BETWEEN:

NISBET SHIPPING COMPANY LIMITED, ... } SUPPLIANT;

1949
June 13, 14
1951
July 20

AND

HIS MAJESTY THE KING ..... RESPONDENT.

Crown—Petition of Right—Negligence—Collision at sea—Exchequer Court Act, R.S.C. 1927, c. 34, ss. 19(c), 50A—Regulations for Preventing Collisions under Order in Council P.C. 259, dated February 9, 1897—Naval Service Act, R.S.C. 1927, c. 139, s. 45—King's Regulations and Admiralty Instructions—Canada Shipping Act, S.C. 1934, c. 44, ss. 649(1), 712—Officers in charge of navigation of Canadian warship not freed from duty of care where operations not actually against enemy—Collision Regulations not binding on Crown but embody principles of good seamanship—Section 19(c) of Exchequer Court Act not restricted to claims based on negligence occurring within Canada—His Majesty not entitled to limitation of liability under Section 649(1) of Canada Shipping Act.

Suppliant claimed damages for loss of its steamship *Blairnevis* in the Irish Sea through collision between it and Canadian warship H.M.C.S. *Orkney*, a steam frigate forming part of His Majesty's Canadian naval forces on active service. The *Blairnevis* had detached herself from a convoy and was proceeding independently to Workington, England, and the *Orkney* was on her way to take over escort duty for portion of the convoy going to Liverpool. The vessels were on crossing courses and the *Orkney* struck the *Blairnevis* on her port bow. Subsequently the *Blairnevis* had to be beached and was lost. Suppliant claimed collision and loss resulted from negligence of officers charged with navigation of the *Orkney*.

Held: that since the operations on which H.M.C.S. *Orkney* was engaged, although warlike operations, were not actual operations against the enemy the officers charged with her navigation were not freed from

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the duty of care for the safety of merchant vessels. *Shaw Savill and Albion Co. Ltd.* v. *The Commonwealth* (1940) 66 C.L.R. 344 approved.

2. That the Collision Regulations established by Order in Council P.C. 259, dated February 9, 1897, do not bind the Crown but, while they do not as such apply to His Majesty's ships, constitute a code recognized by all nations as well adapted for preventing collisions at sea and embody principles of good seamanship that ought to be applied everywhere. *The F. J. Wolfe* (1945) P. 61; (1946) P. 91 followed.

3. That where Parliament has seen fit to establish the standard of care by which the conduct of its officers or servants is to be measured there is no lack of jurisdiction under section 19(*c*) of the Exchequer Court Act by reason of the fact that the collision happened on the high seas and there was no provincial law of negligence that could be applied.

4. That section 19(*c*) of the Exchequer Court Act is not restricted to claims based on negligence occurring within Canada.

5. That the officer of the watch of the *Orkney* was negligent in failing to keep a proper lookout and the Commander did not act as promptly and appropriately as the situation demanded.

6. That there was no contributory negligence on the part of those on board the *Blairnevis*.

7. That the loss of the *Blairnevis* was the result of the negligence of the officers of the *Orkney*.

8. That section 649(1) of the Canada Shipping Act does not apply to His Majesty and he is not entitled to any limitation of liability under it.

PETITION OF RIGHT for damages under section 19(*c*) of the Exchequer Court Act.

The action was tried before the Honourable Mr. Justice Thorson, President of the Court, at Montreal.

C. R. McKenzie K.C., H. A. Aylen K.C. and *B. F. Clark* for suppliant.

L. Beauregard K.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (July 20, 1951) delivered the following judgment:

The suppliant, a Scottish Corporation having its head office and chief place of business at Glasgow, Scotland, claims damages for the loss of its steamship *Blairnevis* in the Irish Sea on February 13, 1945, through a collision between it and a Canadian warship, *H.M.C.S. Orkney,* a

steam frigate forming part of His Majesty's Canadian naval forces on active service and manned by officers and men of the Royal Canadian Navy.

The claim is brought under section 19(*c*) of the Exchequer Court Act, R.S.C. 1927, chap. 34, as amended, which reads as follows:

> 19. The Exchequer Court shall also have exclusive original jurisdiction to hear and determine the following matters:—
>
> (*c*) 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.

In a claim under this section the onus of proof that all the conditions of liability required by it have been met rests on the suppliant. It must bring its claim within the four corners of the section for apart from it the Crown is under no liability.

As to one condition of liability there is no dispute. The *Orkney* was owned by His Majesty in right of Canada and manned by members of the naval forces of Canada. They must, therefore, under section 50A of the Exchequer Court Act, as enacted in 1943, Statutes of Canada 1943, chap. 25, be deemed to have been servants of the Crown, and it is clear that at the time of the collision they were acting within the scope of their duties or employment. The disputed issues of fact are whether there was negligence on the part of any officer of the *Orkney* and, if so, whether or to what extent the loss of the *Blairnevis* resulted therefrom.

