



**SUPREME COURT OF CANADA**

**CITATION:** Isen v. Simms, [2006] 2 S.C.R. 349, 2006 SCC 41

**DATE:** 20061005

**DOCKET:** 31026

**BETWEEN:**

**Stephen Simms and Marla Simms**

Appellants

and

**William Isen**

Respondent

**CORAM:** McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

**REASONS FOR JUDGMENT:**  
(paras. 1 to 30)

Rothstein J. (McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella and Charron JJ. concurring)

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Isen v. Simms, [2006] 2 S.C.R. 349, 2006 SCC 41

**Stephen Simms and Marla Simms**

*Appellants*

v.

**William Isen**

*Respondent*

**Indexed as: Isen v. Simms**

**Neutral citation: 2006 SCC 41.**

File No.: 31026.

2006: June 21; 2006: October 5.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the federal court of appeal

*Maritime law — Scope — Pleasure craft — Limitation of liability — Boat being prepared for transport on highway — Boat owner using bungee cord to secure engine cover — Plaintiff suffering personal injury when metal hook at end of bungee cord struck him in eye — Plaintiff bringing action in damages against boat owner — Whether limitation of liability provision contained in federal shipping legislation applicable — Whether plaintiff's claim falling within ambit of federal maritime law — Canada Shipping Act, R.S.C. 1985, c. S-9, s. 577.*

*Constitutional law — Division of powers — Navigation and shipping — Scope — Pleasure craft — Boat being prepared for transport on highway — Boat owner using bungee cord to secure engine cover — Plaintiff suffering personal injury when metal hook at end of bungee cord struck him in eye — Plaintiff bringing action in damages against boat owner — Boat owner claiming benefit of limitation of liability provision contained in federal shipping legislation — Whether matter governed by federal power over navigation and shipping or provincial power over property and civil rights — Constitution Act, 1867, ss. 91(10), 92(13).*

After a day of recreational boating on a lake, S and I removed the boat from the water on a trailer and prepared it for transport on the highway in a parking lot near the water. I, the owner of the boat, was stretching a bungee cord over the engine cover to secure it when the cord slipped from his grasp and hit S who suffered an eye injury. S and his wife brought a personal injury action for damages totalling \$2.2 million in the Ontario Superior Court of Justice. I denied liability and also applied to the Federal Court for a declaration that, in the event he was found liable, his liability would not exceed \$1 million pursuant to s. 577 of the *Canada Shipping Act*. The Federal Court and the majority of the Federal Court of Appeal both held that the claim was a maritime law claim and was subject to the limitation of liability set out in s. 577.

*Held:* The appeal should be allowed.

The allegedly negligent acts giving rise to S's injuries are not governed by federal maritime law, but rather, are governed by provincial law. Accordingly, the *Canada Shipping Act* is not constitutionally applicable in this case and I cannot claim

the benefit of the limitation of liability provided in that Act. While Parliament's jurisdiction over navigation and shipping pursuant to s. 91(10) of the *Constitution Act, 1867* includes the tortious liability of owners of pleasure craft for negligent launching into, navigation on and removal from Canadian waterways, the mere involvement of a pleasure craft in an incident is not sufficient to ground federal jurisdiction. Rather, the factual context must be examined to determine whether the allegedly negligent act is integrally connected with the act of navigating the pleasure craft on Canadian waterways such that it is a practical necessity for Parliament to have jurisdiction over the matter. Here, the securing of the engine cover for transport by highway had nothing to do with navigation of the boat on water and everything to do with preparing the boat to be transported on Ontario's highways. Once the boat was being secured for road transport, it was no different than any other type of cargo that is transported on the highway, and the provincial legislature has jurisdiction. Therefore, the law concerning the standard of care and I's liability should be that applied to other users of Ontario roads who make preparations to transport some form of cargo. [5] [22-27]

### Cases Cited

**Applied:** *Whitbread v. Walley*, [1990] 3 S.C.R. 1273; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; **referred to:** *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752.

### Statutes and Regulations Cited

*Act to Amend the Canada Shipping Act (Maritime Liability)*, S.C. 1998, c. 6, s. 2.

*Canada Shipping Act*, R.S.C. 1985, c. S-9 [am. 1998, c. 6], ss. 2, 576(3), 577, 581.

