

to the amounts received by the taxpayers the character of income. To this extent the judgment must be regarded as going beyond literal and logical construction into the ground of judicial pragmatism.

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## LIABILITY OF THE POST OFFICE IN CONTRACT

### *TRIEFUS & CO. LTD. v. POST OFFICE*

What has been described as a "courageous endeavour"<sup>1</sup> to make the Post Office liable for loss of postal matter ended in failure with the decision of the Court of Appeal in the *Triefus Case*.<sup>2</sup> Both English and Australian case law is, in view of the volume of business handled by the post offices of both countries at the present day, surprisingly barren. In England there have been only two decisions, one of 1701 (*Lane v. Cotton*<sup>3</sup>) and the other of 1778 (*Whitfield v. Lord Le Despencer*<sup>4</sup>), while in Australia there have been no reported cases at all. This dearth of cases seems to be not so much a result of the efficiency of the Post Office system in ensuring safe arrival of all matter despatched, as of practice and silence combining, apart from statute, to put the Post Office in a privileged position in the eyes of the public. This is strikingly illustrated in the judgment of Lord Mansfield in *Whitfield v. Lord Le Despencer* when he said,<sup>5</sup> (with reference to the earlier decision in *Lane v. Cotton*<sup>6</sup>):

In that year (1701) a solemn judgment was given, that an action on the case would not lie against the Postmaster-General, for a loss in the office by the negligence or fault of his servant. The nation understood it to be a judgment; and therefore it makes no difference, if what has been thrown out were true, and the writ of error was stopped in the way that has been mentioned, for the bar have taken notice of it as a judgment; the Parliament and the people have taken notice of it, every man who has sent a letter since has taken notice of it; many Acts of Parliament for the regulation and improvement of the Post-office, and other purposes relative to it, have passed since, which by their silence have recognised it. The mail has been robbed a hundred times since, and no action whatever has been brought. What have merchants done since and continue to do at this day, as a caution and security against a loss? They cut their bills and notes into two or three parts, and send them at different times; one by this day's post, the other, by the next. This shews the sense of mankind as to their remedy. If there could have been any doubt therefore before the determination of *Lane v. Cotton*, the solemn judgment in that case having stood uncontroverted ever since, puts the matter beyond dispute. Therefore we are all clearly of the opinion that the action will not lie.

In order that the position of the Post Office in both countries may be better understood, it is proposed to give a short resumé of the earlier decisions, the *Triefus Case*,<sup>8</sup> and relevant statute law. The first case, *Lane v. Cotton*<sup>9</sup> followed the first Post Office Act<sup>10</sup> of 1660 which recited the existence of

<sup>1</sup> (1957) 31 *A.L.J.* 367.

<sup>2</sup> *Triefus & Co. Ltd. v. Post Office* (1957) 2 *Q.B.* 352.

<sup>3</sup> (1701) 1 *Ld. Raym.* 646.

<sup>4</sup> (1778) 2 *Cowp.* 754.

<sup>5</sup> *Id.* at 766.

<sup>6</sup> (1701) 1 *Ld. Raym.* 646.

<sup>7</sup> This refers to the settlement of the action. The Court of King's Bench gave judgment for the defendants, who, apparently thinking that the plaintiff intended to bring a writ of error on the judgment, paid the money to the plaintiff. There are no traces in the Exchequer Chamber of any writ of error having been brought, nor in the Post Office of the money having been paid.

<sup>8</sup> (1957) 2 *Q.B.* 352.

<sup>9</sup> (1701) 1 *Ld. Raym.* 646.

<sup>10</sup> 12 *Car.* 2, c.35.

Post Offices, established the office of Postmaster-General and fixed the rates for carrying letters. With this Act in mind a majority of the Court were of the opinion, although the matter was not raised in the pleadings, that there was no contract, either express or implied, between the parties the breach of which would entitle the plaintiff to recover damages for loss of Exchequer Bills sent through the post. The opinion of the dissenting judge (Holt, C.J.) was founded upon a comparison of the situation of the Postmaster with that of a common carrier or the master of a ship taking goods on board for freight. He considered that as the Post Office took upon itself the duty of receiving goods of all subjects and received payment for it, that was sufficient to support the claim. He denied that any contract was necessary but based liability in negligence. In the second case of *Whitfield v. Lord Le Despencer*<sup>11</sup> it was decided that (as mentioned previously) case did not lie against the Postmaster-General for a bank note stolen by a letter-sorter. Lord Mansfield in delivering his decision made reference to Holt, C.J.'s judgment in the earlier case and said:<sup>12</sup>

. . . the comparison between a Post-master and a carrier, or the master of a ship, seems to me to hold in no particular whatsoever. The Post-master has no hire, enters into no contract, carries on no merchandise or commerce. But the Post-office is a branch of revenue, and a branch of police created by Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy therefore between the case of the Post-master and a common carrier.