The *Blairnevis* had sailed from Melilla in Spanish Morocco on February 1, 1945, with a cargo of iron ore bound for Workington, England, joined a naval convoy at Gibraltar and sailed from there in convoy on February 4, 1945, continued in this convoy until February 12, 1945, when she reached a position in the Irish Sea off certain islands known as the Skerries. There the convoy had been broken up into two portions, one going east to the Mersey and the other north-west to the Clyde and the *Blairnevis* had been instructed by the commodore of the convoy to detach herself from it and proceed independently to Workington. While she was doing so she was struck on her port bow

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at about 1.34 a.m. on February 13, 1945, by *H.M.C.S. Orkney*. The *Orkney* was one of four Canadian frigates, designed as anti-submarine vessels, making up the 25th Escort Group based at Londonderry in Northern Ireland. With two other frigates of the group she had left Moville near Londonderry at 10 a.m. on February 12, 1945, under the command of Acting Commander Victor Browne of the Royal Canadian Volunteer Reserve, who was also the senior officer of the group, with instructions to relieve the escort that was with the Mersey portion of the convoy and take over escort duty for the balance of its voyage. It was while the *Orkney* and the other two frigates were on their way to take over this duty that the *Orkney* struck the *Blairnevis*. The collision occurred at 1.34 a.m. on February 13, 1945, and the position of the vessels was established at latitude 53 degrees 38 minutes North and longitude 4 degrees, 38 minutes West, about 57 miles west of Liverpool.

The respondent's main defence in point of law was that at the time of the collision *H.M.C.S. Orkney* was engaged in warlike operations to protect merchant vessels against enemy submarine action and that consequently the respondent could not be held responsible for loss caused by her even if it resulted from negligence on the part of those charged with her navigation. It can be accepted that the *Orkney* was engaged in warlike operations. With her sister ships of the 25th Escort Group she was on her way to take over escort duty for the Mersey portion of the convoy that had come from Gibraltar and relieve the escort that had accompanied it. The threat of danger to merchant vessels from enemy submarine action in the area made such duty necessary. The Irish Sea was a theatre of war. If, therefore, the respondent's contentions were well founded in law that would be the end of the suppliant's case but I am satisfied that the law does not go that far. Counsel for the respondent could not, of course, find any English decision directly in point, for prior to the Crown Proceedings Act, 1947, no claim lay against the Crown in the United Kingdom for the negligence of its officers or servants, but he relied strongly on the decision of the Full Court of the High Court of Australia in *Shaw Savill and Albion Co. Ltd.* v. *The Commonwealth* (1). In Australia section 56 of the

(1) (1940) 66 C.L.R. 344.

Judiciary Act, 1903-1940, provides that any person making any claim against the Commonwealth, whether in contract or in tort, may in respect of the claim bring a suit against the Commonwealth in the High Court. The legislation is thus similar in principle to section 19(*c*) of the Exchequer Court Act, although broader in extent in that the claim in tort is not confined to a claim for negligence. In the case relied upon the plaintiff, a United Kingdom company, sued the Commonwealth for damages suffered by it as the result of a collision between its motor vessel and an Australian warship and certain questions of law came before the Court on demurrers and motion. The Full Court unanimously held that an action for negligence brought against the Crown for acts done in the course of active naval or military operations against the enemy must fail, four of the judges taking the view that while the forces of the Crown are engaged in actual operations against the enemy they owe no duty of care to avoid loss or damage to private individuals and the other that such acts are not justifiable *durante bello*. But the Court also held that this immunity from action does not attach to activities of the Crown's combatant forces in time of war other than actual operations against the enemy. The governing reasons for the decision were clearly expressed by Dixon J., with whom Rich A. C. J. and McTiernan J. agreed. After pointing out that the liability of the Commonwealth must be vicarious and depends on the existence of a duty of care in some individual, as is also true of the liability of the Crown under section 19(*c*) of the Exchequer Court Act, he said, at page 361:

> Outside a theatre of war, a want of care for the safety of merchant ships exposes a naval officer navigating a King's ship to the same civil liability as if he were in the merchant service. But, although for acts or omissions amounting to civil wrongs an officer of the Crown can derive no protection from the fact that he was acting in the King's service or even under express command, it is recognized that, where what is alleged against him is failure to fulfil an obligation of care, the character in which he acted, together, no doubt, with the nature of the duties he was in the course of performing, may determine the extent of the duty of care; Cp. *Halsbury's Laws of England*, 2nd ed., vol. 23, p. 666. It could hardly be maintained that during an actual engagement with the enemy or a pursuit of any of his ships the navigating officer of a King's ship of war was under a common-law duty of care to avoid harm to such non-combatant ships as might appear in the theatre of operations. It cannot be enough to say that the conflict or pursuit is a circumstance affecting the reasonableness of the officer's conduct as a discharge of the duty of care, though the duty itself persists. To adopt such a view

