318 F. Supp. 839, 841 (C.D. Cal. 1970). To assume that Appellant did not exercise the care of a reasonably prudent operator is speculative in light of the evidence presented. It can just as readily be assumed that Appellant was exercising the appropriate standard of care when a crew member negligently or

intentionally began discharging oil through the fitting. Thus, the discharge could have occurred, in the ordinary course of events, while Appellant was using that quantum of care required of him as an operator. Evidence proving that the discharge occurred may be sufficient to support assessment of a civil penalty under the Federal Water Pollution Control Act, but without more, such evidence is not sufficient to establish a *prima facie* case of negligence in an R.S. 4450 proceeding against Appellant's license as operator.

In summation, the evidence on the record fails to disclose any manner in which Appellant either failed to perform an act which a similarly situated, reasonably prudent person would have performed or committed an act which was unreasonable. This lack of substantial evidence cannot be cured by speculation or wishful thinking. Without substantial evidence to support the charge alleged, the order of the Administrative Law Judge must be vacated and the charge dismissed.

ORDER

The order of the Administrative Law Judge dated at San Francisco, California, on 9 July 1975, is VACATED and the charge is DISMISSED.

O. W. SILER
Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 22nd day of April 1976.

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