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O'Brien v. Cunard S.S. Co., Limited

O'BRIEN V. CUNARD S.S. CO., LIMITED

(*Supreme Judicial Court of Massachusetts.*
Suffolk. Sept. 1, 1891.)

Exceptions from superior court, Suffolk county.

Action of tort by Mary E. O'Brien against Cunard Steam-Ship Company, Limited. Judgment for defendant. Plaintiff brings exceptions. Exceptions overruled.

E.N. Hill and *Frederic Cunningham*, for plaintiff. *Geo. Putnam* and *Thos. russell,* for defendant.

KNOWLTON, J. This case presents two questions: *First*, Whether there was any evidence to warrant the jury in finding that the defendant, by any of its servants or agents, committed an assault on the plaintiff; *secondly,* whether there was evidence on which the jury could have found that the defendant was guilty of negligence towards the plaintiff. To sustain the first count, which was for an alleged assault, the plaintiff relied on the fact that the surgeon who was employed by the defendant vaccinated her on ship-board, while she was on her passage from Queenstown to Boston. On this branch of the case the question is whether there was any evidence that the surgeon used force upon the plaintiff against her will. In determining whether the act was lawful or unlawful, the surgeon's conduct must be considered in connection with the surrounding circumstances. If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only be her overt acts and the manifestations of her feelings. Ford v. Ford, 143 Mass. 578, 10 N. E. Rep. 474: McCarthy v. Railroad Corp., 148 Mass. 550, 552, 20 N E. Rep. 182. It is undisputed that at Boston there are strict quarantine regulations in regard to the examination of emigrants, to see that they are protected from small-pox by vaccination, and that only those persons who hold a certificate from the medical officer of the steam-ship, stating that they are so protected, are permitted to land without detention in quarantine, or vaccination by the port physician. It appears that the defendant is accustomed to have its surgeons vaccinate all emigrants who desire it, and who are not protected by previous vaccination, and give them a certificate which is accepted at quarantine as evidence of their protection. Notices of the regulations at quarantine, and of the willingness of the ship's medical officer to vaccinate such as needed vaccination, were posted about the ship in various language, and on the day when the operation was performed the surgeon had a right to presume that she and the other women who were vaccinated

understood the importance and purpose of vaccination for those who bore no markes to show that they were protected. By the plaintiff's testimony, which, in this particular, is undisputed, it appears that about 200 women passengers were assembled below, and she understood from conversation with them that they were to be vaccinated; that she stood about 15 feet from the surgeon, and saw them form in aline, and pass in turn before him; that he "examined their arms, and, passing some of them by, proceeded to vaccinate those that had no mark;" that she did not hear him say anything to any of them; that upon being passed by they each received a card, and went on deck; that when her turn came she showed him her arm; he looked at, and said there was no mark, and that she should be vaccinated; that she told him she had been vaccinated before, and it left no mark; "that he then said nothing; that he should vaccinate her again;" that she held up her arm to be vaccinated; that no one touched her; that she did not tell him she did not want to be vaccinated; and the she took the ticket which he gave her, certifying that he had vaccinated her, and used it at quarantine. She was one of a large number of women who were vaccinated on that occasion without, so far as appears, a word of objection from any of them. They all indicated by their conduct that they desired to avail themselves of the provisions made for their benefit. There was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary, for that purpose. Viewing his conduct in the light of the surrounding circumstances, it was lawful; and there was no evidence tending to show that it was not. The ruling of the court on this part of the case was correct. The plaintiff contends that, it if was lawful for the surgeon to vaccinate her, the vaccination was negligently performed. "There was no evidence of want of care or precaution by the defendant in the selection of the surgeon, or in the procuring of the virus or vaccine matter." Unless there was evidence that the surgeon was negligent in performing the operation, and unless the defendant is liable for this negligence, the plaintiff must fail on the second count.