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would mean that whether the combat be by sea, land or air our men go into action accompanied by the law of civil negligence, warning them to be mindful of the person and property of civilians. It would mean that the Courts could be called upon to say whether the soldier in the field of battle or the sailor fighting on his ship might reasonably have been more careful to avoid causing civil loss or damage. No one can imagine a court undertaking the trial of such an issue, either during or after a war. To concede that any civil liability can rest upon a member of the armed forces for supposedly negligent acts or omissions in the course of an actual engagement with the enemy is opposed alike to reason and to policy. But the principle cannot be limited to the presence of the enemy or to occasions when contact with the enemy has been established. Warfare perhaps never did admit of such a distinction, but now it would be quite absurd. The development, of the speed of ships and the range of guns were enough to show it to be an impracticable refinement, but it has been put out of question by the bomber, the submarine and the floating mine. The principle must extend to all active operations against the enemy. It must cover attack and resistance, advance and retreat, pursuit and avoidance, reconnaisance and engagement. But a real distinction does exist between actual operations against the enemy and other activities of the combatant services in time of war. For instance, a warship proceeding to her anchorage or manoeuvring among other ships in a harbour, or acting as a patrol or even as a convoy must be navigated with due regard to the safety of other shipping and no reason is apparent for treating her officers as under no civil duty of care, remembering always that the standard of care is that which is reasonable in the circumstances. Thus the commander of His Majesty's torpedo-boat destroyer *Hydra* was held liable for a collision of his ship with a merchant ship in the English Channel on the night of the 11th of February 1917, because he failed to perceive that the other ship, which showed him a light, was approaching on a crossing course. The hearing was *in camera* and obviously the *Hydra* was on active service and war conditions obtained (*H.M.S. Hydra* (1918) P. 78).

It may not be easy under conditions of modern warfare to say in a given case upon which side of the line it falls. But, when, in an action of negligence against the Crown or a member of the armed forces of the Crown, it is made to appear to the court that the matters complained of formed part of, or an incident in, active naval or military operations against the enemy, then in my opinion the action must fail on the ground that, while in the course of actually operating against the enemy, the forces of the Crown are under no duty of care to avoid causing loss or damage to private individuals.

There is no authority dealing with civil liability for negligence on the part of the King's forces when in action, but the law has always recognized that rights of property and of person must give way to the necessities of the defence of the realm. A good statement will be found by *Sir Erle Richards, Law Quarterly Review,* vol. 18, at p. 135. To justify interference with person or property, it must, according to some, be shown that the measures were reasonably considered necessary to meet an appearance of imminent danger. But this seems a strict test: See *Pollock* on *Torts,* 14th ed. (1939), p. 132, note t, and p. 134; *Law Quarterly Review* vol. 18, at pp. 138-141 and 158, and cp. *R.* v. *Allen* (1921) 2 I.R. 241.

The uniform tendency of the law has been to concede to the armed forces complete legal freedom of action in the field, that is to say in the course of active operations against the enemy, so that the application of private law by the ordinary courts may end where the active use of arms begins. Consistently with this tendency the civil law of negligence cannot attach to active naval operations against the enemy.

In my judgment, the principles thus laid down are applicable in the present case. It follows that since the operations in which *H.M.C.S. Orkney* was engaged, although warlike operations, were not actual operations against the enemy, the officers charged with her navigation were not freed from the duty of care for the safety of merchant vessels. That a collision between one of His Majesty's warships and a merchant vessel in time of war may be attributed to the negligence of the commander of the warship is illustrated by a case such as *H.M.S. Hydra* (1), although it must be conceded that in that case it was not shown that at the time of the collision the warship was engaged in warlike operations. This fact may have prompted counsel for the respondent to contend that immunity from the duty of care for merchant vessels extended to the officers of a Canadian warship engaged in warlike operations even although they were not actual operations against the enemy. He suggested that the decision of the House of Lords in *Yorkshire Dale Steamship Company Ltd.* v. *Minister of War Transport* (2) supports this proposition but, as I read the reasons for judgment in that case, it has no applicability here. There the issue was whether the claimant's motor vessel had been stranded as a consequence of warlike operations and consequently entitled to war risk insurance. It does not touch the question whether persons engaged in warlike operations are free from the duty of care to which they would otherwise be subject.

The next defence put forward was a denial of the Court's jurisdiction to entertain the claim. Counsel for the suppliant urged that the officers charged with the navigation of the *Orkney* had been guilty of negligence in that they had failed to comply with the "Regulations for Preventing Collisions and for Distress Signals", generally known as the

(1) (1918) P. 78.

(2) (1942) 78 Lloyd's List L.N. 1.

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International Rules of the Road, as established by Order in Council P.C. 259, dated February 9, 1897, as amended, particularly Article 19 which reads as follows:

> When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other.

Exception to this contention was taken on behalf of the respondent. It was objected that the Regulations do not bind the Crown, that the collision between the vessels occurred on the high seas and no provincial law of negligence can be applied to it, that section 19(c) of the Exchequer Court Act must be construed restrictively as covering only claims where a provincial law of negligence can be applied and that a claim based on negligence outside of Canada is not within its ambit.

