unless the guest should have given him written notice of having such merchandise for sale or sample in his possession after entering the inn, unless the loss to the guest was caused by the theft of the innkeeper or his servants; and inasmuch as the evidence here shows that these goods were kept in the hotel for sale or sample, and there is no evidence tending to show that there was any such written notice as the statute requires, and no evidence tending to show that the theft was caused by the innkeeper or his servants, it follows that you must return a verdict for the defendant, and this you can do without leaving your seats.

CRANDALL and others v. GOODRICH TRANSPORTATION CO.

(*Circuit Court, E. D. Wisconsin.* March, 1883.)

1. PARTIES—ACTION FOR NEGLIGENT BURNING OF HOUSE—OWNER AND INSURERS AS JOINT PLAINTIFFS.

   In an action to recover the value of a building destroyed by a fire caused by the alleged negligence of defendant, the owner of the building and an insurance company that has paid the amount of insurance on such building and taken an assignment of the claim from the owner to that extent, may join as parties to the action when the value of the house exceeds the amount for which it was insured.

2. NEGLIGENCE—DEFINITION OF.

   Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined in all cases by reference to the situation and knowledge of the parties under all the attendant circumstances.

3. SAME—BURDEN OF PROOF.

   In an action for negligence the presumption is that due care was exercised, and the burden of proof is upon the plaintiff to show by a preponderance of credible evidence that the defendant has been guilty of negligence. He must satisfy the jury that defendant by some act or omission violated some duty, and that such violation caused the injury complained of.

4. SAME—FIRE CAUSED BY DEFENDANT'S NEGLIGENCE—NEGLIGENCE OF OWNER —LOSS OF ADJOINING HOUSE.

   Where a building has been set on fire by reason of the negligence of defendant, and the fire has extended to and destroyed a house belonging to plaintiff near by, negligence on the part of the owner of the building first burned will not of itself relieve the defendant from liability for his negligence; for where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally culpable.

5. SAME—PROXIMATE CAUSE.

   Where a planing-mill is set on fire by sparks from a steamer which escaped because of the negligence of the owner of the boat, or those in charge of her,

and such fire extends to plaintiff's house, and the burning of such house is a result naturally and reasonably to be expected from the burning of the mill under the circumstances, and is the result of the continued effect of the sparks from the steamer, without the aid of other causes not reasonably to be expected, the negligence of the defendant will be considered as the *proximate* cause of the burning of plaintiff's house.

6. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where the negligence of plaintiff contributes proximately to an injury alleged to have been caused by the negligence of defendant he cannot recover; but the question as to whether plaintiff exercised, under all the attendant circumstances, the ordinary care that a reasonable man would under like circumstances exercise, is for the jury to determine from all the evidence in the case.

At Law.

Cameron, Losey & Bunn, *Robert Rae*, and *C. E. Vroman*, for plaintiffs, W. I. Crandall and Phœnix Insurance Co.

E. H. Ellis, *Hastings & Greene*, *Jas. G. Jenkins*, and *H. M. Finch*, for defendant, the Goodrich Transportation Co.

DYER, J., (*charging jury.*) It is alleged by the plaintiffs that on the twentieth day of September, 1880, the steamer Oconto, a boat belonging to the defendant company, was navigating the waters of Fox river within the limits of the city of Green Bay; that in consequence of the negligence of the defendant, and of those in charge of the boat at the time, sparks escaped from the chimney of the steamer to the shore, and there set a fire which destroyed a certain dwelling-house then owned by the plaintiff Crandall; and this suit is brought to recover the value of the building thus destroyed. It appears that at the time of the fire there was insurance upon the house to the extent of $4,000, the plaintiff insurance company having previously issued to the owner a policy of insurance for that sum. After the fire the insurance company paid to the owner the amount of such insurance, and thereupon the plaintiff Crandall transferred to the company his claim against the defendant, to the extent of $4,000, by virtue of which transfer the insurance company became subrogated to the rights of the owner to the extent of the amount of the insurance. It is admitted that the value of the dwelling-house was $5,846.81, and as this value exceeds the amount of the insurance, the owner of the building and the insurance company join as plaintiffs in this suit, as they may rightfully do.

There is not, as the court understands, any dispute about the fact that the fire in question began in the planing-mill or on the planing-mill dock, so often spoken of in the testimony; and it is claimed by the plaintiffs that the fire was set by sparks escaping from the steamer

while she was passing up Fox river, and as she was approaching the draw of Mason-street bridge; that the fire extended from the planing-mill in a north-easterly direction, and in its course consumed the house of the plaintiff Crandall, which, according to the testimony of one of the witnesses, was situated between 850 and 900 feet from the planing-mill.

