THE NEW BRUNSWICK ADMIRALTY DISTRICT. 1899

May 8.

ERNEST M. WYMAN.....PLAINTIFF;

AND

THE STEAMSHIP "*DUART CASTLE*"..DEFENDANT.

Personal injury done by ship—Jurisdiction—Negligence—Sufficiency of machinery—Fellow-workmen—Evidence—Hospital expenses—Practice.

An engineer while working on a steamer was injured by the breaking of a stop valve:

Held, That the Admiralty Court has jurisdiction to try a suit for damages done by a ship to a person.

2. Adequacy of construction is to be determined by the generally approved use at the time of manufacture; and the absence of the best possible construction is not of itself conclusive evidence of negligence.

3. The officers of the ship as well as the men are fellow-workmen, and for the negligence of the one the steamer is not liable to the other.

4. Improving machinery after an accident is not evidence of insufficiency of its former state.

5. A seaman shipped in Canada and injured in Canada has no claim for hospital expenses under *The Merchants Shipping Act*, 1894.

6. A plaintiff's claim is confined to the particulars indorsed on the summons.

ACTION for damages to the person of a seaman on shipboard arising out of alleged defective machinery.

The following is a brief statement of the facts of the case:

The steamship *Duart Castle* was built some twenty years ago. She was fitted with two boilers, which were connected with a steam superheater by separate steam-pipes, each of such pipes being fitted with a section stop-valve. The main steam-pipe leading from the superheater had a throttle and main stop-valve

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Statement of Facts.

next the engine, but none next the superheater. The main stop-valve was fitted with a cast iron bracket.

The plaintiff being second engineer on board, while lying in the harbour of St. John, N.B., was making some repairs in the high pressure valve casing, and being aware that steam was on for the purpose of running the donkey engines, and therefore up to the valve next to the one at which he was working, he went to the stoke-hole and turned off the steam from the superheater. He then returned to his work in the steam case, when some one (none but fellow-workmen of the plaintiff having access thereto) turned on the steam, when the cast iron bracket broke, thereby severely scalding the plaintiff.

The plaintiff arrested the steamer for $20,000 personal injuries.

The case was heard before Mr. Justice McLeod, Local Judge in Admiralty for the New Brunswick Admiralty District.

J. R. Armstrong Q.C. for the defendant:

The fact of the accident taking place is not evidence of negligence. *Smith on Negligence* (1).

It is not evidence of antecedent negligence or improper construction if a change be made in the construction of machinery subsequent to an accident. *Columbia & Puget Sound Railway Co.* v. *Hawthorne* (2).

The difference in build or superior mode in more modern steamers is not evidence against the defendant steamer. *Sherman & Redfield on Negligence* (3).

Even if it would have been a better device to have had a different style of stop-valve, the defendants would not be liable unless the one which broke was clearly defective. *Carey* v. *Boston & Main Railway Co.* (4).

(1) 2nd Eng. ed. p. 250.
(2) 144 U. S. 202.
(3) Secs. 186 & 195.
(4) 158 Mass. 228.

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Argument of Counsel.

If some one improperly turned on the steam, no stranger being permitted to enter the stoke-hole where the steam was turned on, it must have been the act of a fellow-workman of the plaintiff. A servant who engages to serve a master implicitly undertakes to run all the ordinary risks of the service including the negligence of his fellow-servants, and the master is not bound to compensate him for injuries received through the act of a fellow-workman while in the discharge of work for which he was hired. *Priestley* v. *Fowler* (1).

The master of a ship and seamen are fellow-servants, so is the chief engineer and second engineer. *Hedley* v. *Pinkney & Sons S. S. Co. Ltd.* (2).

It may be fairly presumed that a servant knows the condition of machinery which he has the constant opportunity to inspect. *Sherman & Redfield on Negligence* (3).

Defendants are not bound to furnish best known or best conceivable appliances. *Burke* v. *Witherbee* (4).

A master does not insure his servants against risks incident to the business. *Sherman & Redfield on Negligence* (5).

The maxim *Volenti non fit injuria* applies (6):

The defendant steamer traded between Canadian and British West India ports, and she had not at the time of the accident been brought within the Canadian Acts relating to inspection of steamers by order in council. The rules for inspection of steamboats, therefore, are only evidence to show what the compilers thought desirable, and should have no more weight than the evidence of practical engineers and machinists.