I am unable to agree with these objections. It may be conceded that the Regulations do not bind the Crown but it is established that while they do not as such apply to His Majesty's ships they constitute a code recognized by all maritime nations as well adapted for preventing collisions at sea and embody principles of good seamanship that ought to be applied everywhere: *vide The F. J. Wolfe* (1). In the Court of Appeal Scott L.J. regarded the Regulations as the embodiment of principles of seamanship and said, at page 95:

> Those rules represent the considered views of almost generations of seamen of many nations.

and later, on the same page, expressed these views:

> since the abolition in 1911 of the statutory presumption of fault where there had been a breach of a regulation, it makes, generally speaking, very little practical difference whether one says that the rules for prevention of collisions are directly operative "as such", or merely "as a guide for seamanship" . . . but the principles of seamanship ought, in my view, always to be borne in mind, whether one calls them "rules" or "principles". Their bearing on maritime duty and fault under the one aspect or the other is normally just the same. Every skilled and experienced navigator has the regulations—the crossing rule at any rate—deeply ingrained in his mind, and reacts to it just as a natural stimulus from the brain acts on muscles. It is automatic.

But it is immaterial whether the Regulations were applicable as such or as an embodiment of principles of seamanship that the officers in charge of the navigation of

(1) (1945) P. 61; (1946) P. 91.

His Majesty's ships ought to apply, for *H.M.C.S. Orkney* was bound by the King's Regulations and Admiralty Instructions by reason of section 45 of the Naval Service Act, R.S.C. 1927, chap. 139, which provided:

> 45. *The Naval Discipline Act* 1866 and the Acts in amendment thereof passed by the Parliament of the United Kingdom for the time being in force, and the King's Regulations and Admiralty Instructions, in so far as the said Acts, regulations and instructions are applicable, and except in so far as they may be inconsistent with this Act or with any regulations made under this Act, shall apply to the Naval Service and shall have the same force in law as if they formed part of this Act.

The King's Regulations and Admiralty Instructions in force at the time of the collision were thus by an Act of the Parliament of Canada made applicable to His Majesty's Canadian warships wherever they were operating. Chapter XVI of these Regulations and Instructions contain regulations identical in wording with the Collision Regulations referred to with the result that the situation is similar to that which was pointed out by Sir Gorell Barnes J. in *H.M.S. Sans Pareil* (1). If the facts brought the case within the words of Article 19 it was the duty of the *Orkney* and the officers in charge of her navigation to keep out of the way of the *Blairnevis*. It set the standard for the duty of care to be followed: *vide* also *The Queen Mary* (2).

This disposes of the contention of lack of jurisdiction on the ground that because the collision happened on the high seas there was no provincial law of negligence that could be applied. While it has been established by the Supreme Court of Canada in *The King* v. *Armstrong* (3) and *Gauthier* v. *The King* (4) that the law of negligence to be applied in a claim under 19(*c*) of the Exchequer Court Act is that of the province in which the alleged negligence occurred as it was in force at the time when liability for negligence of that sort was first imposed upon the Crown, and these decisions have been followed and applied in this Court in *Tremblay* v. *The King* (5) and *Zakrzewzki* v. *The King* (6), it is not to be assumed that these decisions are an exhaustive statement of the applicable law. The appropriate provincial law was held to be applicable on the

(1) (1900) P. 267 at 272.
(2) (1949) 82 Ll. L. Rep. 303.
(3) (1908) 40 Can. S.C.R. 229 at 248.
(4) (1918) 56 Can. S.C.R. 176 at 180.
(5) (1944) Ex. C R. 1.
(6) (1944) Ex. C.R. 163.

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assumption that Parliament had this law in mind when it imposed the liability on the Crown since it had not specified what law was applicable. But these decisions can have no bearing in a case where Parliament has itself seen fit to establish the standard of care by which the conduct of its officers or servants is to be measured as it did in the present case when it made His Majesty's ships subject to the King's Regulations and Admiralty Instructions. In such case Parliament has itself enacted, within its competence, the law of negligence to be applied.

Nor can it be agreed, although the question is not free from difficulty, that section 19(*c*) must be restricted to claims based on negligence occurring within Canada. Although, as Maxwell on Interpretation of Statutes, 9th Edition, points out, at page 148, the legislation of a country is primarily territorial, it is also true, as the same author states, at page 151, that an intention that a statute shall have extra-territorial operation may be readily collected from the nature of the enactment. There would have been substance in the respondent's contention when liability for the negligence of its officers or servants was first imposed upon the Crown by section 16(*c*) of the Exchequer Court Act, as enacted in 1887, Statutes of Canada, 1887, chap. 16, when this Court was given exclusive and original jurisdiction to hear and determine:

> (*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 duties or employment;

The liability for negligence was then a narrow one. In order to bring his claim within the statute a suppliant had to prove that his injury had occurred actually "on" a public work. If it happened "off" the public work itself he had no remedy even if the negligence which caused it had arisen "on" a public work. This was definitely settled by the Supreme Court of Canada in *Paul* v. *The King* (1) which was followed in a long line of cases. Under this state of the law there could be no claim based on negligence occurring outside of Canada for it was only when there was injury and negligence on a public work that the responsibility of the Crown was engaged. There was thus a territorial limitation of liability. This was not wholly removed by

(1) (1906) 38 Can. S.C.R. 126.

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the amendment of section 16(*c*) of the Exchequer Court Act in 1917, Statutes of Canada, 1917, chap. 23, which had then become section 20. This repealed the previous enactment and substituted the following:

> (*c*) Every claim against the Crown arising out of any death or injury to the person or to property resulting from negligence of any officer or servant of the Crown while acting within the scope of his duties or employment upon any public work.

