

[HIGH COURT OF AUSTRALIA.]

FEDERAL STEAM NAVIGATION COMPANY } APPELLANT ;  
LIMITED . . . . . }  
DEFENDANT,

AND

J. FENWICK AND COMPANY PROPRIETARY } RESPONDENT.  
LIMITED . . . . . }  
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

*Shipping and Navigation—Towage—Hire of tug to tow vessel—Collision with vessel* H. C. OF A.  
*“ whilst towing ”—Members of crew of tug—Personal injury and loss of life—* 1943.  
*Payments by tugowner—Right to indemnity from owner of vessel—United*  
*Kingdom Standard Towage Conditions.* SYDNEY,  
Dec. 7, 20.

The United Kingdom Standard Towage Conditions provide, *inter alia* :  
“ 2. On the employment of a tug the Master and Crew thereof become the servants of . . . the Hirer. . . . 3. The Tugowner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug . . . or for any personal injury or loss of life, arising from any cause, including negligence at any time of the Tugowner’s servants or agents . . . and the Hirer shall pay for . . . personal injury or loss of life and shall also indemnify the Tugowner against all consequences thereof, and the Tugowner shall not, whilst at the request expressed or implied of the Hirer rendering any service other than towing be held responsible for any damage done to the Hirer’s vessel and the Hirer shall indemnify the Tugowner against any claim by a third party (other than a member of the crew of the tug) for personal injury or loss of life. . . . 4. The Hirer shall not bear or be liable for any loss or damage of any description done by or to the tug otherwise than whilst towing . . . or for loss of life or injury to the crew of the tug. Nevertheless nothing contained herein shall prejudice any claim the Tugowner may have in Admiralty or at Common Law against the Hirer.”

During the towage of a vessel under a contract subject to the United Kingdom Standard Towage Conditions, an accident occurred, without any default on

Latham C.J.,  
Rich,  
McTiernan and  
Williams JJ.



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the part of the hirer, in consequence of which one member of the tug's crew was drowned and another was injured. The tugowner paid to the dependants of the deceased compensation which it was liable to pay under the deceased's contract of employment, and it also paid workers' compensation to the injured member of the tug's crew.

*Held*, by *Rich, McTiernan and Williams JJ.* (*Latham C.J.* dissenting), that the right of the tugowner under the first limb of clause 3 of the Conditions to be indemnified by the hirer in respect of the compensation so paid was not affected by clause 4 of the Conditions.

Decision of the Supreme Court of New South Wales (Full Court): *J. Fenwick & Co. Pty. Ltd. v. Federal Steam Navigation Co. Ltd.*, (1943) 44 S.R. (N.S.W.) 1; 61 W.N. 3, by majority, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by *J. Fenwick & Co. Pty. Ltd.* for the recovery from *Federal Steam Navigation Co. Ltd.* of the sum of £1,420 13s. 7d. upon a contract to indemnify. By consent of the parties and by order of a judge of that Court a case substantially as follows was stated for the opinion of the Court without any pleadings.

The plaintiff company carries on the business of a tugowner in and about Sydney Harbour and at all material times was the owner of the tug *Hero*.

The defendant company at all material times was the owner of the steamship *Northumberland*.

On 23rd September 1940, the *Northumberland* was proceeding to a berth in Sydney Harbour and it was agreed by and between the plaintiff and the defendant that the plaintiff should, for reward to the plaintiff, provide the services of the tug *Hero* for towage and otherwise assisting the *Northumberland* in and about such berthing.

It was further agreed between them that the towage was undertaken by the plaintiff subject, *inter alia*, to the United Kingdom Standard Towage Conditions, as follows:—

"1. For the purpose of these Conditions, the phrase 'whilst towing' shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the Hirer's vessel to pick up ropes or lines, or when the tow rope has been passed to or by the tug, whichever is the sooner, and ending when the final orders from the Hirer's vessel to cast off ropes or lines have been carried out, or the towrope has been finally slipped and the tug is safely clear of the vessel, whichever is the later. Towing is any operation in connection with holding, pushing, pulling or moving the ship.



2. On the employment of a tug the Master and Crew thereof become the servants of and identified with the Hirer and are under the control of the Hirer or his servants or agents, and anyone on board the Hirer's vessel who may be employed and/or paid by the Tugowner shall be considered the servant of the Hirer.