The first question, therefore, to be determined by you is, did the fire which burned the planing-mill or planing-mill dock originate from sparks escaping from the steamer? I say the *first* question, because if you should find that the fire at the planing-mill was *not* caused by sparks from the steamer, that is an end of the case, and your verdict in that event should be for the defendant. But if your conclusion should be that the burning of the planing-mill was caused by sparks from the steamer, then other questions arise for your consideration, which will be submitted to you by the court.

(The court then stated the claims of the parties and called attention to the testimony on the question of the origin of the fire, which part of the charge it is unnecessary to insert here.)

The jury were then instructed as follows:

As I have before stated, if you find that the planing-mill fire was *not* set by sparks from the steamer, you need proceed no further in the case. But if you find that the fire *was* caused by sparks that escaped from the boat, you will then proceed to inquire and determine whether, in the equipment of the steamer, in her management, and in the control exercised over her on that day, proper precautions were taken by the owners of the boat, or those in charge of her, to avoid doing injury to others; in other words, whether the fire was occasioned by negligence on their part. To maintain this action it is essential that, in some one or more of the particulars alleged, negligence be shown. The foundation of the plaintiffs' claim is that the fire was caused by want of proper care on the part of the defendant and its employes in charge of the steamer at the time, and unless such want of care is established by the evidence there can be no recovery.

As is stated in one of the instructions which I am asked to give you, the gist of the action is the negligence of the defendant; unless that be established, the defendant is not liable. The presumption is that due care was exercised, and the burden of proof is upon the plaintiffs to show by a preponderance of credible evidence that the defendant has been guilty of negligence. It is incumbent upon them to satisfy you that the defendant, by its act or omission, vio-

lated some duty imposed upon it, and that such violation caused the injury complained of.

Negligence is claimed in three particulars. It is said—*First,* that on the day in question an unusually violent wind was blowing, and that its course was such as to carry escaping sparks and cinders from the steamer directly towards and upon the city of Green Bay; that a drought had prevailed and that it was then uncommonly dry; that the east shore of the river was lined with wooden buildings and docks, upon which there was combustible material; that the officers of the boat knew the topography and condition of the shore, and that in view of the alleged force and direction of the wind, the state of the weather, and all the circumstances existing at the time, it was negligence on the part of the officers of the boat to proceed up the river toward Depere; and it is claimed that in so doing those in charge of the steamer were guilty of great carelessness. *Secondly,* it is said that the boat was not prudently and carefully operated, and that this alleged want of care consisted in using her steam exhaust inside her chimney, thereby increasing the draft through the chimney, which it is claimed would have a tendency to cause a much greater emission of sparks than would take place if the exhaust was outside the chimney, or than would occur if there was what is called a natural draft through the chimney. *Thirdly,* it is claimed that it was negligence not to have a spark-arrester in or upon the smoke-stack of the steamer.

These are the three principal allegations of negligence made by the plaintiffs, and each one of them is controverted by the defendant.

In considering whether the defendant was or was not negligent, the test which the law applies, and which you should apply, is, what would an ordinarily-careful and prudent person have done with reference to the employment of the boat in navigation at that place, on that day, and with reference to her management and the use of a spark-arrester, under the precise circumstances then existing. Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined, in all cases, by reference to the situation and knowledge of the parties, and all the attendant circumstances. The law does not charge culpable negligence upon any one who takes the usual precautions against accident which careful and prudent men are accustomed to take under

similar circumstances. *Parrott* v. *Wells*, 15 Wall. 524. In short, the defendant and those in charge of the steamer were bound to exercise reasonable care in operating and managing her, and by that is meant such care as a person of ordinary prudence would be expected to exercise in the circumstances existing at that time and place.

As before stated, in connection with the question first submitted to you, there is a controversy between the parties as to the direction and force of the wind when the steamer passed up the river and through the draw of Mason-street bridge. It is claimed by the defendant that it was not hazardous to property on shore, or imprudent for the boat to leave her landing and proceed on her voyage to Depere; that it was the right of the vessel to navigate the river at that time and place; that she was prudently and properly managed; that her steam exhaust was outside the chimney; that she was equipped as the law requires; was provided with all safe and necessary appliances to prevent the escape of sparks; and that the use of such a spark-arrester as the plaintiffs insist should have been attached to her chimney was not necessary or practicable, nor required by the circumstances of the situation.

