Privy Council Appeal No. 30 of 1954

Nisbet Shipping Company Limited - - - - - - *Appellant*

v.

The Queen - - - - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY, 1955

Present at the Hearing:

VISCOUNT SIMONDS
LORD OAKSEY
LORD RADCLIFFE
LORD TUCKER
LORD COHEN

[*Delivered by* VISCOUNT SIMONDS]

This appeal from a decision of the Supreme Court of Canada raises a question of very great difficulty. On the 13th February, 1945, there was a collision between H.M.C.S. "Orkney" and the "Blairnevis" a vessel owned by the appellant company, Nisbet Shipping Company Ltd. On the 20th July, 1951, it was decided by Mr. Justice Thorson sitting as President of the Exchequer Court of Canada that "Orkney" was alone to blame for the collision and that the respondent was not entitled to limit liability under the provisions of the Canada Shipping Act, 1934. The latter part of this decision was on the 28th April, 1953, reversed by the Supreme Court of Canada (Rinfret, C.J., Kerwin, Rand, Kellock, Estey and Cartwright, J.J., dissentiente Locke, J.), which held that the Crown was entitled to avail itself of Section 649 of that Act. Against this decision the appellant company appeals and the single question, simple to state but difficult to answer, is whether the Crown is or is not entitled to claim the benefit of the provisions of this Section.

Under the law of Canada limitation of liability for damages caused by the improper navigation of a ship rests for the purpose of this case solely on the Section that has been mentioned, the relevant words of which are

> "The owners of a ship, whether registered in Canada or not, shall not in cases where all or any of the following events occur without their actual fault or privity, that is to say
>
> . . . . . .
>
> (iv) where any loss or damage is by reason of the improper navigation of the ship caused to any other vessel or to any goods merchandise or other things whatsoever on board any other vessel

be liable to damages . . . to an aggregate amount exceeding 38 dollars and 92 cents for each ton of the ship's tonnage".

It may well be (their Lordships do not think it necessary to determine this question) that, apart from the Section to which they next refer, the Crown could under the circumstances of the present case claim the benefit of Section 649 and limit its liability accordingly. But Section 712 provides that "This Act shall not, except where specially provided, apply to ships belonging to His Majesty". Upon this Section the appellant company relies, contending that the Act contains no special provision

conferring upon the Crown the benefit of Section 649 and that accordingly that Section does not apply in respect of ships belonging to Her Majesty and the Crown cannot limit its liability under it.

It is difficult to think of words more wide and comprehensive than those of Section 712, the phrase "except where specially provided" emphasising that no implication without express words would suffice to bind the Crown or presumably to confer a benefit upon the Crown. But this difficulty has been met in two ways by the respondent. It has been urged in the first place that as a matter of construction the Section does not apply to Her Majesty as the owner of a ship but only to the ships themselves. This appears to have been the contention urged before Thorson, J., and was by no means abandoned before their Lordships. But it was urged in the second place—and this is the argument which prevailed with the Supreme Court—that Section 712 was in effect irrelevant to a claim by the Crown to avail itself of the provisions of Section 649. This contention can only be understood against the background of the history of the Crown's liability for the tortious acts of its servants and specifically of its liability in respect of damage caused by the improper navigation of a ship.

Before 1887 in Canada as in England the doctrine "*respondeat superior*" did not apply to the Crown which was therefore not liable for the tortious acts of its servants.

In that year it was enacted by Section 16 of the Supreme and Exchequer Courts Act, 1887, that the Exchequer Court should have exclusive original jurisdiction to hear and determine amongst other matters "(*c*) every claim against the Crown arising out of any death or injury to the person or to property on any public work, resulting from the negligence of any officer or servant of the Crown while acting within the scope of his employment". This Section has from time to time been amended in such manner as to enlarge the jurisdiction of the Court and paragraph (*c*) now reads "every claim against the Crown arising out of any death or injury to the person or to property resulting from the negligence of any officer or servant of the Crown while acting within the scope of his duties or employment". It is not questioned that these are apt words to give the Court jurisdiction in the present case. It must however be noted that it was only by an amendment made in 1938, that is after the Canadian Shipping Act, 1934, that such jurisdiction was given.