3. The Tugowner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug, or done by or to the Hirer's vessel, or for loss of or damage to anything on board the Hirer's vessel, or for loss of the tug or the Hirer's vessel, or for any personal injury or loss of life, arising from any cause, including negligence at any time of the Tugowner's servants or agents, unseaworthiness, unfitness or breakdown of tug, its machinery, boilers, towing gear, equipment or hawsers, lack of fuel, stores or speed, or otherwise, and the Hirer shall pay for all loss or damage and personal injury or loss of life and shall also indemnify the Tugowner against all consequences thereof, and the Tugowner shall not, whilst at the request expressed or implied of the Hirer rendering any service other than towing be held responsible for any damage done to the Hirer's vessel and the Hirer shall indemnify the Tugowner against any claim by a third party (other than a member of the crew of the tug) for personal injury or loss of life. Provided that any such liability for loss or damage as above set out is not caused by want of reasonable care on the part of the Tugowner to make his tugs seaworthy for the navigation of the tugs during the towing or other services—the burden of proof of any failure to exercise such reasonable care being upon the Owner of the tow.

4. The Hirer shall not bear or be liable for any loss or damage of any description done by or to the tug otherwise than whilst towing, as herein defined, or for loss of life or injury to the crew of the tug. Nevertheless nothing contained herein shall prejudice any claim the Tugowner may have in Admiralty or at Common Law against the Hirer.

5. The Tugowner may substitute one tug for another and may sublet the work, wholly or in part, to other Tugowners who shall also have the benefit of and be bound by these Conditions."

The tug *Hero* thereupon proceeded to meet the *Northumberland* in Sydney Harbour near Blue's Point and, in accordance with orders received from the pilot of that ship, took up a position on the star-board bow of the *Northumberland*. The towrope was passed from the deck of the *Northumberland* to the deck of the *Hero* and was made fast on the *Hero's* towing hook. Shortly afterwards, and whilst the towrope was still fast, and without any negligence on the

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part of those in charge of the *Northumberland*, the port side of the *Hero* came into contact with the stern of the *Northumberland* and the *Hero* heeled over to starboard and sank.

At the time of the sinking of the *Hero* one of the crew of the tug, an engineer, lost his life by drowning. The engineer was employed under the terms of the Merchant Service Guild Award, which award contains the following provision:—"Compensation for Accidents. 19. If personal injury by accident arising out of and in the course of the employment be caused to an employee, and it is not proved to be attributable to his serious and wilful misconduct, and if the employee or his dependants be not entitled to compensation from the employer under any Act whether State or Federal, the employer shall pay to the employee, or in the case of his death to his dependants, compensation as follows:—Where death results from injury a sum equal to three years' pay, computed at the rate of earnings (inclusive of keep, but not of overtime or similar payments) of the employee at the time of the accident. Where total or partial incapacity for work results from the injury, a sum equal to the pay which he would have earned at the rate aforesaid during the incapacity for the first three months, and thereafter a sum equal to one-half of the said pay for a period not exceeding twelve months from the accident."

The engineer was not a "worker" to whom the provisions of the *Workers' Compensation Act 1926-1938* (N.S.W.) applied at the time of his death, and his dependants were not entitled to compensation by the plaintiff under any Act whether State or Federal.

Pursuant to the provisions of the above-mentioned award, the plaintiff paid to the widow and daughter of the deceased engineer dependent upon him at the time of his death the sum of £1,372 16s.

At the time of the sinking of the *Hero* one of the crew of the tug, a deckhand, who was a "worker" to whom the provisions of the *Workers' Compensation Act 1926-1938* (N.S.W.) applied, received personal injury arising out of and in the course of his employment, and, pursuant to the provisions of that Act, the plaintiff paid to him compensation amounting in all to the sum of £47 17s. 7d.

The defendant had not paid to the plaintiff any part of the moneys paid by way of compensation as above.

The question reserved for the opinion of the Court was:—

Whether the plaintiff company is entitled to be indemnified by the defendant company and to be paid by it the sum of £1,420 13s. 7d., or any part thereof, paid by the plaintiff as aforesaid?



The Full Court of the Supreme Court, by a majority, answered the question in the affirmative, and held that the plaintiff was entitled to the whole amount claimed : *J. Fenwick & Co. Pty. Ltd. v. Federal Steam Navigation Co. Ltd.* (1).

From that decision the defendant appealed to the High Court.

