

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0721

NORBERT PRINCE, SR. AND HAZEL PRINCE

VERSUS

**HASLEY L. PROSPERIE AND STATE OF LOUISIANA
THROUGH THE DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT**

Judgment Rendered: December 28, 2006

On Appeal from the 16th Judicial District Court
In and For the Parish of St. Mary
Trial Court No. 109,067, Division "B"

Honorable Paul J. deMahy, Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Q 77 Pettigrew, J. concurs

ROB

HUGHES, J.

This appeal arises from a judgment in favor of plaintiffs for damages allegedly sustained as a result of exposure to a chemical leak following an allision¹ between a tug boat and barge with a bridge. For the reasons that follow, we amend the judgment and affirm as amended.

FACTS AND PROCEDURAL HISTORY

On July 19, 2001, at approximately 4:30 a.m., Captain Hasley Prosperie was piloting a tug boat, the M/V Mr. Barry, which was pushing a barge, Kirby 31801, toward a “swing bridge” (known as the Louisa Bridge) located at the crossing of the Intracoastal Waterway and Highway 319 in Louisa, Louisiana. A misunderstanding occurred in the communication between Captain Prosperie and the bridge tender, resulting in the bridge tender’s failure to open the bridge. Captain Prosperie failed to notice the bridge had not been opened in time to bring his vessel and barge to a stop before colliding with the bridge. Some part of the barge’s cargo of propane and propylene was released when valves on the barge were sheared off in the accident.

Plaintiffs, Norbert and Hazel Prince, lived approximately 1,000 feet from the bridge in question. They immediately evacuated and sought medical attention for exposure to the chemicals. In this personal injury suit that ensued, the trial court awarded both Mr. and Mrs. Prince \$20,000.00 each, and fault was assigned 70% to Captain Prosperie, and 30% to the State of Louisiana, through the Department of Transportation (State), for the fault of the bridge tender. The State has appealed, asserting the trial court erred in finding fault in the conduct of the bridge tender and in awarding excessive

¹ An allision is a collision between a moving vessel and a stationary object. **Bertucci Contracting Corp. v. M/V ANTWERPEN**, 465 F.3d 254, 257 n.1 (5th Cir. 2006), citing Thomas J. Schoenbaum, *Admiralty & Maritime Law*, 14-2 (4th ed. 2004).

damages. Captain Prosperie filed an answer to the appeal seeking to have a greater percentage of fault assessed to the State for the fault of the bridge tender.

DISCUSSION

Allocation of Fault

The manifest error standard of review is applied to a factfinder's allocation of fault. The trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances that might require the actor to proceed in haste, without proper thought. **Toston v. Pardon**, 2003-1747, pp. 17-18 (La. 4/23/04), 874 So.2d 791, 803, citing **Watson v. State Farm Fire & Casualty Ins. Co.**, 469 So.2d 967, 974 (La. 1985).

The trial judge gave the following oral reasons for rendering judgment in this case:

The first question to answer is, who was at fault for this allision. Basically, Captain Prosperie's employer[s] have admitted their fault. The question is, what percentage of fault did that contribute to the allision, and whether the State was at fault.

The first issue I make note of is, whether the navigational light on the southeast corner of the bridge was properly aligned. Of course, it is the burden upon the plaintiff and Prosperie to prove that it was not properly aligned, since that is an issue of fault that they must establish by a preponderance of the evidence. Captain Prosperie testified that he did not notice the light. He didn't say he definitely knew the light was not lit where he could see it. Smith and Duet saw too many lights.

Smith saw three lights on the bridge when there's only one and Duet - I mean, Duet saw three lights. Smith saw two. So, their credibility is not real good. However, I feel the plaintiff and Prosperie have failed to prove, more likely than not, that the light was improperly aligned.

With regard to the delayed openings of bridges as related in the correspondence between the State and the [Coast Guard], none of the correspondence specifically designated that the Louisa [B]ridge had a problem, or that Ms. Simon had a problem with delayed openings. Regardless, Ms. Simon was retrained shortly before the allision, so there was no - the plaintiff and Prosperie have not shown that by a preponderance of the evidence that the State was at fault in failing to properly train Ms. Simon or properly supervise her operation of the bridge.

Finally, we come to what actually happened that night between the bridge tender and Captain Prosperie. I'd like to point out that the video that was presented, as I previously indicated, was taken at a time of day where there was still sunlight illuminating the entire area. So, it was not real helpful in indicating what it looked [like] at the time of the allision. However, it did emphasize the fact that lights on the bridge and communication between the bridge tender and a vessel are extremely important, because I did notice when the bridge was finally opened, the only way I could tell it was open on the video is a reflection of the sunlight on the water past the bridge. So, at night, lights and communication are absolutely essential as far as I can tell, having no experience operating a tug boat.