In determining whether it was prudent and proper for the steamer to leave her landing and proceed up the river, and whether she was operated with due care, you will consider all the evidence on the subject, and also the entire situation—the direction and force of the wind, the material of which the planing-mill and dock were constructed, the condition of the dock with reference to combustible material thereon, the distance that the steamer was from the planing-mill; whether the master of the steamer knew the character and condition of the buildings and docks along the river on the Green Bay side, including the planing-mill and *its* dock; whether, in approaching and entering the draw of Mason-street bridge, the fire in the furnace of the boat was increased so as to make escaping sparks unusually dangerous; whether there was a prudent use of the power of the engine in the existing circumstances; whether the steam exhaust was inside or outside the chimney, which is a controverted question of fact, and one that you must settle upon the testimony; whether, in short, as I have before said, such care and prudence were exercised in controlling the movements of the boat as ordinarily-prudent persons would have exercised in like circumstances.

Concerning the use of a spark-arrester in the chimney of the steamer, the defendants take the position that if the vessel was provided with the equipment, machinery, and mechanical appliances

required by the act of congress regulating steam-vessels, this was sufficient, and that negligence is not imputable to the defendant because of the absence of a spark-arrester in the chimney of the steamer. I have given this question consideration and have concluded that the court ought not to instruct you, as matter of law that the owners of the boat were not bound to use a spark-arrester in or upon the chimney of the boat, but that it should be left to you to say upon the evidence whether or not the defendant was guilty of negligence in that respect. And here, again, the test is, what would an ordinarily careful and prudent man, owning such a boat as this, have done in regard to having an appliance in or upon her chimney to prevent the escape of sparks?

Much testimony has been introduced relative to the use and the practicability of using a spark-arrester on the Oconto and on steamers of her class. It is claimed by the plaintiffs that such a spark-arrester as has been described to you would have prevented the escape of sparks from this steamer, and would therefore have prevented the fire; that it is a device in use on many of the lake boats; that it could have been efficiently employed on the Oconto; and that prudence and a due regard for the safety of property on shore required its use on the occasion in question.

On the other hand, it is said that the use of such a device is not consistent with the safety of the boat; that by getting clogged it operates like a damper, and tends to obstruct the draft through the the chimney, and thus to interfere with the motive power of the boat; that when in condition for use it does not prevent the escape of sparks; that it has been found impracticable to use it; that the law applicable to steam-vessels does not require its use, and therefore, in view of these various considerations and others that have been suggested, the defendant was not bound to have such an appliance on this steamer.

Now, it is for you to say what was the duty of the defendant in this respect. What would an ordinarily-prudent man, who owned a boat like this, have done in regard to using a spark-arrester? In answering this question, you will take into account the manner in which the steamer was equipped with reference to her machinery and all her mechanical apparatus. If her equipment in that respect was such as the law requires, you may take that into consideration; you will consider whether this appliance in question has been found to be generally used by prudent and careful men in the management of vessels and steam-power; what is the general usage, what have been

the experiments made, and what are the opinions and experience of those who have used spark-arresters on boats; consider the situation and surroundings of the steamer at the time when it is alleged the fire was set; whether a spark-arrester would have operated efficiently to prevent the escape of sparks; whether its use would have in any degree endangered the safety of the boat itself; you will consider what appliances the boat had for controlling or regulating the escape of sparks; to what extent, if at all, the outside exhaust diminishes, and the inside exhaust increases, the quantity of sparks produced, and their escape through the chimney; and in the light of all the circumstances, you will say whether there was any duty imposed on the defendant to have a spark-arrester on this steamer at the time of the fire complained of occurred. *Kellogg* v. *Milwaukee & St. P. Ry. Co.* 5 Dill. 543.

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Upon this general question of negligence I need only add, in substantially the language of Mr. Justice MILLER, in the case of *Kellogg* v. *Milwaukee & St. P. Ry. Co., supra*, that with the elements of transportation used in commercial transactions, and with the great bulk of material transported to and from different parts of the country, the use of steam-power has become not only necessary, but indispensable to the interests of the whole country, and you may properly consider how far the interests of the public require those using this great power to be restricted, and how far the good of the people require those making use of it to adopt means of safety and protection. Steam and fire are dangerous elements, but they must be used. The defendant and its employes had a right to employ the steamer Oconto in navigating the waters of Fox river, but they were required to exercise such care and prudence as I have before stated to you; and the question is, was there anything in the circumstances and situation at the time in question to put those exercising control over the boat, on their guard? Did they exercise due care and prudence, such as an ordinarily-prudent person would have exercised? This is the gist of your inquiry.

If your conclusion shall be that the planing-mill fire *was set* by sparks from the steamer, but that it was not the result of any negligence on the part of the defendant or those in charge of the boat, then the plaintiff cannot recover, and the case would necessarily stop at that point. But if you find that the fire originated from sparks from the Oconto, and that it was caused by negligence on the part of