NOT DESIGNATED FOR PUBLICATION

LUBERTHA EDWARDS HESS, INDIVIDUALLY AND ON	*	**NO. 2000-CA-1594**
BEHALF OF HER MINOR CHILDREN, RYAN EDWARDS,	*	**COURT OF APPEAL**
JUAN EDWARDS AND VALERIE EDWARDS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
VERSUS	*	
LOUISIANA STATE DEPARTMENT OF TRANSPORTATION AND	*	
DEVELOPMENT	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-17294, DIVISION "C-6"
Honorable Roland L. Belsome, Judge

* * * * * *

Chief Judge William H. Byrnes, III

* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Charles R. Jones, and Judge Patricia Rivet Murray)

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AFFIRMED

The State of Louisiana through the Department of Transportation and Development ("DOTD") appeals a judgment in favor of plaintiff, Lubertha Edwards Hess, and her three minor children, Ryan Edwards, Juan Edwards, and Valerie Edwards for injuries incurred when a ferry docked in Algiers. We affirm.

On October 18, 1995, at approximately 5:30 p.m., Ms. Hess drove her 1990 Ford Bronco onto the Chalmette ferry to Algiers. The ferry, M/V ALVIN STUMPF, was owned and operated by DOTD, and was piloted by Captain Raymond Neal Crumbley. According to Ms. Hess, the children unbuckled their seatbelts while their vehicle was parked on the ferry. Ms. Hess allowed her oldest son, eleven-year-old Ryan, to exit the vehicle, and her six-year-son, Juan, to play in the vehicle's rear space behind the back seat. Ms. Hess's three-year-old daughter, Valerie, stayed in the back seat. When the ferry reached the West Bank, Ms. Hess felt the ferry shake as it

landed on the fixed dock. She testified that the ferry was going a little faster than normal. Ms. Hess claimed that she was tossed about in her seat; her son, Ryan, struck his head on the open door as he was entering the vehicle; Juan, who was crawling over the back seat, was knocked to the floor; and Valerie fell against the driver's seat. Ryan and Ms. Hess saw two trucks parked next to her collide. When she reached her home, Ms. Hess called Sergeant Michael L. Schmitt of the Crescent City Connection Police Department to report the incident at 6:40 p.m.

Ms. Hess filed her petition in civil district court against DOTD on October 18, 1996. After a bench trial on November 3, 1999, the trial court rendered judgment on November 17, 1999, against DOTD. The judgment awarded Ms. Hess $100 each for Juan and Valerie, as well as $112 each for their medical expenses; $5,000 for her son, Ryan, as well as $527 for his medical expenses; and $6,000 for her injuries plus $603 for her medical expenses. In its reasons for judgment, the trial court found that the total judgment amount was $12,544, and the trial court awarded to the plaintiff court costs and judicial interest from the date of judicial demand. DOTD's appeal followed.

On appeal, DOTD contends that the trial court erred in finding that: (1) the vessel owner breached its duty of reasonable care to the petitioner while docking the vessel; and (2) the plaintiff established negligence and proximate cause by a preponderance of the evidence.

Admiralty claims may be brought in federal court pursuant to its admiralty jurisdiction or in state court under the savings to suitors clause; in either case, federal substantive maritime law applies. *Antill v. Public Grain Elevator of New Orleans, Inc.* 577 So.2d 1039 (La.App. 4 Cir.1991), *writ denied,* 581 So.2d 684 (La.1991). In an admiralty case, the appellate court reviews the district court's findings of fact for clear error and considers all questions of law *de novo*. *Randall v. Chevron, U.S.A., Inc.*, 13 F.3d 888 (5 Cir.1994), *modified on other grounds on rehearing,* 22 F.3d 568 (5 Cir.1994), *certiorari dismissed sub nom. Sea Savage, Inc. v. Chevron, U.S.A., Inc.*, 512 U.S. 1265, 115 S.Ct. 5, 129 L.Ed.2d 906 (1994). Factual findings made by the trial court in a claim under general maritime law are reviewed under a clearly erroneous standard, which is the same manifestly wrong or clearly wrong standard of review used by the Louisiana appellate courts in reviewing factual findings of lower courts. *Wall v. Progressive*

Barge Line, 97-0665 (La. 4 Cirri. 10/29/97), 703 So.2d 681, *writ denied*, 98-0280 (La. 3/20/98), 715 So.2d 1220. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse it even though it is convinced that if it had not been sitting as the trier of fact, it would have weighed the evidence differently. *Anderson v. Bessemer City, N.C.*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *Wall, supra*.