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*A. R. Taylor* K.C. (with him *R. L. Taylor*), for the appellant. What the parties contemplated in clause 4 of the towage contract was loss of life to some person who was not employed on the ship. Clause 3 is a complete code to determine and regulate rights and liabilities as between the tugowner and the shipowner. The shipowner is bound to indemnify the tugowner in respect of a great many things done under that clause, but the clause is subject all the time to the proviso thereto. That proviso relates to the commencing part as well as to the concluding part of clause 3. The accident happened "whilst towing", as defined in the contract, was being carried out. The appellant escapes the operation of clause 3 because clause 4 provides that the hirer, that is, the appellant, shall not be liable for loss of life or injury to the crew of the tug. Clause 3 deals with the question of liability for damage generally. In clause 4 the parties directed their attention to a very special case, namely, the case of personal injury to the members of the crew of the tug. If the special provisions cannot be reconciled with the general provisions the special provisions should prevail: See *Elderslie Steamship Co. Ltd. v. Borthwick* (2). In view of clause 4, clause 3 should not be read as applying to the crew of the tug. If it is necessary for clause 4 to appear in the contract to provide some immunity to the shipowner or in some third class of case, then it is strange that the parties did not make it subject to the same qualification in favour of the shipowner, because under clause 4 if there was a liability to pay damage on the part of the tugowner apart from those things which are excepted, the shipowner would be liable even though the tugowner had been negligent in seeking to make his tug seaworthy for the navigation of the tug during the tow. The first part of clause 4 was intended to deal with the position of the hirer, the owner of the ship, when the tug is performing some service other than towing. The tugowner's right is reserved in respect of negligence on the part of the shipowner by the concluding parts of clause 4. The clauses relating to liability should be read to the effect that the hirer shall not be liable to the tugowner. Those clauses only fixed the relations between the parties (*The Devonshire and St. Winifred* (3)). The

(1) (1943) 44 S.R. (N.S.W.) 1; 61 W.N. 3.

(2) (1905) A.C. 93, at p. 96.

(3) (1913) P. 13.



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contract should be construed as leaving the parties to their common law rights in effect where the parties are operating under independent control. A similar case is *Nelson Line (Liverpool) Ltd. v. James Nelson & Sons Ltd.* (1). Clause 4 is not an exception. In any event it is not ambiguous. So far as loss or damage of any description done by the tug is concerned, clause 4 operates in respect of that period when the tug is doing something other than towing as defined by the contract. It is clear so far as that portion of clause 4 is concerned that the hirer is not to be under any contractual obligation in respect of the loss or damage to the tug unless the tug is, at the time, towing as therein defined.

*Teece* K.C. (with him *Henchman*), for the respondent. The provision in clause 3 that the "Hirer shall pay for all loss or damage and personal injury or loss of life and shall also indemnify the Tug-owner against all consequences thereof" clearly affects the appellant with liability on the facts of this case. The words "service other than towing" do not mean a service preliminary to towing, but service which is not, nor is preliminary to, towing. It is common knowledge that such service is often rendered by tugs. The mutual obligations under clause 3 of tug and tow are in three classes, namely, (i.) where the vessel is actually towing, (ii.) where the tug is rendering some service other than towing, and (iii.) where the tug is not towing and not rendering service other than towing. A class of case which is other than towing or rendering service other than towing is where a tug is moving out for the work of the day. Such a construction reconciles the whole contract and does not leave any inconsistent clauses. Clause 3 clearly throws on the shipowner whilst towing an obligation to indemnify the tugowner in consequence of any loss of life of a member of his crew. The opening words of clause 4 seem to be restricted to where a tug is not towing. That is inconsistent with the first limb of clause 3. There is no rule of construction which would prevent the court from so construing the contract. The only rule of construction to be called in aid is the *contra proferentem* doctrine. Where a provision is inserted in a contract for the benefit of one particular party he is regarded as the *proferens* so far as that particular provision is concerned. The contract was correctly construed by the Chief Justice in the Court below.

*A. R. Taylor* K.C., in reply.

*Cur. adv. vult.*



The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales made upon a case stated in an action in which the respondent company, J. Fenwick & Co. Ltd., claimed indemnity from the appellant company, Federal Steam Navigation Co. Ltd., under the terms of a towage contract. It was held by *Jordan C.J.* and *Maxwell J.*, *Halse Rogers J.* dissenting, that the respondent company was entitled to be indemnified by the defendant in the sum of £1,420 13s. 7d., and it was ordered that the plaintiff should recover against the defendant the said sum.

The plaintiff is a tug-owning company, and the defendant a ship-owning company. By a contract made between the plaintiff and defendant it was agreed that the plaintiff should provide the services of the tug *Hero* for towing the s.s. *Northumberland* to a berth in Sydney harbour. While the tug was engaged in the towing, without any negligence on the part of those in charge of the *Northumberland*, the *Hero* collided with the *Northumberland* and heeled over and sank. The engineer of the *Hero* was killed and a member of the crew of the tug was injured. Under the terms of a Merchant Service Guild Award the tugowner paid in compensation to the widow and daughter of the deceased engineer a sum of £1,372 16s. and under the *Workers' Compensation Act* 1926-1942 (N.S.W.) paid £47 17s. 7d. to the injured member of the crew—a total of £1,420 13s. 7d. The question is whether the shipping company is bound to indemnify the tugowner in respect of these payments.

