# SVYATOSLAV STROK, *Plaintiff*

*v.*

# F/T *NORTHERN JAEGER, NORTHERN JAEGER SEAFOODS, INC. AND OCEANTRAWL, INC., Defendants*

**United States District Court, Western District of Washington, September 28, 1992**
No. C91-1194R

**1993EVIDENCE — 19. Expert Testimony—**
**1993PERSONAL INJURY — 1441. In General, Burden of Proof— 174. Cargo—**
**1993PRACTICE — 287. Summary Judgment.**

Seaman on fish tender claimed injury while handling cargo from being struck by cases of frozen fish thrown to him, supported by eyewitness testimony of events and immediate signs of injury, and for persistent signs and symptoms of intestinal disorder months later, as to the cause of which examining physicians could not opine. *Held*:although jury may consider his initial injury and signs and symptoms while on ship, summary judgment would be granted defendant as to the later symptoms since they require the support of expert medical testimony as to causation.

1993 AMC 1291

Malcolm S. McLeod *for Plaintiff*

Christopher W. Nicoll and Russell R. Williams (Bogle & Gates) *for Defendants*

Barbara J. Rothstein, Ch.J.:

This matter comes before the court on the motion of defendants, F/T *Northern Jaeger*, Jaeger Seafoods, Inc., and Oceantrawl, Inc., for partial summary judgment on the issue of liability for plaintiff's alleged stomach injury and associated complaints. Having reviewed the matter, together with all documents filed in support and in opposition, the court finds and rules as follows:

## I. Factual Background

Plaintiff, Svyatoslav Strok, seeks damages for personal injuries he allegedly incurred while employed aboard the defendants' vessel, the *Northern Jaeger*. Defendants now move for partial summary judgment on the issue of liability for plaintiff's alleged stomach injury and associated complaints.

While employed aboard the *Northern Jaeger*, plaintiff assisted in unloading cartons of frozen surimi. It is undisputed for purposes of this motion that the cartons of surimi weighed approximately 44 pounds each. Plaintiff alleges that he was struck in the abdomen by cartons that were thrown to him in a negligent manner. Plaintiff claims that after being struck in the abdomen by the cartons of surimi he began to experience severe pain inside his stomach. Other symptoms include bleeding, vomiting blood, bruising, swelling, an inability to eat, and the feeling of nausea upon smelling food. Plaintiff also stated that while enroute to Alaskan waters he experienced seasickness so severe that he thought he would die. Plaintiff's testimony is supported by the testimony of Nickolay Stollyarchuk, a fellow crewmember aboard the *Northern Jaeger*. Mr. Stollyarchuk averred that the plaintiff was struck in the stomach by a box of frozen fish and knocked flat on his back, and that later the plaintiff vomited blood and would fall down two to three times per shift.

After arriving in Alaska, plaintiff reported his symptoms to his supervisor and was examined at a nearby

clinic. He returned to Seattle where he has been seen by several doctors. Plaintiff was first seen by Dr. Anderson, a general medical practitioner, on July 18, 1991. Dr. Anderson examined plaintiff's stool for blood and found none. He also examined plaintiff's heart, lungs, and abdomen, and found them to be normal. Dr. Putnam, a specialist in gastroenterology, and internal



medicine, saw plaintiff on several occasions between July 29, 1991 and October 22, 1991, for his alleged injuries. Dr. Putnam conducted several tests including a stomach x-ray, laboratory blood-work, an upper endoscopy of the upper abdominal region, an ultrasound, and a flexible sigmoidoscopy of the lower abdominal region. He was unable to determine the cause of plaintiff's symptoms. According to Dr. Putnam plaintiff failed to show-up when additional tests were scheduled.

Plaintiff was treated by Dr. John Brandabur between January 14, 1992, and May 4, 1992. Dr. Brandabur is also a specialist in gastroenterology and internal medicine. Like Dr. Putnam, Dr. Brandabur conducted several medical tests on plaintiff in an attempt to determine the cause of his symptoms. Dr. Brandabur was ultimately unable to make a causal diagnosis. Both specialists have indicated that they would like to conduct further tests on plaintiff such as small bowel x-rays, follow-up on blood-count, reexamination with specific testing for a hernia, and an ERCP (endoscopic retrogram cholangiole pancreatogram) to rule out pancreatic ductal disruption before making a causal diagnosis.

## II. Discussion

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630-31 (9 Cir. 1987); *Lew v. Kona Hospital*, 754 F.2d 1420, 1423 (9 Cir. 1985). Summary judgment is not appropriate if "a result other than that proposed by the moving party is possible under the facts and applicable law." *See Aronsen v. Crown Zellerbach*, 662 F.2d 584, 591 (9 Cir. 1981), *cert. denied*, 459 U.S. 1200 (1983).

Defendants argue that because the causal connection between plaintiff's alleged original injuries and his subsequent continuing symptoms is not obvious the determination of causation is beyond the purview of common knowledge. According to defendants, plaintiff must introduce expert medical testimony establishing causation. Defendants cite extensive case law in support of this proposition. *See e.g., Moody v. Maine Central R.R. Co.*, 823 F.2d 693 (1 Cir. 1987); *Collins v. Am. Export Lines, Inc.*, 1958 AMC 1127, 165 F.Supp. 256 (SDNY 1958); *Money v. Manville Corp. Asbestos Disease Comp. Trust Fund*, 596 A.2d 1372 (Del. 1991); *Albert v. Alter*, 381 A.2d 459 (Pa. 1977); *Sears, Roebuck & Co.*



v. Hurst, 652 S.W.2d 563 (Tex. Ct. App. 1983); *Greene v. Flewelling*, 366 So. 2d 777 (Fla. Dist. Ct. App. 1979).