Under maritime law, although those who own or operate vessels owe a warranty of seaworthiness only to the members of the crew, the vessel owner or operator owes a duty of reasonable care to all others. *Smith v. Harbor Towing & Fleeting, Inc.*, 910 F.2d 312 (5 Cir.1990), *certiorari denied*, 499 U.S. 906, 111 S.Ct. 1107, 113 L.Ed.2d 216 (1991); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550 (1959).

Issues of negligence and causation in admiralty cases are treated as fact questions. *Johnson v. Offshore Exp., Inc.*, 845 F.2d 1347 (5 Cir.1988), *certiorari denied, Offshore Exp., Inc. v. Johnson*, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 533 (1988). Under maritime law proximate cause requires

proof of direct and substantial cause which in a direct unbroken sequence produces the injury complained of and without which such injury would not have happened. *Alverez v. J. Ray McDermott & Co., Inc.*, 674 F.2d 1037, 1043 (5 Cir.1982); *Olympic Towing Corp. v. Nebel Towing Co., Inc.*, 419 F.2d 230, 233 (5 Cir.1969), *certiorari denied sub nom. Nebel Towing Co., Inc. v. Olympic Towing Corp.*, 397 U.S. 989, 90 S.Ct. 1120, 25 L.Ed.2d 396 (1970). An action cannot be sustained if the speculation or conjecture is not based upon direct or strong circumstantial evidence to support a reasonable inference that the vessel was negligent or unseaworthy. *In re Cooper/T. Smith*, 929 F.2d 1073, 1078 (5 Cir.1991),*certiorari denied sub nom. Abshire v. Gnots-Reserve, Inc.*, 502 U.S. 865, 112 S.Ct. 190, 116 L.Ed.2d 151 (1991),

Where there is a conflict in the testimony, great deference is accorded to the trial court's factual findings, both express and implicit, and reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluation and inferences are reasonable. *Powell v. Regional Transit Authority*, 96-0715 (La.6/18/97), 695 So.2d 1326. *Virgil v. American*

Guaranty and Liability Ins. Co., 507 So.2d 825 (La. 1987); *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La. 1973). Where a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. *Rosell v. ESCO,* 549 So.2d 840 (La. 1989).

DOTD argues that the plaintiffs did not establish negligence and proximate cause by a preponderance of the evidence. DOTD maintains that there were no other reports of injuries from the impact of the landing of the ferry. Captain Crumley testified that fairly frequently vehicles would roll into each other when the parking brakes on a standard shift vehicle were not engaged. Although the log showed that two pick-up trucks collided, no accident report was made. Captain Crumley testified that it was not unusual that some jarring would occur when the ferry was docked at the landing.

The record supports the trial court's reasons for judgment in which the trial court found that the evidence clearly indicated that the wind was blowing in an East/North East direction at approximately 20 knots. The vessel operator, Captain Raymond Crumley, could not specifically remember the date. His log entry, as well as the testimony of Ms. Hess and

her son Ryan showed that the vessel hit the Algiers landing with enough force to cause the pick-up trucks next to Ms. Hess's vehicle to collide. The captain agreed that the wind could affect the speed and control of the ferry. Ms. Hess and Ryan testified that she and her three children were knocked about the vehicle. This testimony, as well as Ms. Hess's report to the Crescent City Authority when she got home that night, and the fact that Ms. Hess and her children saw Dr. Allain the next week and incurred medical expenses, support a finding that DOTD's negligence in the impact of the landing was the proximate cause of the plaintiff and her children's injuries. The trial court was not clearly erroneous in giving credit to Ms. Hess and Ryan's testimony. In the present case the fact finder could draw reasonable inferences that the plaintiff proved by a preponderance of the evidence that DOTD breached its duty of reasonable care to the plaintiff when DOTD's captain/pilot docked the ferry with sufficient force to cause the injuries. The trial court was not clearly erroneous in finding DOTD at fault.