The towage contract between the parties included the United Kingdom Standard Towage Conditions, which were as follows :—

“1. For the purpose of these Conditions, the phrase ‘whilst towing’ shall be deemed to cover the period commencing when the tug is in a position to receive orders direct from the Hirer’s vessel to pick up ropes or lines, or when the tow rope has been passed to or by the tug, whichever is the sooner, and ending when the final orders from the Hirer’s vessel to cast off ropes or lines have been carried out, or the towrope has been finally slipped and the tug is safely clear of the vessel, whichever is the later. Towing is any operation in connection with holding, pushing, pulling or moving the ship.

2. On the employment of a tug the Master and Crew thereof become the servants of and identified with the Hirer and are under the control of the Hirer or his servants or agents, and anyone on board the Hirer’s vessel who may be employed and/or paid by the Tugowner shall be considered the servant of the Hirer.

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3. The Tugowner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug, or done by or to the Hirer's vessel, or for loss of or damage to anything on board the Hirer's vessel, or for loss of the tug or the Hirer's vessel, or for any personal injury or loss of life, arising from any cause, including negligence at any time of the Tugowner's servants or agents, unseaworthiness, unfitness or breakdown of tug, its machinery, boilers, towing gear, equipment or hawsers, lack of fuel, stores or speed, or otherwise, and the Hirer shall pay for all loss or damage and personal injury or loss of life and shall also indemnify the Tugowner against all consequences thereof, and the Tugowner shall not, whilst at the request expressed or implied of the Hirer rendering any service other than towing be held responsible for any damage done to the Hirer's vessel and the Hirer shall indemnify the Tugowner against any claim by a third party (other than a member of the crew of the tug) for personal injury or loss of life. Provided that any such liability for loss or damage as above set out is not caused by want of reasonable care on the part of the Tugowner to make his tugs seaworthy for the navigation of the tugs during the towing or other services—the burden of proof of any failure to exercise such reasonable care being upon the Owner of the tow.

4. The Hirer shall not bear or be liable for any loss or damage of any description done by or to the tug otherwise than whilst towing, as herein defined, or for loss of life or injury to the crew of the tug. Nevertheless nothing contained herein shall prejudice any claim the Tugowner may have in Admiralty or at Common Law against the Hirer.

5. The Tugowner may substitute one tug for another and may sublet the work, wholly or in part, to other Tugowners who shall also have the benefit of and be bound by these Conditions.

6. The Tugowner will not be responsible for the consequences of War, Strikes, Lock-outs, Riots, Civil Commotions, Disputes or Labour Disturbances (whether they be parties thereto or not) or anything done in contemplation or furtherance thereof, or delays of any description, however caused, including negligence of their servants or agents."

It is unnecessary to repeat the reasoning of or the authorities mentioned by the learned Justices of the Supreme Court by which it is established that the contract made between the tugowner and the hirer cannot diminish the rights of third parties against either of them. The contract relates only to the obligations of the contracting parties between themselves. Nor is it necessary to restate the authorities which establish the proposition that an agreement



between two parties that as between themselves one party shall not be liable for certain loss or damage does not in itself create an obligation to indemnify the other party against such loss or damage. The party claiming indemnity under the contract must be able to point to some contractual provision which creates such a right.

In the present case the tugowner relies upon the provisions of clause 3 (first part) and the hirer relies upon the provisions of clause 4.

Clause 3 deals with two cases—(a) while the tug is towing, and (b) while the tug is rendering a service other than towing at the request expressed or implied of the hirer.

In the former case, (a), the clause provides that the tugowner shall not be liable in respect of certain matters set out and that “the Hirer shall pay for all loss or damage and personal injury or loss of life and shall also indemnify the Tugowner against all consequences thereof.” The tug was engaged in towing when the loss of life and personal injury occurred which obliged the tugowner to make the payments against which the tugowner now seeks indemnity. Therefore, *prima facie*, the hirer is bound to indemnify the tugowner against the liabilities which it has incurred and discharged in relation to these matters.

Clause 4, upon which the defendant relies, contains a provision that the hirer shall not bear or be liable for loss of life or injury to the crew of the tug. The loss of life and injury which occurred was such loss and injury to members of the crew of the tug. The hirer contends, therefore, that on the plain words of clause 4 it is not liable to the tugowner in respect of any such loss of life or injury, and that therefore the tugowner is not entitled to the indemnity claimed.