There was evidence of contributory negligence on the part of the plaintiff, and it is to be presumed that

(1) 3 M. & W. 1.
(2) [1892] 1 Q. B. Div. 58; 7 Asp. Mar. App. Cases N.S., pp. 158 & 483: [1894] Appeal Cases, 222.
(3) Sec. 216.
(4) 98 N. Y. 562.
(5) 4 ed. sec. 184.
(6) Broom's Legal Maxims, 267.

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Argument of Counsel.

had he not improperly turned off the steam, the water ram, or whatever caused the accident, would not have happened.

As to the plaintiff's application that judgment should be given in his favour for his hospital expenses, the Admiralty Rules 1893, No. 5, provide that the writ of summons shall be endorsed with a statement of the nature of the claim (1). The endorsement of the summons is in the nature of a declaration. There is no claim endorsed for hospital expenses, neither does the affidavit to arrest mention such claim, the plaintiff, therefore, cannot recover such expenses. There is no common law obligation on the part of an employer to pay the hospital expenses of a man injured in his employ. *The Merchants Shipping Act*, 1894, sec. 207, places this obligation upon the owner, until the injured man is cured, or dies, or is brought back, if shipped in a British possession, to a port of that possession. Here the plaintiff shipped at Halifax, N.S., and is injured at St. John, N.B., a port in the same possession, Canada. As a matter of fact the actual expenses of the hospital, etc., were paid by the ship through the tonnage dues paid by it to the Dominion Government, the Government providing all necessary hospital expenses.

A. A. Stockton Q C. and *J. C. Coster Q.C.* for plaintiff: The plaintiff raises two objections to plaintiff's right to recover. (1) The court has no jurisdiction. (2) That as plaintiff at the time of the injury was a fellow-servant on board the steamer he cannot recover for the negligence or default of any of those on board, including the master and chief engineer.

As to the first point there can be no doubt as to the jurisdiction of the court to entertain the action. The

(1) See also form No. 10.

case of the *Enrique* (1) was decided on the authority of the *Robert Pow* (2); but Judge Watters in the *Maggie M.* (3) refused to follow it. The *Robert Pow* may be considered overruled. See judgment of Lord Herschell. *Mersey Docks and Harbour Board* v. *Turner* (4). The enlarged jurisdiction given to the court by *The Imperial Acts* of 1840 and 1861 was to remedy a grievance, and should be liberally construed so as to afford the utmost relief which the fair meaning of the language will allow. The *Pieve Superiore* (5). The Act of 1861, 24th Vict. c. 10, sec. 7, gives jurisdiction to the court over any claim for damages done by the ship. This is sufficiently comprehensive to include damage to a thing or to a person. See *The Teddington* (6).

The *Sylph* (7); the *Beta* (8); the *Clara Killam* (9); the *Czar* (10); the *Max Morris* (11); the *Daylesford* (12). As to the liability of owners although the vessel was inspected and passed, see *Sherman & Redfield on Negligence* (13); *Simonds* v. *New Bedford & Steamboat Co.* (14).

McLEOD, L.J. now (May 8th, 1899) delivered judgment.

The plaintiff claims damages for injuries done him on board the steamship *Duart Castle* under the following circumstances:

The steamer was running between St. John, Halifax, and the West Indies, and the plaintiff was second engineer on board of her She arrived in St. John on the thirteenth day of March, 1897, and proceeded to

(1) Stockton's Ad. D. 157.
(2) Br. & L. 99.
(3) Stockton's Ad. D. 188.
(4) [1893] A. C. 468.
(5) L. R. 5 P. C. 482.
(6) Stockton's Ad. D. 45.
(7) L. R. 2 A. & E. 24
(8) L. R. 2 P. C. 447.
(9) L. R. 3 A. & E. 161.
(10) Cook 9.
(11) 137 U. S. 1.
(12) 30 Fed. Rep. 633.
(13) P. 315, Vol. 2.
(14) 97 Mass. 361.

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

discharge and take in cargo. On the morning of the eighteenth of March, while the plaintiff was in the steam-chest making some repairs to the high pressure valve, the stop-valve burst, and the plaintiff was badly scalded by the rush of steam. The plaintiff says that before going to work in the steam-chest he went to the boiler and shut the steam off from the superheater. His object in doing this, he says, was twofold, one to get up more steam for the winches on deck that were working the cargo (as the chief engineer, John Mutch, had told him the steam was going down and they did not have enough), and the other was for the purpose of draining the main steam-pipe. He says he intended to open the valve on the drain pipe and then turn the steam on gradually and thus drain the main steam-pipe through the drain pipe. The latter pipe led from the main steam-pipe to the exhaust tank which was a few feet above it. Before, however, he opened the valve for the purpose of draining the pipe he went to work in the steam-chest and had only been in there a few minutes when the stop-valve on the main pipe burst, as has been said, and the accident occurred.