In *Moody* the plaintiff alleged that his employer's harassment caused him to experience angina. The plaintiff was unable to provide medical testimony which linked the employer's acts to his angina. In affirming summary judgment against the plaintiff for failure to provide medical testimony on causation, the court said,

> Where the conclusion (of causation) is not one within common knowledge, expert testimony may provide a sufficient basis for it, but in the absence of such testimony it may not be drawn.

*Moody*, at 695.

In *Money*, the court upheld a directed verdict against plaintiffs who failed to introduce medical testimony on causation. The court said,

> (I)t has generally been recognized that the causation of latent physical conditions must rest upon the individualized findings, and opinion of a trained physician.

*Money*, at 1376.

In *Sears, Roebuck*, the court reversed a verdict for the plaintiff because the plaintiff failed to introduce medical testimony supporting her theory of causation. The plaintiff in that case testified that an improperly installed heating and air conditioning system emitted smoke and soot that caused her to experience a number of symptoms including headaches, stomach aches, and coughing. The court held:

> While there is little question that a lay jury could conclude that smoke and soot can be the cause of coughing, we cannot see that common experience would lead a jury member to the conclusion that smoke and soot ... could cause head and stomach aches for some two or three months thereafter.

*Sears, Roebuck*, at 565.

In *Greene*, the appellate court upheld a decision setting aside the verdict in favor of a plaintiff who claimed an auto accident caused him to lose his senses of smell and taste. The plaintiff's physician testified that there was no evidence that the auto accident caused plaintiff's alleged symptoms. The court ruled that the plaintiff's evidence was in itself insufficient to place the issue of causation before the jury, especially in light of the medical testimony opposed to the conclusion drawn by the plaintiff. *Greene*, at 780-781.



Defendants argue that the statements of plaintiff, his witness Nickolay Stollyarchuk, and his counsel Malcolm McLeod, must be stricken because they are not qualified under Federal Rule of Evidence 702 to give expert medical testimony on the issue of causation. Defendants contend that plaintiff's failure to provide competent medical testimony regarding causation entitles them to partial summary judgment as a matter of law on the issue of defendant's liability for plaintiff's alleged continuing abdominal injuries.

Plaintiff, on the other hand, argues that under the Federal Rules of Evidence the factual issue of causation in this case can be developed through lay opinion testimony:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of the fact in issue.

Fed. R. Evid. 701

Plaintiff argues that Mr. Stollyarchuk's testimony was a rationally based perception of what happened to plaintiff and is helpful to a determination of causation. Mr. Stollyarchuk was an eyewitness to the repeated pounding that plaintiff incurred to his abdomen and the subsequent symptoms he experienced. Mr. Stollyarchuk testified that after the trauma to plaintiff's abdomen he observed plaintiff double-up and fall over in pain, and on a daily basis he observed plaintiff vomit blood.

Plaintiff further argues that Washington state courts allow lay testimony as to general appearances of health, *Goertz v. Continental Life Ins. & Inv. Co.*, 163 P. 938, 95 Wash. 358 (1917); as to appearance before and after an accident, and as to complaints of pain, *Peterson v. Seattle Traction Co.*, 63 P. 539, 23 Wash. 615 (1900), 53 L.R.A. 586, modified 65 P. 543, 23 Wash. 615 (1901), 53 L.R.A. 586; and testimony of the plaintiff regarding how he feels, and how he is able to function, before and after a given accident. *Egede-Nissen v. Crystal Mountain, Inc.*, 606 P.2d 1214, 93 Wash. 2d 127 (1980).

Plaintiff concludes that causation in this case is within the purview of common knowledge and, therefore, expert medical testimony is not required to assist the trier of fact.1(1)



The court finds that defendant's position is persuasive and that *Sears, Roebuck* is directly on point. Here, as in that case, the plaintiff suffered symptoms that a lay jury could conclude were causally related to the alleged injury. However, as *Sears, Roebuck* points out, causation becomes extremely tenuous and difficult to determine through common experience when such symptoms prevail for over a year especially when several doctors and an exhaustive battery of medical tests failed to establish the cause.

Additionally, other evidence offered by plaintiff requires medical testimony for explication. Plaintiff claims he is unable to eat, yet he fails to lose weight. He claims to have a recurring bulge on the right side of his abdomen, yet no one else has seen it. These are questions that the jury requires expert assistance in determining. Plaintiff has failed to provide that assistance. It should be made clear that the court's ruling as to the need for expert medical testimony does not extend to plaintiff's initial injury and on-ship symptoms, as the court finds that these events comprise an appropriate subject for lay testimony.

Furthermore, plaintiff's claims for defendants' failure to pay wages and for maintenance and cure are unaffected by the summary judgment ruling. A jury could find that plaintiff's alleged injury and symptoms were manifest at the time of his service aboard defendants' vessel.2(2)

## III. Conclusion

Now, therefore, defendants' motion for partial summary judgment on the issue of liability for plaintiff's alleged stomach injury and associated complaints is granted.