Under the section as thus amended it was no longer necessary for a suppliant to prove either that his injury had happened actually "on" a public work or that the negligence which caused it had arisen "on" a public work. It did not matter where the injury happened or where the negligence arose so long as the suppliant could prove that his injury resulted from the negligence of an officer or servant of the Crown, while acting within the scope of his duties or employment, if such duties or employment were "upon any public work". In *The King* v. *Schrobounst* (1) these words were held to be descriptive of the kind of duties or employment rather than their physical locality. It was not necessary for a suppliant to prove that the duties or employment were actually "on" a public work so long as he could show that they were related to or connected with a public work. But while there was thus a substantial enlargement of the Crown's liability there was still room for argument that since Parliament imposed liability only where there was negligence by an officer or servant of the Crown while acting within the scope of his duties or employment upon any public work it could not have intended the imposition of liability where the negligence occurred outside of Canada, since there would be no duties or employment upon a public work outside of Canada. Then came the amendment of the Exchequer Court Act in 1938, Statutes of Canada, 1938, chap. 28, by which section 19(*c*) in its present form was enacted. This struck out the limitation of liability implied in the words "upon any public work". With the elimination of this limitation of liability the argument that there was a locational restriction of liability lost its potency. If officers or servants of the Crown are guilty of any negligence outside of Canada while acting within the scope of their duties or employment

(1) (1925) S.C.R. 458.

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and injury results therefrom I see no reason for assuming that Parliament did not intend that the responsibility of the Crown should be engaged. There is nothing in the section itself that warrants its restriction to claims based on negligence occurring within Canada. Moreover, when Parliament by the Naval Service Act made the King's Regulations and Admiralty Instructions applicable to His Majesty's Canadian ships it clearly intended that they should be applicable wherever such ships were operating. I am also of the view that section 50A of the Exchequer Court Act, to which reference has been made, has some bearing on the question. It provided as follows:

> 50A. For the purpose of determining liability in any action or other proceeding by or against His Majesty a person who was at any time since the twenty-fourth day of June, one thousand nine hundred and thirty-eight, a member of the naval, military or air forces of His Majesty in right of Canada shall be deemed to have been at such time a servant of the Crown.

Certainly it was intended that the deemed relation of master and servant should exist in the case of a member of His Majesty's Canadian forces wherever such member was serving and there is nothing to suggest that it was intended that there should be any territorial restriction of the liability for his negligence. I have, therefore, reached the conclusion, although not without some doubt, that the suppliant's claim is not outside the ambit of section 19(*c*) of the Exchequer Court Act by reason of the fact that the alleged negligence of the officers in charge of the navigation of *H.M.C.S. Orkney* occurred outside of Canada.

The disputed issues of fact may now be considered, the first being whether the officers charged with the navigation of the *Orkney* were guilty of negligence. The evidence establishes that the *Orkney* was coming slightly south of south-east on a course of 140 degrees and that the *Blairnevis* was going slightly north-east on a course of 26 degrees. The two vessels were thus on crossing courses involving risk of collision within the meaning of Article 19 of the Regulations and the *Orkney* had the *Blairnevis* on her starboard side. The latter was the stand-on ship and the former the give-way one. It was the duty of the *Orkney* to keep out of the way of the *Blairnevis* and her failure to do so without justification implies negligence on the part of the

officers charged with her navigation. These were Commander Browne, the officer commanding the *Orkney*, and Lieutenant Page, the officer of the watch on duty before and at the time of the collision. In my view, the evidence points to the conclusion that the failure of the *Orkney* to keep out of the way of the *Blairnevis* was due to fault on the part of these officers either severally or jointly. Indeed, counsel for the respondent did not even attempt to defend their conduct.

It cannot be said that the *Blairnevis* appeared suddenly in front of the *Orkney* making it impossible for the latter to avoid the collision. Commander Browne had been advised what to expect. He had been told that a convoy of ships was coming up from the south and that it would break up at the Skerries, one portion proceeding easterly to the Mersey and the other northerly to the Clyde. He ought, therefore, to have anticipated that there might be ships coming up on his starboard side and have seen that a proper lookout was kept for them. Moreover, as early as 1.10 a.m. while he was in the chart house observing the plan position indicator he had the report of the *Orkney's* radar indicating contact with the convoy she was to meet bearing on her starboard side and also the presence of an independent ship, which must have been the *Blairnevis*, also on her starboard side. This latter fact appears from the following answers of Commander Browne on his examination for discovery as an officer of the Crown:

Q. Wherever she was, she must have been picked up by radar somewhere off your starboard bow?

A. Yes.

Q. And she must have been picked up a long time before the collision?

A. That is correct.

Q. That is quite so?

A. Yes.

Q. And, Commander, we are not speaking now of two or three minutes. We are speaking of quite a period of time, as much perhaps as twenty minutes: that is correct also?

A. Yes.

There is also his report of the collision, dated February 20, 1945, in which it is stated that the *Blairnevis* was first seen at 1.30 a.m. and that she was then on a bearing of 210 degrees and approximately 7½ cables, 1,500 yards, away.