The steamer was built in Scotland a number of years ago, and was purchased by the present owners, and for some years has been running on her present route. She was fitted with two main boilers which were connected by two more pipes with a superheater sitting on top of the boilers. (One of the questions in contention is whether this superheater is a part of the boiler or not) The main steam-pipe ran from the superheater to the steam-chest which is in the forward end of the engine. Plan No. 2 filed in evidence shows the relative positions of the boilers, superheater, main steam-pipe, steam-chest and engine. There were two valves close to the engine and the main steam-pipe.

The one next the engine I will call the butterfly-valve. (It is sometimes in the evidence called a stop-valve), and the one next to it, or between it and the superheater, I will call the stop-valve. (It is sometimes in the evidence called a throttle valve.) The latter valve, the one I call the stop-valve, is the one that broke and caused the injury. On the morning of the accident the stop-valve was closed, and the plaintiff says the butterfly-valve was also closed, that he himself closed it. After the accident, however, the butterfly-valve was found open, but was not broken, and the witnesses on behalf of the defendants say that if it had been closed it could not have been forced open, that it would break first. The plaintiff on his part says that it might be and was forced open with the rush of steam. There was no valve between the superheater and the main steam-pipe.

The defendants claim in the first place that this court has no jurisdiction over a claim for a personal injury of this kind. As to this point, sec. 10 of *The Vice Admiralty Act* of 1863 gives this court jurisdiction in "claims for damages done by any ship" and are the same words as are used in sec. 7 of *The Admiralty Act* of 1861, and I think the result of the authorities is, that these words give this court jurisdiction to entertain a suit for damage done by a ship to persons. They have been held to give the court jurisdiction in the widest and most general terms. In this case the damage was done by the ship, and it cannot make any difference in what way the ship did the damage, or what part of the ship did the damage. A number of cases may be cited, but I refer to the *Beta* (1); the *Sylph* (2), and *Turner* v. *Mersey Docks & Harbor Board* (3). I think. therefore, this court has jurisdiction over the claim.

(1) L. R. 2 P. C. 447. (2) L. R. 2 A. & E. 24.
(3) [1892] P. 285.

1899

WYMAN
v.
THE
STEAMSHIP
DUART
CASTLE.

Reasons for Judgment.

The plaintiff contends that the steamship is liable to him by reason of negligence in connection with the machinery. 1st. He says there should have been a stop-valve between the superheater and the main steam-pipe so that the steam could have been turned off at the superheater. 2nd. He says that the stop-valve that broke was not sufficiently strong; that it was a cast iron valve where it should have been either wrought iron or brass. He also says that the steam was improperly and negligently suddenly turned on at the main boilers by some one after he turned it off, thus causing what is called a "water ram" bursting the valve. In order to render the steamship liable the plaintiff must produce reasonable evidence of negligence causing the accident. As to the machinery itself, this steamship, as I have said, was built some years ago in Scotland and equipped with the machinery she now has. No stop-valve was put between the superheater and the steam-pipe, and she has always been run without one, and has in that way at different times passed the Government inspection. The plaintiff claims that the fact that a stop-valve was not put there was such negligence as would render the steamship liable in damages for the accident. I do not think so. In the first place the machinery so far as the evidence shows is now the same as it was when it was built, no change was made by the present owners. No stop-valve has been put between the superheater and the main steam-pipe. The pntiff when he went to work in the steamer, and all the time he worked there, knew there was no stop-valve there. And further, if a stop-valve had been there, the plaintiff must still go further and say he would have closed that valve instead of the one he did close, and still the same thing that did occur might have occurred if some one had suddenly turned the steam

1899

WYMAN
v.
THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

on at the superheater, just as he alleges they turned it on at the boiler.

