Privy Council Appeals Nos. 43 *and* 44 *of* 1915.

William Lambert Fowles - - - - *Appellant*

v.

The Eastern and Australian Steamship Company (Limited) - - - - - *Respondents*

(*Brisbane Case.*)

Same - - - - - - - - *Appellant*

v.

Same - - - - - - - - *Respondents*

(*Rockhampton Case.*)

FROM

THE SUPREME COURT OF QUEENSLAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH JULY, 1916.

Present at the Hearing:

THE LORD CHANCELLOR.
EARL LOREBURN.
VISCOUNT MERSEY.
LORD SHAW.

[*Delivered by* EARL LOREBURN.]

FOWLES *v.* THE EASTERN AND AUSTRALIAN STEAMSHIP COMPANY.
(*Brisbane Case.*)

In this case a steamship company sues the Government of Queensland (represented by Mr. Fowles as nominal defendant under statutory provisions for that purpose) to recover damages in respect of a vessel belonging to the company, which was stranded in the port of Brisbane. It is to be taken that the damage was caused by the negligence of one Maxwell, a pilot duly licensed and qualified for the port pursuant to the Statutes there in force, and the pilotage was compulsory. The only question is whether the Government are liable for this negligence.

Mr. Justice Chubb held the Government liable, and his order was affirmed by the Supreme Court of Queensland, from

which this appeal directly comes. But the Board has also the advantage of judgments in the High Court of Australia, delivered at an earlier stage of the case. In both Courts the whole of the law was very carefully considered. Mr. Justice Isaacs expressed an opinion that the Government were not liable, but the balance of opinion was decided in favour of the plaintiff company. It is therefore undoubtedly a difficult case.

It will be convenient to begin by considering the actual relations between the plaintiffs and the defendants, as created by law. The plaintiffs claim damages for breach of a duty owing to them. What was that duty? There was no contract between these parties. The duty, whatever it may have been, must be one that depends upon the Statute. It is not of course necessary that the Statute should contain an express statement of the duty, but it is necessary that the obligation should result from these enactments. Coming closer to the present case, the plaintiffs say that their ship was stranded owing to the negligence of a pilot named Maxwell. In order to succeed, they must show that the law imposed upon the defendants, the conduct and management of that particular ship by that particular pilot; and this they seek to do by reasoning which would make the Government liable for the conduct and management of all ships compelled to accept the pilotage of pilots in the same position as Maxwell. There is nothing inherently unreasonable in such a contention, but its weight depends upon the extent and nature of the duty which the Government owe to the shipowner. It is very necessary, for this reason, to look into the true position of Maxwell and other pilots, because that may help in answering the true question, namely, whether or not the Government had laid upon them the conduct and management of this ship. If so, then they were bound to use proper care and skill and are liable for failure to do so.

In examining the Statutes, it is well to bear in mind the condition of things in regard to pilots before Parliament interposed. Originally the business was simply a matter of private enterprise; seamen of local experience made their own bargains with masters of ships. Mr. Justice Barton traces the sequel in his judgment. A licence was required, in the interests of public safety, then pilotage fees were turned by Statute into pilotage rates, no doubt for public reasons, but still the rates were paid to the men for their private emolument. Then the Treasury took the rates and empowered the Government to fix the remuneration of pilots. "The Statutes also provided for constitution of a Marine Board acting in the execution of its powers and functions under the control of the Crown. The same Statutes regulated the pilots in their duties after the manner of public servants and provided for a pilotage service, and, indeed, as was admitted, the Government supplied the port pilots with the instruments of their calling in the shape of boats maintained and crews paid, at Government cost, while the admissions and the regulations show that, on the

other hand, the coast pilots were allowed to receive fees for themselves, and had to find their own boats and crews. The port pilots were made regular officers of the Government service, paid from the public funds, though the department called the Marine Board managed the pilot service under the immediate control of the Government. The port pilots were classified under the public service laws, according to salary, as professional servants of the Government." To this it may be added that pilotage in prescribed ports was made compulsory.