The Exchequer Court Act both in its original and amended form purported only to confer jurisdiction, but by a series of decisions, the authority of which cannot be questioned, it has been held that it not only conferred jurisdiction on the Court but also imposed liability on the Crown: see for instance *City of Quebec* v. *The Queen* 24 S.C.R. 420; *Filion* v. *The Queen* 4 Ex.C.R. 134; *The King* v. *Armstrong* 40 S.C.R. 229; *Gauthier* v. *The King* 56 S.C.R. 176. The question then is what is the measure of the liability which is not defined by the Act but is to be inferred from the creation of jurisdiction. It is not in dispute that at least those circumstances which give rise to a claim between subject and subject will support a claim by a subject against the Crown. From this it is an easy step to say that a subject is not entitled to any greater relief against the Crown than he would be against a fellow subject, and this is supported by reference to Section 8 of the Petition of Right Act (Revised Statutes of Canada, 1927, Cap. 158) which provides that the statement of defence or demurrer to a petition of right may raise, besides any legal or equitable defences in fact or in law available under that Act, any legal or equitable defences which would have been available if the proceedings had been a suit or action in a competent Court between subject and subject. Nor can it be ignored that, though the right to limit liability for damage is not part of the common law but in England and Canada alike is the creature of statute, it is a right almost universally established in the law of nations and of considerable antiquity. It would therefore be easily assumed that the Crown, assenting to the imposition of a new liability, would secure for itself the advantage at

least of limiting it in a manner so generally conceded. This view is thus cogently stated by Rand, J. "Where liability, then, on the same footing as that of a subject is established, giving a right to damages, I can think of no more appropriate enactment to which that basic rule of the prerogative could be applied than to a statutory limitation of those damages". The basic rule to which the learned Judge refers is that under which it is said that the Sovereign may avail himself of the provisions of any Act of Parliament.

These are the considerations which prevailed with the learned Judges of the Supreme Court, with the exception of Mr. Justice Locke with whose judgment their Lordships find themselves in agreement. They are weighty considerations but, as it appears to their Lordships, they do not explain why full effect should not be given to Section 712. It is true that in 1934 that Section, which was itself a re-enactment of Section 741 of the Merchant Shipping Act, 1894, could have no operation in regard to any liability of the Crown, for it was only in 1938 that any relevant liability was imposed on the Crown. It does not, however, follow that, when that liability is imposed, as it is by the amending Act of 1938, the provisions of Section 712 can be ignored. In the United Kingdom the same problem arose when under the Crown Proceedings Act, 1947, the Crown was for the first time made liable for the tortious acts of its servants and it was by that Act specifically enacted that the Sections of the Merchant Shipping Act, 1894, should apply to limit the liability of the Crown. And in Canada similar provision is now made by the Crown Liability Act, 1953. It may be said that this latter Act can be regarded as having been passed *ex majore cautela* and it certainly cannot be treated as decisive of the meaning and scope of Section 712 of the Canadian Shipping Act, 1934. But it is precisely the provision which, if the liability of the Crown had been established before 1934, would have been appropriately inserted in the Act of that year as a special provision excluding the operation of Section 712 and the fact that it was not so inserted because the necessity for it was not then foreseen cannot deprive Section 712 of any part of its meaning and effect. The right to limit liability is, as has already been said, derived solely from a section of an Act which unequivocally enacts that the Act shall not apply, except where specially provided, to ships of His Majesty. Where then can the Crown find that right? It appears to their Lordships that there is no sufficient justification for saying that, because the Exchequer Court in the exercise of its jurisdiction applies to proceedings between subject and Crown the law which it applies between subject and subject, therefore it should apply even that law which by the terms of the Statute enacting it is expressly excluded from application to the Crown.

Upon this part of the case a final argument was based on Section 16 of the Interpretation Act which enacts that no provision or enactment in any Act affects in any manner whatsoever the rights of Her Majesty Her heirs or successors unless it is expressly stated therein that Her Majesty is bound thereby. This provision however appears to have no relevance to a Statute which expressly enacts, as the Act of 1934 does, how far the rights of the Crown shall be affected. In Section 712 the relevant word is "apply" which appears adequately to cover any provision whether it creates an obligation or confers a benefit.

Their Lordships have so far proceeded upon the footing that Mr. Justice Thorson was right in rejecting the argument that a distinction can be drawn between the words in Section 712 "ships belonging to His Majesty" and such words as "His Majesty" simpliciter. In their Lordships' opinion the learned Judge took the correct view. An attempt was made at the Bar to indicate those sections to which, if the distinction was valid, Section 712 applied and those to which it did not. It soon appeared that the task was an impossible one. Nor, if such a distinction is made, does it appear at all clear why any part of Part XII of the Act which is headed "Navigation—Collisions—Limitation of Liability"

should not be properly described as provisions relating to ships belonging to His Majesty. In their Lordships' opinion this argument of the respondent also fails.

In the result their Lordships will humbly advise Her Majesty that this appeal should be allowed, the judgment of the Supreme Court set aside and that of Mr. Justice Thorson restored. The respondent must pay the costs of the appellant of this appeal and in the Supreme Court of Canada.

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In the Privy Council

NISBET SHIPPING COMPANY LIMITED

v.

THE QUEEN

[DELIVERED BY VISCOUNT SIMONDS]

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