DUNSTAN v. THE R. R. KIRKLAND.

Case No. 4,181.

{3 Hughes, 641.}[1]

Distric Court, E. D. Virginia. Oct. 21, 1879.

ADMIRALTY JURISDICTION—DAMAGES TO PERSON BY COLLISION—STEAMER BACKING—LOOKOUT—SAIL—PLEADING—WAIVER OF VARIANCE.

1. Damages to the person of one on board of a vessel, resulting from collision, may be recovered by libel in admiralty from the vessel in fault.

{Affirmed in The Manhasset, Case No. 4,295.}

2. It is the duty of a steamer, in the act of backing, to keep a lookout in the stern of the vessel.

3. It is fault in a steamer, when about leaving a wharf, not to give the usual signal of three long whistles.

4. It is too late to take advantage of a supposed variance between the proofs and the allegations in the pleadings after the evidence is closed and the argument for the defence is begun; and, in any event, the evidence must be material.

5. Steamers must keep out of the way of sail-vessels, whenever there is possible danger of collision.

In admiralty. Libel {by P. C. Dunstan against the R. R. Kirkland} for damages to the person from the collision of two vessels. The amount of damages claimed was $8000. At about half past three in the afternoon of the 1st of March, 1879, the sloop Annie Clarke, in charge of her owner and master, the libellant in this case, with two other experienced seamen on board, was crossing the harbor of Norfolk, southwardly from the Old Dominion Steamship wharf, on the Norfolk side, towards Peters & Reed's wharf on the Portsmouth side, which is the next wharf south of another one on that side leased by the Old Dominion Steamship Company. When the sloop was within a hundred yards of the latter wharf, and abreast of it, the ferry-boat came out ahead of her from her dock in Portsmouth to cross over to Norfolk, and was about twenty yards from her, a circumstance which made it impracticable for the sloop to change her course to her port side. As the sloop approached the wharf of Peters & Reed in these circumstances the steamtug R. R. Kirkland, which had shortly before touched at the Old Dominion wharf next adjoining, backed off from the latter wharf nearly at right angles, and continued backing for a distance of some seventy-five yards, without heed to the passing sloop. In doing so the tug's stern collided with the sloop, and her "eye-bolt" punched a hole three inches large in the hull of the sloop, which placed her in a sinking condition. The two men jumped off the sloop on board the tug, but the leg of Dunstan, the master, was caught between the tug and the sloop's cabin and greatly bruised and injured. Dunstan was lifted on board the tug. From this injury he was entirely disabled for about six weeks, during part of which time he suffered a good deal of pain. He has since been crippled with a stiff knee, and may be so afflicted for the rest of his life. The tug had no lookout on her stern when she

backed out into the channel, and previously to backing out neglected to give the usual signal of three long whistles to indicate that she was about to leave her wharf. Though the sloop was under sail and plainly visible, she was not seen by the master of the tug before the collision, and the tug took no measures to keep out of her way. Dunstan, the libellant, is a poor man, thirty-five years old, with a wife and large family of children dependent upon his labor. This is the second year of a lease he has for three years upon a trucking farm near Norfolk. The physician intimated that libellant's injury would be permanent in all probability.

Garnett & White and Sharp & Hughes, for libellant.

W. H. C. Ellis; for owner of the Kirkland.

Brief of libellant's counsel:

I. The Burden of Proof.—In a collision between two steamers or two sail-vessels the burden of proof is on the libellant. But in a collision between a seamer and a sail-vessel, the burden of proof is on the steamer, irrespective of who is the libellant. Every presumption is against the steamer. In this case the burden of proof is on the steamtug R. R. Kirkland. See The Washington Irving {Case No. 17,243}; Seaman v. Crescent City {Id. 12,581}; The Oregon v. Rocco, 18 How. {59 U. S.} 570; Pope v. The R. B. Forbes {Case No. 11,275}; The Fannie, 11 Wall. {78 U. S.} 238.

II. Relative Degree of Caution Required as between Steamers and Sail-Vessels.—It is always the duty of the steamer to avoid the sail-vessel. All that the sail-vessel has to do is to keep her course. If she does not alter her course and a collision occurs the steamer is in fault. Desty, Shipp. & Adm. § 357, and cases there cited; Id. § 375, and cases cited.

III. The Want of a Lookout is Fatal.—The tug had no lookout or watchman on her stern, or aft, when backing. McGrew v. Melnotte {Case No. 8,812}; The State of New

York [Id. 13,327]; The Morning Star [Id. 9,817]; The Comet [Id. 3,051]; The Empire State [Id. 4,474].

IV. Remedy in Rem for injuries to Person.—Miller v. The W. G. Hewes [Case No. 9,594]; The New World v. King, 16 How. [57 U. S.] 469; The Sea Gull [Case No. 12,578]; The Gregory and The Washington [Id. 4,100], affirmed 9 Wall. [76 U. S.] 513.

V. Error in Extremis.—It is no defence to this action to say, as the answer does, that the men on the sail-vessel might have gotten out of the way, even after they saw that a collision was inevitable. Acts done in the excitement of the moment are not faults, and are not sufficient to exonerate the vessel by which the danger was first brought about. Such acts are excusable. Desty, Shipp. & Adm. § 381, and cases cited.