Against this contention the tugowner relies in substance upon two contentions. In the first place it is contended that his claim for indemnity plainly falls within the clear words of the first part, (a), of clause 3. These words relate to “all loss or damage and personal injury or loss of life,” and are certainly wide enough to cover personal injury to or loss of life of members of the crew. It is further urged for the tugowner that in the second part of clause 3, (b), which relates to claims by third parties for personal injury or loss of life when the tug is rendering upon request to the hirer service other than towing, there is an express exception from such claims of claims by parties “other than a member of the crew of the tug.” The express exclusion of members of the crew in (b) helps to emphasize the fact that they are not excepted but are included in (a).

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The second contention of the tugowner is that clause 4 should be limited in both of its provisions to occasions when the tug is engaged in services otherwise than towing. The words of clause 4 are as follow :—"The Hirer shall not bear or be liable for any loss or damage of any description done by or to the tug otherwise than whilst towing, as herein defined, or for loss of life or injury to the crew of the tug." The words "otherwise than whilst towing" are grammatically attached only to the first part of the clause dealing with loss or damage done by or to the tug. But it is contended that the clause should be read so as to attach them also to the latter portion of the clause relating to loss of life by or injury to the crew of the tug. In my opinion the terms of the clause are such as to render this interpretation impossible. The words "otherwise than whilst towing" are most clearly attached only to the first part of the clause, and they cannot be transferred so as to control and limit the second part of the clause so as to make it apply only while the tug is rendering a non-towing service. If they were so transferred they would merely repeat the provision contained in the second part, (b), of clause 3, which had already excepted the hirer while a non-towing service was being rendered from any liability to indemnify the tugowner in respect of consequences of personal injury or loss of life to a member of the crew of the tug. But the real answer to the plaintiff's contention is that which has already been stated, namely, that it is impossible grammatically to attach the words in question to the second part of the clause. The document is so badly drafted that considerations of surplusage or vain repetition, as distinct from inconsistency, can have but little weight in determining its interpretation.

The obstacle to the plaintiff arising from the position in clause 4 of the words "otherwise than whilst towing" cannot be removed by any interpretation of those words. It has been suggested that they should be regarded as covering some service other than towing and other than service rendered at the request of the hirer. Some difficulty was experienced in specifying the character of such a service, but, whether the words are interpreted as having the same meaning as the words in the second part, (b), of clause 3, "rendering any service other than towing", or in some other sense (if that be possible), the difficulty of attaching them to the second part of clause 4 still remains.

Therefore the position is that clause 3 of the contract provides that the hirer shall indemnify the tugowner against all consequences for all personal injury or loss of life happening while the tug is



towing, whereas clause 4 provides that the hirer shall not bear or be liable for loss of life or injury to the crew of the tug.

It is for the plaintiff to establish a case for indemnity. The plaintiff must show an agreement by the hirer to indemnify. *Prima facie* the plaintiff does so by reference to the provision in the second part, (b), of clause 3. But that provision must be read together with the whole of the contract and, if possible, some effect must be given to all the provisions of the contract. Doubtless a party relying upon an exception in his favour must bring himself within the terms of the exception and, if he fails to do so on account of ambiguity in the provision, he cannot be allowed the benefit of the exception. But in the present case the words of the exception (the second part of clause 4) are quite clear. They in very definite terms provide an exception to the obligation to indemnify which has been created by the first part, (a), of clause 3. That part of clause 3 imposes upon the hirer an obligation to indemnify the tugowner against all consequences of personal injury or loss of life during towing, but clause 4 then provides that there shall be no such obligation where the loss of life or injury is to the crew of the tug. Clause 4 in my opinion provides a clear exception to the provision of clause 3.

The only objection to this construction of the contract is that it renders unnecessary the exception relating to the crew of the tug which has already been made in the second part, (b), of clause 3. Under that provision the hirer is excepted from liability (to the tugowner) where a claim for personal injury or loss of life is made by a member of the crew of the tug if at the relevant time the tug is engaged in rendering a requested service other than towing. Thus clause 4 (upon the construction suggested) in part repeats this provision in providing for a general exception (i.e., not limited to non-towing service) in favour of the hirer in respect of loss of life or injury to members of the crew. The result, therefore, is that the provision in clause 4 is partly surplusage. But surplusage is distinct from inconsistency. There is no inconsistency between the relevant provisions if the second provision is taken as providing an exception to the first. The fact that in part the second provision is surplusage does not create any ambiguity which would stand in the way of the hirer relying upon the terms of the exception, which are in themselves clear.