The Code of Federal Regulations require[s] that the vessel request - as it approaches a drawbridge, request an opening either by signal or by radio communication, that the bridge tender acknowledge the request, and once that occurs, the vessel may proceed and the bridge tender opens the draw. I feel that this establishes a duty on the part of both the bridge tender and the operator of the vessel to communicate clearly their intentions to each other. In this case, Simon told Prosperie that she would close - she was opening, but this isn't important. This part isn't important. That she was opening the draw for the Lady Jeanette or Maggie Rae, or she had already opened it, but once they - she did tell him, once they passed, she would close the draw and reopen it for him. He took this to mean that he could proceed forward, that she was immediately going to reopen the draw. It was her intention that she expected another communication from him that he was coming forward and wanted her to reopen the draw. This failure of communication, I feel, was the responsibility of both parties. They both failed to communicate their actions to the other, so that both parties, both the State as the employer for Ms. Simon, and Mr. Prosperie, are both responsible for the failure of communication, and thus, both are responsible for the allision. And there is, I just want to point out before I go further, that there is no obligation that I can find that the tender be required to make constant vigilance watching the waterway to determine

if and when a vessel is approaching the draw. As I read in the Code of Federal Regulations, the primary obligation is on the vessel to request an opening of the draw, and once he receives an acknowledgement, he is then permitted to proceed.

Therefore, I find in this situation that Captain Prosperie would be 70% at fault and the State would be 30% at fault for the actions of Ms. Simon. Which brings us to the element of damages.

The injuries suffered by the Princes, or the physical injury, based on the medical records, seem to be mild and not very serious. Most of the injury they suffered was emotional, anxiety. And because of the situation - and a lot of it because, not knowing, particularly, in the beginning, what they were actually exposed to, and anxiety of having to remain living 1,000 feet from that structure constantly worrying whether another allision would occur again causing them damage. And this anxiety continued until they recently moved from that location, and had not moved earlier because of their financial - financially, were not able to do so.

Based on this, I find the appropriate award for each, Mr. and Mrs. Prince, to be \$20,000.00, and the costs are to be paid by the State -- 30% of the costs to be paid by the State, 70% of the costs to be paid by Prosperie. ...

After a thorough review of the testimony and evidence presented in this case, we are unable to say that the trial court erred in its determinations of causation and fault in this case. The record presents a reasonable basis for the factual findings made.

The only communication between Captain Prosperie and the Louisa bridge tender, Ruby Simon, occurred when Ms. Simon heard Captain Prosperie talking on the radio to another vessel. At that time, Captain Prosperie had pulled his vessel alongside the bank approximately three-quarters of a mile away from the Louisa Bridge to await the arrival of crew change personnel; Captain Prosperie was inquiring of the other vessel's crew whether they had sight of his incoming crew member(s) on the bank near the bridge. Ms. Simon broke into the conversation to inform Captain Prosperie that his crew member, Captain Hardy, had arrived at the bridge tender house en route to meet the M/V Mr. Barry. Ms. Simon informed Captain Prosperie that she would be closing the bridge after two vessels passed through to

allow Captain Hardy to cross the bridge. She indicated to Captain Prosperie that she would afterwards re-open the bridge to allow him passage. However, Ms. Simon testified that she expected Captain Prosperie to contact her to request a bridge opening when he was approximately one-half mile away. Captain Prosperie testified that the bridge tender did not tell him to call her back and he assumed the bridge would be open.

Federal regulations control the operation of drawbridges on navigable waterways. The opening of a drawbridge is governed by 33 C.F.R. § 117.9, which provides: “No person shall unreasonably delay the opening of a draw after the signals required by § 117.15 have been given.” The signals required to trigger a bridge opening are provided in 33 C.F.R. § 117.15 as follows:

(a) General.

(1) The operator of each vessel requesting a drawbridge to open shall signal the drawtender and the drawtender shall acknowledge that signal. The signal shall be repeated until acknowledged in some manner by the drawtender before proceeding.

(2) The signals used to request the opening of the draw and to acknowledge that request shall be sound signals, visual signals, or radiotelephone communications described in this subpart.

(3) Any of the means of signaling described in this subpart sufficient to alert the party being signaled may be used.

(b) Sound signals.

(1) Sound signals shall be made by whistle, horn, megaphone, hailer, or other device capable of producing the described signals loud enough to be heard by the drawtender.

(2) As used in this section, “prolonged blast” means a blast of four to six seconds duration and “short blast” means a blast of approximately one second duration.

(3) The sound signal to request the opening of a draw is one prolonged blast followed by one short blast sounded not more than three seconds after the prolonged blast. For vessels required to be passed through a draw during a scheduled closure period, the sound signal to request the opening of the draw during that period is five short blasts sounded in rapid succession.

(4) When the draw can be opened immediately, the sound signal to acknowledge a request to open the draw is one

prolonged blast followed by one short blast sounded not more than 30 seconds after the requesting signal.

(5) When the draw cannot be opened immediately, or is open and shall be closed promptly, the sound signal to acknowledge a request to open the draw is five short blasts sounded in rapid succession not more than 30 seconds after the vessel's opening signal. The signal shall be repeated until acknowledged in some manner by the requesting vessel.