The language thus used by the learned Judge is general in its terms, and was not of course intended to extend the words of the Statutes, which lay down the functions of the Board and the nature of Governmental control, but it presents the general result in a way from which their Lordships are not at all disposed to differ. They also entirely agree with the way in which Mr. Justice Barton puts, a little earlier in his judgment, the resulting question, "Was it the duty (of the Government) to undertake with due care and skill the pilotage of such vessels, or was it only a duty to supply qualified pilots to those who were bound to accept the services of such officers?" The learned Judge comes to the former conclusion, though expressing the same difficulty which their Lordships also feel, and which, in their case, is enhanced by the adverse authority, not only of himself and the majority of his colleagues, but also of the Supreme Court of Queensland.

Nevertheless, their Lordships have been constrained to the conclusion that no greater obligation is laid on the defendants than that of providing qualified pilots. The fact that pilotage is compulsory cannot affect them. It is not they but the law that makes it so. The fact that, through the Marine Board, they license pilots cannot affect them. That has been repeatedly laid down and is not questioned. Yet, though the argument is placed on other grounds, the real thought behind the argument, which makes it forcible, is that if you compel a master to place his ship in the hands of someone else whom you designate without consulting him you ought to make good any loss arising from his negligence. There is an appearance of natural equity in this view, and, perhaps, more than an appearance; but it is clearly established that this will not suffice, and, were it relevant, ample considerations might be adduced in support of the view which has prevailed. If, then, the defendants are to be made liable, it must be on the ground that they charge pilotage rates, which go into the Treasury, that they pay salaries to the pilots, whom they choose, dismiss, or reprimand, and that they class them in the Civil Service and supply them with boats, implements, and crews; also that they make regulations which control them, but not regulations interfering with their conduct and management of ships.

Now if the crucial question here were whether or not Maxwell was in the service of the defendants, as might arise in an

action of wrongful dismissal, this class of evidence would be very cogent to show that he was in their service. It is the kind of evidence common in such cases. But if the question be, as their Lordships think it is, whether or not the defendants were bound to navigate this ship and employed Maxwell to do for them the work which they were bound to do, then it is not conclusive to say that he was in their service unless it can also be said that the Government were "the principals in the piloting of ships," to borrow the happy phrase of Mr. Justice Isaacs. That phrase seems to hit the point exactly. If Maxwell himself was the principal in the piloting of ships, then the defendants cannot be liable. It was he and not they that owed the duty of careful piloting to the plaintiffs.

In their Lordships' opinion these Acts of Parliament did not alter the original status of a pilot, which is, in effect, that he must be regarded as an independent professional man in discharging his skilled duties. If it had been intended to alter this old and familiar status, it is to be supposed that the legislature would have done it more explicitly. What it has done is more consistent with a different and limited purpose, namely, to secure a proper selection, a proper supply, a proper supervision, and a proper remuneration of men to whose skill life and property is committed, whether the shipowner likes it or not. For this purpose they become servants of the Government. For the purpose of navigating ships, they remain what they were, and the duty which the State or Government owes to a shipowner, exercised, it is true, by various authorities, is to provide a qualified man in the terms of the Statutes, but not to take the conduct or management of the ship. It is not said that they have failed in this duty of providing a qualified man.

Taking this view of the Statutes themselves, their Lordships do not think it is necessary to review the authorities, which were exhaustively considered, both in the High Court of Australia and the Supreme Court of Queensland. They will only say that, if they had thought the Government were directed to carry on the business of pilotage, they would have held them responsible for negligence in that business, as in the case of Brabant and Co. *v.* King, 1895, A. C. 632, where the relation of bailor and bailee for hire was established.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and judgment entered for the appellant with costs throughout. The respondents must pay the costs of the appeal.

FOWLES *v.* THE EASTERN AND AUSTRALIAN STEAMSHIP COMPANY (LIMITED).

(Rockhampton Case.)

The facts of this case are similar, and their Lordships will humbly advise His Majesty that this appeal should also be allowed, and judgment entered for the appellant with costs throughout. The respondents must pay the costs of the appeal.

In the Privy Council.

WILLIAM LAMBERT FOWLES

v.

THE EASTERN AND AUSTRALIAN STEAMSHIP COMPANY (LIMITED).

(*Brisbane Case.*)

SAME

v.

SAME.

(*Rockhampton Case.*)

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