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While there was some dispute as to visibility Commander Browne put it at 1,500 yards. The other evidence is that lights could be seen much farther away. The second officer of the *Blairnevis* said that the visibility was good to pick up lights but not objects and that when coming along past the Skerries he could see the Skerries light over 10 miles away and Captain McKinnon said that he saw the stack lights on Anglesey 15 miles away. The *Blairnevis* was sailing under dimmed lights, a red light on her port side and a green one on her starboard side, and without a mast-head light. Commander Browne was in the chart room looking at the plan position indicator when he was told by the officer of the watch that there was a ship at 210 degrees on his starboard side and concluded that it was sufficiently far off the beam that he did not need to worry about it, but then he was advised very shortly afterwards that the ship was now 30 degrees and he then realized that that was very dangerous and came on the bridge. It was also stated that the first light of the *Blairnevis* that was seen was her red port navigation light. This was the sighting of the officer of the watch but Commander Browne said that he first saw it not more than a minute before the collision or not more than two minutes. It should also be remembered that prior to the collision the *Orkney* was sailing without any lights. Commander Browne said that he had switched on the lights at 1.30 a.m., which was 4 minutes before the collision, but on this point I prefer the evidence of the witnesses for the suppliant who were on the *Blairnevis* that when they first saw the *Orkney* she was unlighted and that her lights went on just a few seconds before the collision. The fact that the *Orkney* was sailing without lights made it all the more necessary to keep a sharp lookout for such vessels as the *Blairnevis* whose presence in the vicinity had been indicated or should have been anticipated. It was much easier for the *Orkney* to see the *Blairnevis* sailing with her dimmed navigation red light, which was visible at least a mile away, than for the *Blairnevis* to pick up the *Orkney* sailing without any lights. On the evidence I have no difficulty in finding that there was failure on the part of the responsible officer of the *Orkney* to keep a proper lookout for the movement of the *Blairnevis* on her starboard side from the time of her first reported presence at 1.10 a.m.

according to the radar and her first sighting by the officer of the watch at 1.30 a.m. according to Commander Browne's evidence. This failure must primarily be laid at the door of Lieutenant Page, the officer of the watch, who was temporarily in charge of the ship. If he had kept the lookout which he could and should have done the *Blairnevis* would have been seen sooner than she was and there would have been no difficulty in keeping the *Orkney* out of her way as Article 19 of the Regulations required. His failure to keep a proper lookout was negligence on his part from which the collision was a resulting consequence.

But, although the failure of the officer of the watch to keep a proper lookout was the prime cause of the collision, and this is sufficient to establish the suppliant's claim, I have also come to the conclusion that Commander Browne was not wholly free from fault. He did not act as promptly and appropriately as the situation demanded. He ought to have appreciated sooner than he did the risk of collision with the vessel on his starboard side which the radar had reported and the officer of the watch had sighted and should have taken charge sooner. If he had gone to the bridge sooner than he did the collision could have been averted. There is some question as to when he did come to the bridge after he realized the imminence of danger and what he did. He said that he did not appreciate the proximity of the ship until one of his officers told him that she was very close. He said that he first saw the red light of the *Blairnevis* not more than a minute or not more than two minutes before the collision and that he gave the order for half speed astern as soon as the presence of the ship was reported to him and the order full speed astern as soon as he appreciated how close she was. There is an important discrepancy between the oral evidence and the entries in the deck log and the engineer's log. The deck log shows that both engines were put half astern at 1.32½ a.m. and full astern at 1.33¼ a.m. and that the collision occurred at 1.34 a.m. But the engineer's log records the half astern order at 1.34, with the notation that the impact was felt, and the full astern order at 1.34½ a.m., which was half a minute after the collision. The *Orkney* was easily manoeuverable. Commander Browne said that he could bring her to a stop

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even at her top speed of over 10 knots in a minute or a minute and a half during which she would go 300 yards. He also said that at 1.30 a.m. he had switched on her lights and reduced her speed to 8 knots which would enable her to be brought to a stop in even a shorter time and distance. Commander Browne suggested that there had been delay on the part of the engineer in putting his orders into effect. If that is so then the engineer was negligent but I am of the view that Commander Browne cannot place the delay in stopping the engines and putting them full speed astern on the engineer. He was himself responsible. If he had acted more promptly he would have had time in which to bring the *Orkney* to a stop and so avert the collision. Moreover, there is substance in the submission that he failed to take the helm action, either hard aport or hard astarboard, that he ought to have taken. On the evidence, I have come to the conclusion that his failure to act as promptly and as appropriately as he ought to have done must be regarded as negligence on his part.

While counsel for the respondent admitted that on the facts the case against the *Orkney's* officers was a strong one he submitted that there was contributory negligence on the part of those on board the *Blairnevis* and that the suppliant's petition should, therefore, be dismissed. The submission would, in my judgment, be a sound one if such contributory negligence could be established, notwithstanding the division of damages in *Saint John Tug Boat Company Limited* v. *The King* (1), but as I view the evidence it does not warrant a finding of contributory negligence.