In the *Triefus Case*, the appellants posted and the Post Office accepted in April and June 1953 two registered postal packets containing diamonds for conveyance to New Zealand. On the back of the certificate of posting it was stated that "Registration in the international service is not a system of insurance. Compensation is not paid for loss or damage of contents as distinct from loss of the entire packet and the payment may in no circumstances exceed £2/18/0". The packets were stolen by a servant of the Post Office whilst in transit. As the value of the diamonds, which were uninsured, was considerably in excess of £2/18/- the appellants attempted to recoup themselves for the loss by taking action against the Post Office<sup>13</sup> to recover damages for breach of the contracts of carriage and bailment, and alternatively for negligence. The action was originally heard by Gorman, J. who held himself bound by authority to dismiss it.

The appellant argued that upon the receipt of the diamonds by the Post Office for transmission, contracts had been created because of the fundamental contractual element of service in exchange for reward. He said that the most likely incidents of the existence of the contracts as alleged would be that the Post Office would be careful in its custody of the packets and not allow them to be stolen. He also submitted an argument not raised in the original hearing namely, that as *Lane v. Cotton*<sup>14</sup> and *Whitfield v. Lord Le Despencer*<sup>15</sup> were actions in case, the *dicta* (to the effect that the Postmaster-General never enters into contracts) in those cases were *obiter* and also no longer applicable since the Postmaster-General was now empowered by Acts of Parliament to enter

<sup>11</sup> (1778) 2 Cowp. 754.

<sup>12</sup> *Id.* at 764-65.

<sup>13</sup> The action was brought against the Post Office, and not against the Postmaster-General, by virtue of the directions given in the Crown Proceedings Act, 1947 (Eng.), 10 and 11 Geo. 6, c.44, s. 17.

<sup>14</sup> (1701) 1 Ld. Raym. 646.

<sup>15</sup> (1778) 2 Cowp. 754.

into many contracts. He conceded that the claim in negligence was barred by s. 9 (1) of the Crown Proceedings Act, 1947,<sup>16</sup> which forbids proceedings in tort against the Crown or any officer of the Crown other than for loss or damage to inland mail.

The Post Office by their defence denied that there had been any contracts on the ground of lack of intention on the part of the Post Office to make any contracts. Counsel stated that postage was a duty enacted for revenue and not money paid pursuant to any contractual obligation. Finally, he said that s. 13 of the Post Office Act, 1908,<sup>17</sup> and Regulation 61<sup>18</sup> of the British Commonwealth and Foreign Post Warrant, 1948,<sup>19</sup> (the regulations made under the Act) provided a complete answer for the Post Office.

Ormerod, L.J. in dismissing the appeal dealt first with *Lane v. Cotton*<sup>20</sup> and *Whitfield v. Lord Le Despencer*.<sup>21</sup> He said that he agreed that observations in those cases on contract were *obiter*, but the law laid down in the two cases had been accepted from 1778 until the present day and was too clear to be got over. He (Ormerod, L.J.) countered appellants' argument that the Post Office now continually entered into contracts, by pointing out that these contracts were only for the running of the Post Office and similar contracts (though on a smaller scale) would of necessity have been made in the eighteenth century. With regard to the position of the Post Office under the provisions of the Post Office Act and Regulations, he said that in his view the framers of the Act had clearly proceeded on the footing that no contractual obligation arises between the Post Office and the sender of a letter. His Lordship in conclusion made reference to the following provision contained in the *Post Office Guide*.<sup>22</sup> "The Post Office does not enter into a contract of carriage, either express or implied. It accepts postal packets for transmission by post under, and subject to, the provisions of the Post Office Act and Regulations made thereunder." He said that, for these reasons, in his opinion Gorman J.'s decision was correct. The rest of the Court, (Hodson and Parker L.JJ.), endorsed his views and leave to appeal to the House of Lords was refused.

In Australia the relevant Act is the Post and Telegraph Act 1901-1950 (Cwlth.),<sup>23</sup> s. 158 of which provides:

An action or other proceeding shall not be maintainable against the King or the Postmaster-General or any officer of the Department by reason of any default, delay, error, omission or loss whether negligent or otherwise in the transmission or delivery or otherwise in relation to—  
(a) a postal article posted or received or omitted to be posted or received under this Act, or — (b) a telegram sent or received or omitted to be sent or received under this Act.