As to the stop-valve that broke, it was made of cast iron and had been used about a year, and had always been sufficient for the purpose for which it was used, and the witnesses who saw and examined it after the accident said that the break was a clear clean break and showed no flaw in the iron. But the plaintiff says it was negligence to use a cast iron valve at all, it should have been of wrought iron or brass. As to that a number of expert witnesses were called and they all said that cast iron valves were largely used on engines and steamers of this size, and that they were sufficiently strong and safe. Among the witnesses called were Mr James Fleming, of Fleming & Son, machinists; Mr. Oscar White, of Waring, White & Co., machinists; Thos. Irwin, John P. Esdale, (who is steamboat inspector for the Dominion Government), Charles M. Lang and John J. Ewing, all engineers; and they all say that cast iron valves are very largely used and that they are sufficiently strong and safe, and, being given the size of the valve that broke in this case, they said that it was amply sufficient for the purpose for which it was used. The only witnesses called by the plaintiff as to the sufficiency of the valve were Mr. Wm. G. Gray and Wm. J. Barton, neither of whom gave very much evidence in regard to it; the most was given by Mr. Barton who when asked whether the bracket or the valve would have been less liable to break if made of wrought iron or some material other than cast iron, replied: "If it had been made of wrought iron or brass, that is composition, it would have been less liable to break than cast iron." and again when asked, "Would you yourself put a cast iron one in this place?" He answers, "I would use a wrought iron or brass, the best composition." I

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

do not think this evidence shows that it was negligence to use cast iron. The question is not could a stronger valve have been made, but was the one used sufficiently strong for the purpose. It had proved to be sufficiently strong while the steamer was running on its route It broke while the steamer was lying in port, and when there should have been no extra pressure on it. Two suggestions were made during the progress of the trial as to the cause of the accident, one was that the plaintiff, while lowering the door of the steam-chest in order to enable him to work there might have struck the bracket of the valve and broke it, but the evidence does not seem to support that view. The other is after the plaintiff had, as he alleges, turned off the steam at the superheater, some one suddenly turned it on thus causing what is called a water ram in the pipe and bursting the valve. All the expert witnesses who were called said if there was a little water in the pipe and the steam was suddenly turned on it would be liable to burst the pipe or valve. The plaintiff says he turned off the steam at the superheater, but Mutch, the chief engineer, and some of the other witnesses say that if it had been turned off, the winches that were working the cargo would have ceased working, and they say they did not stop working, and therefore the steam could not have been turned off. But assuming that the plaintiff did turn the steam off at the superheater and then some one suddenly turned it on, and thus caused the accident, it would not be such negligence as would render the steamship liable. The captain, chief engineer and other employees on board the steamship are all fellow-workmen with the plaintiff, and negligence by any one of them would not render the owners liable. *Hedley* v. *The Pinkney & Sons Steamship Co., Ltd.* (1);

(1) [1894] App. Cas. 222.

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

Wilson v. *Merry* (1). The engines themselves appear to have been good and substantial engines, and the valve had proved to be sufficient while the steamer was running on its route, and, as I have said, nearly all the witnesses said cast iron valves were good and sufficient valves, and were largely used on steamers such as this, and that a cast iron valve of the size of the one that broke was sufficient to bear all the pressure that would be put on it in the working of the steamer. The fact, therefore, that it was broken in some way while the steamer was in port is not sufficient to create a liability at all events with reference to the valve itself. The simple fact that the accident happened is not enough to create a liability, there must be some reasonable evidence of negligence. *Moffatt* v. *Bateman* (2).

It does not appear that any of the men employed on the steamer were incompetent, indeed it appears that they were all competent, and the master is not liable for the management of the machinery by servants not incompetent; (See *Beven on Negligence* (3), and *Bastinville & Co.* v. *Reid* (4) and if that is so the owners would not be liable, so that if it is said the accident occurred through the mismanagement of the officers on board the steamer (of which there is no evidence), there would not be a liability.

The owners put a brass valve on in place of the one that was broken, and it is claimed that this is some evidence of negligence in using the cast iron one. But this is not so, putting in improved machinery is not evidence that using the former machinery was negligence. *Hart* v. *Lancashire & Yorkshire Railway Co.* (5). We know that improve-

(1) L. R. 1 H. L. (Sc.) 326.
(2) L. R. 3 P. C. 115.
(3) P. 336.
(4) 3 MacQ. 226.
(5) 21 L. T. N. S. 261.

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

ments in machinery are being continually made. Practically every new steamer is an improvement over the old ones, some new improvement in machinery or elsewhere is made, yet it cannot be said to be negligence to use and run the old ones. A man would not dare to make improvements in the machinery of his engines if that fact was to be evidence that he had been negligent in using what he previously had. It is true that a most serious accident happened by which the plaintiff was terribly injured; but having heard the evidence, and having since carefully gone over it, I am unable to find that it occurred through any negligence or want of care on the part of the owners, so that the claim for damages will be dismissed. The plaintiff, however, claims that in any event whether it is negligence or not so as to render the steamship liable for the damages, he is entitled to recover in this action, the amount of a bill of $280 presented to him by the Commissioners of the Public Hospital, and also the costs of this action, and in those questions I will hear further argument.

June 14th, 1899.