Accordingly, in my opinion clause 4 provides a reply to the claim made by the tugowner and the question for the opinion of the court, which asks whether the plaintiff company is entitled to be indemnified by the defendant company in respect of the sum of £1,420 13s. 7d., should be answered in the negative.

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In my opinion, therefore, the appeal should be allowed, the question should be answered in the manner stated, and the judgment should be given for the defendant in the action with the costs of the action and of the appeal.

RICH J. The accident, which occurred "whilst towing", caused the death of one and injuries to another of the crew of the tug and obliged the plaintiff company, the owner of the tug, to pay compensation to their relatives. In an action brought in the Supreme Court of New South Wales the plaintiff company claimed to be indemnified by the defendant company in respect of this payment and a case stated in the action submitted the question of liability to that Court. By a majority the Court answered the question in the affirmative. The defendant company has appealed to this Court.

The towing conditions which give rise to the controversy are not happily expressed. Clause 2 defines the relationship between the parties. Clause 3 particularizes their rights and liabilities in two separate operations. The first part of the clause states clearly enough the liability of the hirer "whilst towing" and the obligation of the hirer to indemnify the tugowner in respect of this liability. The second part of the clause, which deals with the position when services other than towing are being rendered, while absolving the tugowner from responsibility for any damage done to the hirer's vessel, expresses a more limited indemnity than that contained in the first part of the clause "whilst" the tugowner, "at the request expressed or implied of the Hirer", is rendering any services other than towing. The indemnity is in these terms: "and the Hirer shall indemnify the Tugowner against any claim by a third party (other than a member of the crew of the tug) for personal injury or loss of life." It exempts the tugowner from responsibility for damage done to the hirer's vessel, and excepts claims by members of the crew of the tug from the liability to indemnify the tugowner from claims by third parties for personal injury or loss of life which the hirer otherwise assumes. Clause 4, like the second part of clause 3, deals with the relations of the parties when towing is not in progress. When this situation exists, the hirer is not to be liable for loss or damage done by or to the tug, or for loss of life to the crew of the tug. Thus, the first part of clause 3 provides that when towing is in progress the hirer shall indemnify the tugowner against, *inter alia*, all damage done to or by the tug and *all* personal injury or loss of life; whilst when towing is not in progress the second part of clause 3 provides that the hirer shall indemnify the tugowner against claims (except by a member of the crew of the tug) for personal



injury or loss of life, and clause 4 provides that the hirer shall not be liable for damage done by or to the tug, or for loss of life or injury to the crew of the tug. Clause 4 and the second part of clause 3 overlap, if they do not coincide, in their ambit, but they are both confined to the period when other than towing is going on, and do not touch the period of towing, which is dealt with by the first part of clause 3: It is contended that there is a conflict between clause 4 and clause 3, but in my opinion there is none. Clause 4 is in complete harmony with the part of clause 3 which deals with the same subject matter, and the object of both these provisions is to indicate certain respects in which the hirer's obligations when his ship is not under tow differ from his obligations when it is, the latter being provided for by the first part of clause 3, which covers the field upon which neither of the other provisions impinges.

In my opinion the appeal should be dismissed.

McTIERNAN J. In my opinion the appeal should be dismissed.

The view that there is ambiguity in the provision which is made in this contract for indemnifying the tugowner in respect of compensation for personal injury to a member of the crew of the tug or for the loss of the life of a member of the crew whilst the tug is rendering the service of towing, results, as it is contended, from the impossibility of attaching the words, "or for loss of life or injury to the crew of the tug," in clause 4 to the phrase, "otherwise than whilst towing," occurring also in that clause. It is contended that, because of the position of this phrase in the clause, it should be read as describing only the occasions when the hirer shall not be liable for loss or damage done by or to the tug. In this view clause 4 would provide for a general exemption of the hirer from liability to the tugowner for the loss of life or injury to the crew of the tug and it would not be certain whether the indemnity in the first limb of clause 3 extends to personal injury to a member of the crew or the loss by a member of the crew of his life whilst the tug was engaged in towing.