The first ground of contributory negligence assigned was that there had been failure on the *Blairnevis* to keep a proper lookout. It was submitted that it was imperative to keep a sharp lookout because the *Blairnevis* was sailing without a masthead light, that there should have been a lookout on the forecastle head instead of on the port wing of the bridge since there were gun nests in front of it, that if there had been a lookout on the forecastle the *Orkney* might have been seen sooner and steps taken to prevent the collision. It was also urged that the important duty of lookout ought not to have been entrusted to a young man

(1) (1945) Ex. C.R. 214; (1946) S.C.R. 466.

of 18 years. There is nothing in the evidence to support a finding of failure to keep a proper lookout. The presence of the gun nests in front of the port wing of the bridge would not obstruct the view from it of a vessel on the course taken by the *Orkney* and there is no foundation for the assumption that the *Orkney* would have been seen sooner if there had been a lookout on the forecastle instead of on the port wing of the bridge. Furthermore, it would have taken longer for a message to get back to the bridge from the forecastle than from the port wing. I also find that the young man who was posted on the port wing of the bridge saw the *Orkney* as soon as it could be seen and gave the alarm immediately. There was a proper lookout on the *Blairnevis*.

It was next urged that the *Blairnevis* had failed to take sufficiently prompt evasive action to prevent the collision. Reference was made to article 21 of the Regulations and the note thereto reading as follows:

> Article 21. Where by any of these Rules one of two vessels is to keep out of the way, the other shall keep her course and speed.
>
> Note:—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

It was submitted that since the *Orkney* was sailing without lights she could not be seen by lookouts on the *Blairnevis* until she was quite near, that consequently the situation was the same as if the *Blairnevis* had been sailing in thick weather—that is to say, when visibility is restricted by fog—and that as soon as the second officer of the *Blairnevis* saw the *Orkney* on his port side and that a collision was imminent he ought to have taken immediate action and reversed his engines to swing his bow to starboard and that he had failed to do so. The answer to this charge is that it was the duty of the *Blairnevis* as the stand-on ship to keep her course and speed and that the master of the *Blairnevis* took helm action hard astarboard just as soon as he saw that the *Orkney* was not going to keep out of the way.

The third count of contributory negligence charged to the *Blairnevis* was that as soon as the presence of a vessel on her port side was reported her masthead light should

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have been switched on in order to indicate her course to the *Orkney*. This would have made no difference for Commander Browne admitted that he had seen the red light of the *Blairnevis* and knew the direction in which she was proceeding.

Finally, it was argued that when the second mate gave the order for hard astarboard a signal of one blast should have been given as required by Article 28 of the Regulations. The answer to that is that even if there was a failure to give this signal such failure did not contribute to the collision: *vide The "Dotterel"* (1).

My conclusion is that there was no contributory negligence on the part of those on board the *Blairnevis*. When they first picked up the *Orkney* out of the dark on the port side of the *Blairnevis* and saw that she was not going to keep out of the way there was nothing that they could do to avert the collision. The fault was solely that of the officers charged with the navigation of the *Orkney*. I, therefore, find that the suppliant has brought its claim within the ambit of section 19(*c*) of the Exchequer Court Act and is entitled to damages.

It was agreed between counsel that if the suppliant should be found entitled to damages there should be a reference to the Registrar for an enquiry as to quantum. It was submitted for the respondent that the responsibility of the Crown should be restricted to the damages resulting from the collision and should not extend to the loss of the ship on the ground that it resulted from the negligence of the master and officers of the *Blairnevis* in not applying for tug assistance to get her to Liverpool sooner than they did. It was also suggested that the determination of this issue should be left to the Registrar as part of his enquiry. I have come to the conclusion that the Court ought to determine it as a matter of law so that the Registrar could proceed with his assessment of the damages on the basis so determined. I also find myself unable to accept the submission that the Crown ought not to be held responsible for the loss of the *Blairnevis*. The facts are against it. The collision tore a hole in her port bow in her No. 1 hold. The pumps were started immediately and Captain McKinnon

(1) (1947) 80 Ll.L. Rep. 272.