This case was further argued before me as to whether the plaintiff was entitled to recover in this action, under sec. 207 of *The Merchants Shipping Act* of 1894, for an account of $280 that was rendered him, by the Commissioners of the General Public Hospital, as expenses while in the said hospital. The plaintiff was shipped at Halifax, N.S. He received his injuries at St. John, N.B., and was sent to the Public Hospital there. That hospital has taken the place of the Marine Hospital, and all sailors have a right to be sent there for treatment in case of accident or sickness. This steamer, as well as other steamers and vessels, paid what are called sick mariners fees. The writ of

1899

WYMAN
v.
THE
STEAMSHIP
DUART
CASTLE.

Reasons for Judgment.

summons by which this action was commenced was endorsed as follows: "Plaintiff claims $20,000 damages for personal injuries sustained by him and caused to him by the steamship *Duart Castle*."

Rule 5 of the Admiralty Rules, 1893, requires that the writ of summons "shall be endorsed with a statement of the nature of the claim and of the relief or remedy required, and of the amount claimed, if any," and by Rule 9, "The judge may allow the plaintiff to amend the writ of summons and the endorsements thereon in such manner and on such terms as to the judge shall seem fit." No application was made to amend the summons or endorsement, and the case was tried out for damages for personal injuries received on board the steamer. It appeared during the trial that the plaintiff had been sent to the hospital, and that a bill had been sent him for $280, and this amount he claims he is entitled to recover in this action in any event. The defendants contend that as there is no separate endorsement on the summons for this claim, and as the steamer is not liable for the accident, the plaintiff cannot recover under the present endorsement; 2ndly: That as the injury was received and the plaintiff discharged in the same British possession in which he was shipped, he cannot recover; and 3rdly. That the necessary surgical and medical advice and attendance and medicine were provided. The plaintiff, as I have said, was sent to the hospital, and it does not appear but that he could have been treated in the public ward without any additional expense, but as a matter of fact he was given a private room, for which an extra charge was made, and it is for this extra charge that this claim arises. No case was cited to me as to the effect of this endorsement. But looking at the rule requiring an endorsement of the nature of the claim, and also the rule providing that it may be

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

amended in such manner and on such terms as to the judge may seem fit, I think it must be taken to be in the nature of particulars to which the plaintiff is confined. The object being to let the defendant know the nature of the claim he is to defend. In this case it being for damages done him on board the steamer, and not a claim arising under sec. 207 of *The Merchant Shipping Act* of 1894. This action, therefore, being for damages for injury done through alleged negligence, the only way this claim could be included in this endorsement would be as a part measure of the damages arising out of the negligence. But I have held that there was not negligence and that the steamer is not liable, so that on that ground the plaintiff could not recover because he could only get it in the assessment of damages for the injuries received; and I having held that there is no legal liability for the accident, there is no assessment of damages. The plaintiff, however, claims that he is entitled under said sec. 207 to recover these expenses in this action whether negligence has been proved or not. If that contention is correct, and these expenses can be so recovered, without negligence having been proved, it can only be by virtue of that section, that is, that section must have created the liability, and made the owners liable when the accident happened on board the vessel whether there was negligence or not. Without now deciding whether the claim arising that way could be recovered in this action or not, it seems to me that if it could be recovered it should be endorsed on the summons so that the defendants may know what they are to defend. The question then would not be whether or not there was negligence, but whether the injury was received in the service of the ship, and whether the services had been rendered and were necessary. In this case there is not much evidence

1899

WYMAN v. THE STEAMSHIP DUART CASTLE.

Reasons for Judgment.

given as to this claim; but so far as I can tell from what evidence was given and what was said, the necessary surgical and medical advice and attendance and medicine were provided, this claim being for the extra amount charged for a private room, and I think it cannot be recovered. Under *The Interpretation Act* of 1899, sec. 18, sub-sec. 2, "British Possessions" means "Any part of Her Majesty's Dominions exclusive of the United Kingdom, and where parts of such Dominions are under both a central and a local legislature, all parts under the central legislature shall for the purpose of this definition be deemed to be one British Possession"; so that the plaintiff was injured in the port of the possession in which he was shipped, and the defendants, if liable at all, would only be liable for the necessary surgical and medical advice, &c. And as I have said, it appears, so far as I can tell from the evidence, this was provided.

I feel myself, therefore, forced to the conclusion that the plaintiff cannot succeed in any claim in this action and the suit must be dismissed with costs.

Solicitor for the plaintiff: *C. J. Coster.*

Solicitor for the defendants: *J. R. Armstrong.*