Whether there was any evidence of negligence of the surgeon we need not inquire, for we are of opinion that the defendant is not liable for his want of care in per-[*267]forming surgical operations. The only ground on which it is argued that the defendant is liable for his negligence is that he is a servant engaged in the defendant's business, and subject to his control. We think this argument is founded on a mistaken construction of the duty imposed on the defendant by law. By the fifth section of the act of congress of August 2, 1882, (22 U.S. St. at Large, 188,) is provided that "every steam-ship or other vessel carrying or bringing emigrant passengers, exceeding fifty in number, shall carry a duly competent and qualified surgeon or medical practitioner, who shall be rated as such in the ship's articles, and who shall be provided with surgical instruments, medical comforts, and medicines proper and necessary for diseases and accidents incident to sea voyages, and for the

proper medical treatment of such passengers during the voyage, and with such articles of food and nourishment as may be proper and necessary for preserving the health of infants, and young children; and the services of such surgeon or medical practitioner shall be promptly given in any case of sickness or disease to any of the passengers or to any infant or young child of any such passengers, who may need his services. For a violation of either of the provisions of this section the master of the vessel shall be liable to a penalty not exceeding two hundred and fifty dollars." Under this statute it is the duty of the ship-owners to provide a competent surgeon, whom the passengers may employ, if they choose, in the business of healing their wounds, and curing their diseases. The law does not put the business of treating sick passengers into the charge of common carriers, and make them responsible for proper management of it. The work which the physician or surgeon does in such cases is under the control of the passengers themselves. It is their business, not the business of the carrier. They may employ the ship's surgeon, or some other physician or surgeon who happens to be on board, or they may treat themselves if they are sick, or may go without treatment if they prefer; and, if they employ the surgeon, they may determine how far they will submit themselves to his directions, and what of his medicines they will take and what reject, and whether they will submit to a surgical operation or take the risk of going without it. The master or owners of the ship cannot interfere in the treatment of the medical officer when he attends a passenger. He is not their servant, engaged in their business, and subject to their control as to his mode of treatment. They do their whole duty if they employ a duly qualified and competent surgeon and medical practitioner, and supply him with all necessary and proper instruments, medicines, and medical comforts, and have him in readiness for such passengers as choose to employ him. This is the whole requirement of the statue of the United States applicable to such cases; and if, by the nature of their undertaking to transport passengers by sea, they are under a liability at the common law to make provision for their passengers in this respect, that liability is no greater. It is quite reasonable that the owners of a steam-ship used in the transportation of passengers should be required by law to provide a competent person to whom sick passengers can apply for medical treatment, and when they have supplied such a person it would be unreasonable to hold them responsible for all the particulars of his treatment when he is engaged in the business of other persons, in regard to which they are powerless to interfere. The reasons on which it is held in the courts of the United States and of Massachusetts that the owners are liable for the negligence of a pilot in navigating the ship, even though he is appointed by public agencies, and the master has no voice in the selection of him, do not apply to this case. The Chine, 7 Wall. 53-67; Yates v. Brown, 8 Pick. 23. The pilot is engaged in the navigation of the ship, for which, on grounds of public policy, the owners should be held responsible. The business is theirs, and they have certain

rights of control in regard to it. They may determine when and how it shall be undertaken, and the master may displace the pilot for certain causes. But in England it has been held that even in such case the owners are not liable. Carruthers v. Sydebotham. 4 Maule & S. 88: The Maria, Id. 95. The view which we have taken of this branch of the case is fully sustained by a unanimous judgement of the court of appeals of New York in Laubheim v. DeKoninglyke N.S. C., 107 N.Y. 228, 13 N. E. Rep. 781. See, also, Secord v. Railway C., 18 Fed. Rep. 221; McDonald v. Hospital, 120 Mass. 432. We are of opinion that on both parts of the case the rulings at the trial were correct. The evidence excepted to was rightly admitted. Exceptions overruled.