It seems to me that the phrase, "otherwise than whilst towing," holds the same relative position to the words, "or for loss of life or injury to the crew," as the phrase, "whilst towing," holds to the hirer's promise in the first limb of clause 3 to indemnify the tugowner in respect of personal injury or loss of life; and as the phrase, "whilst at the request expressed or implied of the hirer rendering any service other than towing," holds to the hirer's promise in the second limb of that clause to indemnify the tugowner against any claim by a third party (other than a member of the crew) for personal

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injury or loss of life. No-one contends that the phrase, "whilst towing," attaches only to the provision (in the midst of which it occurs), in the first limb of clause 3, exempting the tugowner from liability for damage done by or to the tug or the hirer's vessel; or that the phrase, "whilst at the request expressed or implied of the hirer rendering any service other than towing," in the second limb of clause 3, attaches only to the provision exempting the tugowner from liability for damage done to the hirer's vessel. It is clear that it was the intention of the parties that the phrase, "whilst towing," in the first limb of clause 3 should indicate the occasions when the hirer should be liable to pay for personal injury or loss of life and to indemnify the tugowner in respect thereof, as well as when the tugowner should be liable for loss or damage done by or to the tug or the vessel; and it is clear too that the phrase, "whilst at the request expressed or implied of the hirer rendering any service other than towing," in the second limb of clause 3, indicates the occasions when the hirer should be liable to indemnify the tugowner against any claim by a third party (other than a member of the crew) as well as the occasion when the tugowner should be exempt from liability for damage done to the hirer's vessel.

In the same way, the phrase, "otherwise than whilst towing," in clause 4, indicates in the first place the occasions when the hirer shall be exempt from liability for loss or damage to the tug; and, furthermore, the position of this phrase in relation to the provision, which is made in clause 4, exempting the hirer from liability in respect of personal injury and loss of life to a member of the crew, is so like that which the phrases, "whilst towing," and, "whilst . . . rendering any service other than towing," respectively hold in relation to the provisions in clause 3 dealing with liability for personal injury and loss of life, that, in order to give a consistent reading to clauses 3 and 4, it is necessary to read the words of clause 4, from "The hirer" down to "crew of the tug," as an entire clause providing for an exemption of the hirer from liability to the tugowner for loss or damage by or to the tug as well as for loss of life or personal injury to the crew of the tug, whilst the tug is engaged "otherwise than in towing."

In my opinion it was the intention of the parties that the exemption from liability given to the hirer by clause 4 should not extend beyond the occasions indicated by the phrase "otherwise than whilst towing." Clause 4 does not, therefore, affect the hirer's promise in the first limb of clause 3 to indemnify the tugowner in respect of personal injury or loss of life "whilst towing." Personal injury to a member of the crew of the tug or the loss of the life of a member



of the crew of the tug are not excluded by any express words from that indemnity. That exclusion is made only from the indemnity in the second limb of clause 3, and this latter indemnity is expressed to apply only on occasions indicated by the phrase "whilst rendering service other than towing at the hirer's request."

In my opinion the compensation which the tugowner paid in respect of the loss of the life of a member of the crew of the tug and the personal injury which another member of the crew sustained whilst the hirer's vessel was being towed are within the indemnity in the first limb of clause 3.

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WILLIAMS J. From the facts stated in the special case it appears that on 23rd September 1940 a collision occurred between the tug *Hero* owned by the plaintiff company and the s.s. *Northumberland* owned by the defendant company while the tug was towing the ship in Sydney Harbour without negligence on the part of the crew of the ship, as a result of which the *Hero* was sunk, one member of its crew was drowned, and another member was injured.

As a result of the accident the plaintiff became legally liable to pay, and in fact paid, compensation to the relatives of the deceased seaman and to the injured seaman, amounting to approximately £1,420.

The question that arises upon the appeal is whether the majority of the Supreme Court of New South Wales was right in holding that the defendant is liable to indemnify the plaintiff against the payment of this amount.

The answer to this question depends upon the proper construction to be placed upon clauses 2, 3 and 4 of the towing conditions subject to which the tow was proceeding at the time of the accident.

These clauses read as follows:—

2. On the employment of a tug the Master and Crew thereof become the servants of and identified with the Hirer and are under the control of the Hirer or his servants or agents, and anyone on board the Hirer's vessel who may be employed and/or paid by the Tugowner shall be considered the servant of the Hirer.

3. The Tugowner shall not, whilst towing, bear or be liable for damage of any description done by or to the tug, or done by or to the Hirer's vessel, or for loss of or damage to anything on board the Hirer's vessel, or for loss of the tug or the Hirer's vessel, or for any personal injury or loss of life, arising from any cause, including negligence at any time of the Tugowner's servants or agents, unseaworthiness, unfitness or breakdown of tug, its machinery, boilers, towing



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gear, equipment or hawsers, lack of fuel, stores or speed, or otherwise, and the Hirer shall pay for all loss or damage and personal injury or loss of life and shall also indemnify the Tugowner against all consequences thereof, and the Tugowner shall not, whilst at the request expressed or implied of the Hirer rendering any service other than towing be held responsible for any damage done to the Hirer's vessel and the Hirer shall indemnify the Tugowner against any claim by a third party (other than a member of the crew of the tug) for personal injury or loss of life. Provided that any such liability for loss or damage as above set out is not caused by want of reasonable care on the part of the Tugowner to make his tugs seaworthy for the navigation of the tugs during the towing or other services—the burden of proof of any failure to exercise such reasonable care being upon the Owner of the tow.