(c) Visual signals.

(1) The visual signal to request the opening of a draw is--

(i) A white flag raised and lowered vertically; or

(ii) A white, amber, or green light raised and lowered vertically.

(2) When the draw can be opened immediately, the visual signal to acknowledge a request to open the draw, given not more than 30 seconds after the vessel's opening signal, is--

(i) A white flag raised and lowered vertically;

(ii) A white, amber, or green light raised and lowered vertically; or

(iii) A fixed or flashing white, amber, or green light or lights.

(3) When the draw cannot be opened immediately, or is open and must be closed promptly, the visual signal to acknowledge a request to open the draw is--

(i) A red flag or red light swung back and forth horizontally in full sight of the vessel given not more than 30 seconds after the vessel's opening signal; or

(ii) A fixed or flashing red light or lights given not more than 30 seconds after the vessel's opening signal.

(4) The acknowledging signal when the draw cannot open immediately or is open and must be closed promptly shall be repeated until acknowledged in some manner by the requesting vessel.

(d) Radio telephone communications.

(1) Radiotelephones may be used to communicate the same information provided by sound and visual signals.

Note: Call signs and radio channels for drawbridges with radiotelephones are listed in Appendix A to this part.

(2) The vessel and the drawtender shall monitor the frequency used until the vessel has cleared the draw.

(3) When radiotelephone contact cannot be initiated or maintained, sound or visual signals under this section shall be used.

“Except as otherwise required by this subpart, drawbridges shall open promptly and fully for the passage of vessels when a request to open is given in accordance with this subpart.” 33 C.F.R. § 117.5.

Clearly, Captain Prosperie was primarily at fault in causing this accident. Although he believed that the bridge tender was going to open the bridge to allow his passage after their radio communication, he never initiated a request. Further, Captain Prosperie made no effort to verify that the bridge had in fact been opened.

The bridge tender in the instant case, Ms. Simon, was aware at the time of her communication with Captain Prosperie that he did not have his vessel in motion, but rather was “laying against the bank or just holding it against the current,” and that only upon receiving information from Ms. Simon that his crew change had arrived did he began to resume navigation toward the Louisa Bridge. Ms. Simon testified that she checked the radar after talking to Captain Prosperie and saw that his vessel was three-quarters of a mile from the bridge. Testimony in the record reflected that at three to four knots (the M/V Mr. Barry’s rate of speed) it would take approximately fifteen minutes for the vessel to reach the bridge after it pulled away from the bank and re-positioned itself into the channel.

Ms. Simon negligently gave Captain Prosperie the impression that she would have the bridge open for him when he arrived. Thus the trial court did not err in assigning a percentage of fault for the accident to her employer, the State. Nevertheless, Captain Prosperie had the greater duty to request and ensure that the bridge was open for the safe passage of his vessel; therefore, we find no manifest error in the trial court’s assessment of a greater percentage of fault to Captain Prosperie.

Award of Damages

However, we believe the trial court abused its discretion in the amount of damages awarded to the plaintiffs.

In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury. LSA-C.C. art. 2324.1. On appellate review, damage awards will be disturbed only when there has been a clear abuse of that discretion. The initial inquiry must always be directed at whether the trial court's award for the particular injuries and their effects upon this particular injured person is a clear abuse of the trier of fact's much discretion. **Cole v. State, Dept. of Public Safety and Corrections**, 2003-2269, p. 5 (La. App. 1 Cir. 6/25/04), 886 So.2d 463, 465, writ denied, 2004-1836 (La. 10/29/04), 885 So.2d 589.

The discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993). Only after making a finding that the record supports that the lower court abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court. **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1977).

In this case, Mr. and Mrs. Prince sought treatment only three times, and only during the weeks immediately following the incident, for symptoms they claim arose from their exposure to the chemicals released as a result of the accident at issue herein. In each instance, although Mr. and Mrs. Prince complained of nausea, shortness of breath, skin and/or eye

irritations, no objective medical evidence of these symptoms was found to correlate the symptoms to the chemical exposure. The plaintiffs further testified to their continued anxiety, which they claimed lasted over the course of several years, resulting from a fear of another accident occurring. However, even though the plaintiffs had access at all pertinent times to medical care at Chabert Medical Center in Houma, they did not establish that any further treatment for their symptoms was sought.

Based on the evidence presented on the issue of damages, we believe that the highest possible award that could have been awarded to these plaintiffs was \$10,000.00 each. Accordingly, we amend the judgment to reduce the amount of damages awarded each to Norbert Prince, Sr. and to Hazel Prince from \$20,000.00 to \$10,000.00. In all other respects, the judgment of the trial court is affirmed.

CONCLUSION

For the reasons assigned herein, the judgment of the trial court is amended as stated hereinabove, and as amended, affirmed. Each party is to bear his own costs of this appeal.

AMENDED; AFFIRMED AS AMENDED.