VI. Amount of Damages.—Rule: "Restitutio in integrum." Loss of time, injury to the vessel, all kinds of expenses incurred, such as doctor's bill, expenses of nursing, etc., are to be estimated; physical or mental pain and suffering caused thereby are grounds for damages, even for heavy damages. The D. S. Gregory [supra]; Curtis v. Rochester & S. R. Co., 18 N. Y. 534.

HUGHES, District Judge. It seems plain to me from all the evidence in the case, that the tug was at fault in three respects, namely: 1st. She failed to give the usual signal of three long whistles, to announce her intention of leaving the wharf at which she had touched. 2d. She had no lookout in that end of her which was moving foremost. It is just as incumbent upon a steamer backing to keep a lookout well aft, as upon a steamer moving on to keep a lookout well forward. 3d. She did not "keep out of the way" of the sailing vessel, as she was required to do by the 20th rule of navigation, established by act of congress. See Rev. St. U. S. p. 818. Indeed the answer in this cause seems virtually to consider that the tug was in fault, not only in its admissions of fact, but in its omission to negative the implication of fault in the respects just set out. It is proper for me to notice an objection made in the argument by the learned counsel of the claimant, that, although the libel alleges that the sloop was bound for the Old Dominion wharf in Portsmouth, yet the proofs showed that she was aiming for Peters & Reed's wharf; and he claimed that there was a fatal variance between the allegata and probata of the plaintiff's case. I think the objection is untenable, for the reason that it was made too late, and that the variance is not material. The evidence shows that the two wharves lie next each other; the chart of the harbor shows that the course of a vessel sailing from an opposite point on the Norfolk side to one or the other of these wharves on the Portsmouth side would not vary half a point of the compass; and the proofs establish that the collision occurred irrespectively of the circumstance that the sloop was moving on a course half a point away from the one pointing to the Old Dominion wharf adjoining Peters & Reed's. The variance in this ease, therefore, is not material. The variance between the proofs and the allegations, whether of the libel in setting out its case, or of the answer in stating its case, in order to defeat

either party to the pleadings, must be "essential in its character." The Washington Irving [supra]. Moreover, in order to entitle either party to the benefit of a variance, objection must be taken when the evidence is offered at the trial, and comes too late if made after the evidence is closed and the cause is under argument Roberts v. Graham, 6 Wall. [73 U. S.] 578.

These matters being disposed of I come now to deal with the question of the amount of damages to be awarded the libellant, no objection being raised to the jurisdiction of an admiralty court to award damages to a person injured by the collision of two vessels against the vessel in fault. It must be confessed that the ascertainment of damages by a judge in a court of admiralty is not only an unpleasant but a difficult task, and is liable to great abuse. I regret that it cannot be referred to a jury of twelve men, that best of all tribunals for the assessment of damages between man and man. I shall approach a conclusion on the subject by careful steps, and endeavor to arrive at a result that will commend itself to the approval of any impartial, well-balanced, and practical mind, it was not shown in the evidence that the sloop was permanently injured by the collision. The injury was promptly repaired by the owner of the Kirkland, and I think an item for repairs can have no rightful place in the account of damages now to be made up. Nor is there anything due on the score of medical bills. These have been paid by the claimant, and were quite inconsiderable in themselves, amounting to less than $25.

We have, therefore, only to consider what is to be allowed for the three following items, viz., for pain and suffering; for loss of time and wages; and for permanent disability; these being the grounds of allowance for which we have precedents in the reported cases.

1. The suffering of the libellant in consequence of his wound, though doubtless severe for a few days, was soon greatly assuaged, and I think a liberal allowance on this score would be $250.

2. The loss in farming operations resulting to the libellant, while quite serious for a poor man, cannot in this case be estimated at the very high figures which we see reported in many cases in this country and England. True, the injury occurred at an important season of the second year of his three years' lease of the trucking farm on which he lived, which was a year in which

he expected, with reason, to make up in profits for the unremunerated labor and preparation of the first year. True that the legitimate expectation for this second year was, that the results should compensate for the labor and investment of both years. But yet I do not think I would be justified in estimating these profits from one man's labor, on a small farm of indifferent fertility, at more than $500 for the two years named.

3. We come, last, to the permanent effect of the injury sustained by the libellant, the damages allowable for which are the more difficult of ascertainment for the reason that they can be little other than conjectural. The knee upon which the bruises which were suffered concentrated, is now still enlarged and stiff, seriously impeding the movements of a laboring man. While the physician who attended the libellant and who testified at the trial would not express the positive opinion that it would continue so permanently, yet all that he said seemed to indicate a belief on his part that the probabilities were on the side of a permanently stiff, and enlarged knee. The libellant is a poor man, with a large family to support. He is thirty-five years of age, and has a long "expectation of life." The conditions of his case are, therefore, such as appeal strongly for a liberal allowance. I therefore feel authorized by established precedents and by considerations of natural justice to award damages, on this score, to the amount of $1000.

A decree may, therefore, be taken for $1750.

[1] {Reported by Hon. Robert W. Hughes, District Judge, and here reprinted by permission.}