The district court's determination of the amount of damages in a maritime case may not be overturned unless clearly erroneous. *Brunet v. United Gas Pipeline Co.,* 15 F.3d 500 (5 Cir.1994). Unless persuaded that

the judge's decision is a clear abuse of discretion, the appellate court must accept the trial court's determination as to quantum. *Myers v. Pennzoil Co.*, 889 F.2d 1457 (5 Cir.1989). The discretion vested in the trier of fact is "great", and even vast in determining the amount of damages. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La.1993), *certiorari denied sub nom. Maritime Overseas Corp. v. Youn*, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Recompense for pain and suffering cannot be calculated with precision. *Davis v. Sewerage and Water Bd. of New Orleans*, 555 So.2d 664 (La.App. 4 Cir.1989), *writ denied*, 558 So.2d 603 (La.1990). Severity and duration of pain is considered in an award for pain and suffering. *Perez v. State Through Depart. of Transp. and Development*, 578 So.2d 1199 (La.App. 4 Cir.1991), *writ denied*, 581 So.2d 706 (La.1991).

In the present case, according to Dr. J. Allain, Jr.'s February 29, 1996 medical report from Uptown Physical Medicine and Rehabilitation, he first saw Lubertha Edwards [Hess] on October 26, 1995. He noted in part:

> . . . Examination revealed tenderness and spasm to palpation of the paravertebral muscles of the cervical spine. Range of motion of the cervical spine was limited to 95 % on all planes due to pain on motion. Strength of the cervical spine was limited to 95 % due to pain on effort. Examination revealed spasm and tenderness to palpation of the paravertebral muscles of the lumbo-sacral spine.

> Range of motion of the lumbo-sacral spine was limited to 95 % due to pain on motion. Strength of the lumbo-sacra spine was limited to 95 % due to pain on effort.

Treatment included "ultrasound, electric muscle stimulation and moist heat to the affected areas in the form of hydrocollator packs. Dr. Allain saw Ms. Hess five times and the injuries were unresolved at the time of the patient's last visit on February 29, 1996, with a final diagnosis of: "1. Strain, (acute), cervical spine. 2. Strain, (acute) lunbo-sacral spine."

Dr. Allain's February 29, 1996 medical report shows that Ryan Edwards was seen four times, beginning on October 26, 1995 until January 8, 1996. The physical examination portion stated in part:

> Examination revealed pain and tenderness to palpation of the trapezius muscle, bilaterally. Range of motion of the cervical spine was limited to 95 % in all planes due to pain on motion. Strength of the cervical spine was limited to 95 % in all planes due to pain on effort.

Ryan's medical treatment "consisted of ultrasound, electric muscle stimulation and moist heat to the affected areas in the form of hydrocollator packs." At the time of Ryan's last visit, the injuries were unresolved with a final diagnosis of "1. Acute cervical sprain of the trapezius muscle, billaterally."

According to Dr. Allain's December 27, 1995 medical report for Juan

Edwards, the "[e]xamination revealed tenderness of his sides" and under "Impressions," the doctor included "Strain, oblique muscles, (bilateral)."

Valerie Edwards' November 30, 1995 medical report stated that:

> Examination revealed spasm and tenderness to palpation of the paravertebral muscles of the lumbo-sacral spine. Examination revealed spasm and tenderness to palpation of the patient's chest.

Under "Impressions" and final diagnosis under "Discharge" on October 26, 1995, Dr. Allain noted: "1. Pain, chest; 2. Pain, lower back."

Dr. Allain recommended future conservative medical treatment including periodic medical evaluation, medication, and brief periods of physical therapy as needed for Ms. Hess, Ryan, and Valerie.

Considering the medical treatment and expenses, the trial court did not abuse its discretion in its damage award of $12,544, court costs, and judicial interest from the date of judicial demand.

Accordingly, the judgment of the trial court is affirmed.

AFFIRME

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