<sup>16</sup> S. 9(1) "... no proceedings in tort shall lie against the Crown for anything done or omitted to be done in relation to a postal packet by any person while employed as a servant or agent of the Crown, or for anything done or omitted to be done in relation to a telephonic communication by any person while so employed; nor shall any officer of the Crown be subject, except at the suit of the Crown, to any civil liability for any of the matters aforesaid."

<sup>17</sup> 8 Edw. 7, c. 48, s. 13: "The registration of or giving a receipt for a postal packet, or the giving or obtaining of a certificate of posting or delivery of a postal packet, shall not render the Postmaster-General or the Post Office revenue in any manner liable for the loss of the packet or the contents thereof." This Act has been repealed and superseded by the Post Office Act, 1953 (Eng.) (1 and 2 Eliz. 2, c. 36), and the British Commonwealth & Foreign Post Warrant, 1948 has been revoked and replaced by the British Commonwealth & Foreign Post Warrant, 1953 (s. I, 1953, No. 1732). The Act of 1908 was the statute relevant to the claims litigated in these proceedings.

<sup>18</sup> Regulation 61: "... nothing contained in or done under or in pursuance of this Warrant shall render him (the Postmaster-General) liable either personally or in his official capacity to any action or other legal proceedings in respect of or in consequence of any such loss or damage ..."

<sup>19</sup> S. I, 1948, No. 590.

<sup>20</sup> (1778) 2 Cowp. 754.

<sup>21</sup> *Post Office Guide*, (July 1956 ed.) 77.

<sup>22</sup> No. 12, 1901 — No. 80, 1950 (Cwlth.).

<sup>23</sup> (1701) 1 Ld. Raym. 646.

One criticism of the wording of this Section which is immediately apparent is the vagueness of the words "negligent or otherwise". Does the immunity from proceedings cover loss as a result of negligence or deliberate interference, or does it only cover negligence? Presuming that it covers both (and it seems most unlikely that the legislature would have left such an obvious loophole), then in the case of theft by an employee there would be no recourse against the Post Office or the offending employee. The Act does provide for criminal proceedings to be instituted against the latter,<sup>24</sup> but this would be of little comfort to the injured party. If the other interpretation be adopted, then civil action could be taken against the employee (subject to the rule of trespass merging in a felony), and the success of proceedings against the Post Office would depend on the rules of liability in tort. In particular, it could succeed only if the offending employee was acting within the course of his employment in committing the theft.<sup>25</sup> An action for breach of contract would be open to the same common law defences as were raised in the *Triefus Case*.<sup>26</sup> The English cases too, though not binding, would be highly persuasive in favour of the Post Office. The Australian *Post Office Guide* does not include a provision similar to that in its English counterpart denying intention to enter into contractual relations. The Australian authorities have evidently assumed that no further denial of liability is required other than that contained in s. 158.

In conclusion, it may be mentioned that one inroad has been made into the immunity of the English Post Office by s. 9(2)<sup>27</sup> of the Crown Proceedings Act, 1947 (Eng.) which, notwithstanding s. 13 of the Post Office Act, does allow proceedings in tort against the Crown in certain circumstances for loss of, or damage to, a registered inland postal packet. Apart from this exception, until such time as the legislatures or the courts decide otherwise, the Post Offices of both countries would appear to be in a virtually impregnable position.

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## INNOCENT MISREPRESENTATION

### OSCAR CHESS LTD. v. WILLIAMS

The remedies, if any, available to a purchaser who has suffered loss as the result of an innocent misrepresentation made by the vendor in the course of a transaction for the sale of goods, were examined in *Oscar Chess Ltd. v. Williams*.<sup>1</sup>

Generally speaking, the principles of law to be applied to cover this situation are well-defined, and the question of whether the representee has a remedy or not will depend on whether, at the time it was made, the representation was regarded by both parties as a contractual term, i.e. one imposing

<sup>24</sup> S. 114.

<sup>25</sup> On this point see *United Africa Co., Ltd. v. Saka Owoade* (1955) A.C. 130 (P.C.) (transport contractor held liable for theft by his servants of goods being carried by him for the plaintiff).

<sup>26</sup> (1957) 2 Q.B. 352.

<sup>27</sup> S. 9(2): "Notwithstanding the provisions of section 13 of the Post Office Act, 1908, proceedings shall lie against the Crown under this subsection in respect of loss of or damage to a registered inland postal packet, not being a telegram, in so far as the loss or damage is due to any wrongful act done or any neglect or default committed by a person employed as a servant or agent of the Crown while performing or purporting to perform his functions as such in relation to the receipt, carriage, delivery or other dealing with the packet."

<sup>1</sup> (1957) 1 All E.R. 325.