informed the *Orkney* that he was proceeding slow to Liverpool and requested her to accompany. The *Blairnevis* was found to be making water in the No. 1 hold and her engines were stopped. A collision mat was prepared and fixed over the hole and she went slow ahead but the mat was carried away and she stopped again. Captain McKinnon then, through the *Orkney,* requested a salvage tug. The collision mat was re-rigged and the ship went slow ahead. She was still making water in the No. 1 hold, the pumps were not able to keep up and Captain McKinnon again enquired about the tug. At 7.00 a.m. he informed the *Orkney* that a salvage tug was urgently required and asked her to come within hail. The *Orkney* did so and offered the use of her pumps but they were useless because of a difference in voltage. The second collision mat was put on and the *Blairnevis* tried to proceed slowly. At 11.20 a.m. the tug *Crosby* came alongside and put her pumps to work but the *Blairnevis* was making water fast and sinking slowly by the head. At 12.10 a.m. her foredeck was awash and at 12.12 her engines stopped and her No. 1 hold was full of water. At 12.40 a.m. the salvage tug *Watchful* came alongside and commenced pumping water from the No. 1 hold but could not lower it. There was a strong breeze blowing and in the heavy swell seas were breaking continuously over the deck. At 13.00 p.m. the pumping operations ceased, the pumps were disconnected and preparations were made to beach the ship. The crew was taken off and she was taken in tow by two tugs and towed stern first towards the Zebra Bank. At 16.45 a.m. she went aground and at 17 a.m. she was re-boarded by her master, officers and a few members of the crew. The *Watchful* was standing by hoping to refloat her at high tide and beach her so that the hole in her side would be accessible at low water. At high tide the *Blairnevis* was again taken in tow by four tugs and beached, but the heavy seas and the condition of the ship made it impossible to continue salvage operations on that tide. Finally, the master received instructions from the Salvage Master on the *Watchful* to be prepared to abandon ship. It seemed doubtful whether the tugs could get alongside to take off the crew and the *New Brighton* lifeboat was called out but this proved unnecessary for at 3.30 a.m. on February 14, one of the

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tugs succeeded in coming alongside and taking off the crew. At high water the vessel was boarded by a salvage crew and found to be almost completely broken in half. Subsequently, the Liverpool and Glasgow Salvage Association and the Mersey Dock and Harbour Board concluded that the salvage of the *Blairnevis* was impracticable and notice was given by the Board that she had become an obstruction that had to be removed. It was impossible to hold a survey on her. The owners had no alternative other than to submit to the decision of the Board and could do nothing to minimize their loss. It was urged that if the assistance of a tug had been requested earlier the *Blairnevis* might have been saved. That may possibly be so, but there is nothing to suggest that the master and officers were negligent in not requesting aid sooner. Captain McKinnon did not think that his ship was as badly damaged as it turned out to be. He asked for aid as soon as his collision mat went away and thought that an earlier call for assistance would not have made any difference. Nor should any fault be attributed to him for not sending his request for aid by wireless. It was not for him to break radio silence and bring possible danger from submarines to escort and other vessels. I am satisfied that the master and officers of the *Blairnevis* did everything that was reasonable to save their ship and no responsibility for her loss should be attributed to them. Her loss must be regarded as the result of the negligence of the officers of the *Orkney* and I so find. It is on that basis that the Registrar should assess the suppliant's damages.

There remains only the contention that the respondent has the right to limit his liability to $38.92 for each ton of the *Orkney's* tonnage and a decree of limitation of liability accordingly is sought. The right is claimed under section 649(1) of the Canada Shipping Act, 1934, Statutes of Canada, 1934, chap. 44, which provides as follows:

> 649. (1) 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—
>
> (i) where any loss of life or personal injury is caused to any person being carried in such ship;
>
> (ii) where any damage or loss is caused to any goods, merchandise, or other things whatsoever, on board the ship;

(iii) where any loss of life or personal injury is, by reason of the improper navigation of the ship, caused to any person carried in any other vessel;

(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 in respect of loss of life or personal injury, either alone or together with loss or damage to vessels, goods, merchandise, or other things, to an aggregate amount exceeding seventy-two dollars and ninety-seven cents for each ton of their ship's tonnage; nor in respect of loss or damage to vessels, goods, merchandise, or other things, whether there be in addition loss of life or personal injury or not, to an aggregate amount exceeding thirty-eight dollars and ninety-two cents for each ton of the ship's tonnage.

In my opinion, the application for limitation of liability should not be granted. Section 712 of the Canada Shipping Act, 1934, provides:

712. This Act shall not, except where specially provided, apply to ships belonging to His Majesty.

It should be noted that as a matter of law the liability of ship owners for damage done by their ship to another ship is unlimited except in so far as that law has been modified by statute: *vide* Dr. Lushington in the *Wild Ranger* (1). The applicant for limitation of liability must, therefore, show that his claim falls within a modifying statute and that the general rule does not apply to him. This the respondent cannot do. Counsel for the respondent sought to escape from section 712 by contending that, while it stated that the Act, except where specially provided, did not apply to His Majesty's ships, it did not state that the Act did not apply to His Majesty as the owner of the ships and that consequently he could take advantage of the limitation of liability conferred by section 649. I am unable to accept this restriction on the meaning of section 712. I find support for a larger view of it, namely, that it means that the Act, except when specially provided, does not apply to His Majesty, in the statement of Kerwin J. in *The King* v. *Saint John Tug Boat Co. Ltd.* (2) that by section 712 section 640 of the Act does not apply to His Majesty. I am similarly of the view that section 649 of the Act does not apply to His Majesty and that he is not entitled to any limitation of liability under it.

(1) (1863) Lush. 564, s.c. 7 L.T.N.S. 725.

(2) (1946) S.C.R. 466 at 468.

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This disposes of the contention but, even apart from this ground, there is also the fact that there is no evidence before me of tonnage on which a limitation of liability could be based.

The result is that there will be judgment that the suppliant is entitled to damages for the loss of the *Blairnevis* in such amount as will be found by the Registrar on the enquiry to be held by him. The suppliant is also entitled to costs.

Judgment accordingly.