4. The Hirer shall not bear or be liable for any loss or damage of any description done by or to the tug otherwise than whilst towing, as herein defined, or for loss of life or injury to the crew of the tug. Nevertheless nothing contained herein shall prejudice any claim the Tugowner may have in Admiralty or at Common Law against the Hirer.

Although the effect of clause 2 is to make the master and crew of the tug the servants of the defendant during the employment of the tug, the rights and liabilities of the parties are not left to be determined by the common law of master and servant, but are, to a considerable extent, specifically defined by the provisions of clauses 3 and 4.

These clauses deal with at least two situations that arise in the course of the employment: (1) whilst towing is proceeding, and (2) whilst the tug is performing services other than towing at the express or implied request of the defendant; and there may possibly be a third situation where the tug is doing some act within the employment other than towing or performing some service at the express or implied request of the defendant, but it is difficult to conceive such an act. The first limb of clause 3 is directed to the rights and liabilities of the parties in the first situation, while the second limb of the clause is directed to their rights and liabilities in the second situation.

The first limb is clear and intelligible. While the two vessels are tied to one another, it makes the defendant liable for any damage done to or by either vessel and for personal injury to the crew of either vessel and for damage done by either vessel to third parties as though they were one vessel. It contains an express promise by the defendant in clear, general and unambiguous terms to indemnify



the plaintiff against all loss and damage and all personal injury or loss of life, which must include personal injury to or loss of life of a member of the crew of the tug. Indeed, it was not contested that if the conditions stopped at the end of this limb the defendant would be liable to pay the amount in question to the plaintiff.

The second limb of clause 3 relates to the situation where the vessels are not tied together, but the tug in the course of the employment undertakes some service express or implied for the defendant. Such service would include the conveyance to or from the ship of persons or cargo. It is evident that in the course of such service the tug might collide with the ship or some third vessel, and that persons or cargo on the ship or the tug or the third vessel might be damaged. The second limb expressly provides that the tug shall not be liable for any damage done to the ship. It also provides that the defendant will assume liability for any claims for personal injury or loss of life by persons whether on the ship or the tug or a third vessel other than a member of the crew of the tug. In the event of a collision between the ship and the tug causing damage to the tug, the second limb does not exclude a claim by the plaintiff that the tug was damaged by the negligence of the crew of the ship, or, supposing that the collision was due to the negligence of the crew of the tug, a claim that under clause 2 of the conditions the crew of the tug were the servants of the defendant, so that the damage to the tug was due to the negligence of its servants.

The position is, therefore, that if the conditions stopped at the end of clause 3 they would adequately provide for the legal relations of the parties while the ship was in tow, but would inadequately provide for the legal relations of the parties while the tug was performing some service in the course of the employment other than towing the ship. It is in the light of those general considerations that the construction of clause 4 should be approached.

The first portion of clause 4 is expressly confined to the employment of the tug otherwise than whilst towing the ship. It deals with the claims which I have said were not excluded by the second limb of clause 3 because, whilst it retains the liability of the defendant for any damage done to the tug due to the negligence of the crew of the ship, it relieves the defendant from liability for any damage caused to the tug by the negligence of the crew of the tug. The clause then proceeds to state that the defendant shall not be liable for loss of life or injury to the crew of the tug. The question is whether these words apply to both limbs of clause 3, or to the second limb only. On either view they are to the same extent a repetition of the words in brackets in the second limb. If they apply to the

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first limb they engraft an exception upon an indemnity which is in terms clear and general. If they apply to the second limb only they are more than a mere repetition of the words in brackets, because these words only amount to an exception from an express promise to indemnify the plaintiff against any claim by a third party for personal injury or loss of life, while the words in clause 4 expressly provide that the defendant shall not be liable for loss of life or injury to the crew of the tug.

Read in the context of the conditions as a whole it appears to me that clause 4 was not intended to affect the rights and liabilities of the parties under the first limb of clause 3, but only to affect their rights and liabilities under the second limb. The concluding words in the clause appear to be complementary to the words in brackets in clause 3. If the defendant's contention were right it would be difficult to understand why the words of exception were added in brackets in the second limb of clause 3 but were omitted from the first limb of the clause.

For these reasons I am of opinion that the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitors for the appellant, *Ebsworth & Ebsworth.*

Solicitors for the respondent, *Stephen, Jaques & Stephen.*

J. B.