*Constitution Act, 1867*, ss. 91(10), 92(13).

*Family Law Act*, R.S.O. 1990, c. F.3.

*Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 2, 22.

*Marine Liability Act*, S.C. 2001, c. 6, s. 28(1)(a).

APPEAL from a judgment of the Federal Court of Appeal (Décary, Nadon and Sexton JJ.A.), [2005] 4 F.C.R. 563, 254 D.L.R. (4th) 273, 334 N.R. 233, [2005] F.C.J. No. 756 (QL), 2005 FCA 161, affirming a decision of Snider J. (2004), 247 F.T.R. 233, 236 D.L.R. (4th) 376, [2004] F.C.J. No. 278 (QL), 2004 FC 227. Appeal allowed.

*David R. Tenszen*, for the appellants.

*Geoffrey D. E. Adair, Q.C.*, and *Robert M. Ben*, for the respondent.

The judgment of the Court was delivered by

ROTHSTEIN J. —

I. Introduction

1           The appellant, Dr. Stephen Simms, suffered personal injuries when the metal hook at the end of a bungee cord struck him in the eye. The incident occurred while the respondent was using the bungee cord to secure a part of his boat prior to

towing it on the highway. The appellants, Dr. Simms and his wife, have commenced an action for damages against the respondent.

2           The dispute in this appeal is whether the respondent can claim the benefit of a limitation of liability provision contained in federal legislation, namely s. 577(1)(a) of the *Canada Shipping Act*, R.S.C. 1985, c. S-9 (as amended by S.C. 1998, c. 6) (now s. 28(1)(a) of the *Marine Liability Act*, S.C. 2001, c. 6), such that his liability to pay damages to the appellants, if any, will not exceed \$1,000,000. This dispute raises two issues.

3           The first issue, as put to this Court by the appellants, is whether the Federal Court has jurisdiction over the matter. The Federal Court has jurisdiction over matters of maritime law, a federal body of law comprised of both statutory rules and non-statutory principles. The real question is whether the allegedly negligent acts giving rise to Dr. Simms' injuries are governed by federal maritime law, or rather, by provincial law.

4           If the allegedly negligent acts giving rise to Dr. Simms' injuries fall within the ambit of maritime law, the second issue is whether the claims of the appellants are subject to the limitation of liability in the *Canada Shipping Act*. The question is whether the claims of the appellants occurred "in direct connexion with the operation of the ship".

5           I am of the opinion that the allegedly negligent acts giving rise to Dr. Simms' injuries are not governed by federal maritime law, but rather, are governed by provincial law. The *Canada Shipping Act* is not constitutionally applicable to the

appellants' action for damages against the respondent. Thus, the respondent cannot claim the benefit of the limitation of liability provided in that Act. Given that the appeal is allowed on this basis, the second issue does not arise.

## II. Facts

6           The respondent owned a 17-foot pleasure craft with a gross tonnage of less than 300 tons (the “boat”). In the interior of the boat, there was an opening that permitted access to the engine. This opening was covered by a vinyl padded piece of wood, which served as a seat when access to the engine was not required (the “engine cover”).

7           When the boat needed to be transported across land, it was placed on a trailer that was towed by a vehicle. When the boat was transported on the highway, the engine cover would blow upwards and flap in the wind. Therefore, prior to transporting the boat on the highway, the respondent would secure the engine cover with a bungee cord. Securing the engine cover during highway transport was the only use of the bungee cord. When the bungee cord was not in use, it was stored on the boat.

8           The boat was ordinarily moored to a dock on a lake adjacent to a cottage property owned by the respondent in the Orillia-Coldwater area of Ontario. On August 1, 1999, Dr. Simms and the respondent set out from the respondent's cottage to embark on a boating trip on Lake Muskoka, Ontario. The boat was transported via the highway on a trailer towed by the respondent's vehicle. Upon arriving at Lake Muskoka, the boat was launched into the water using a public boat ramp. At the end

of the day of navigation on the lake, Dr. Simms and the respondent returned to the boat ramp in order to remove the boat from the water and transport it back to its ordinary mooring at the respondent's cottage. The vehicle and trailer were backed onto the ramp and the boat was placed on the trailer. The respondent then moved the vehicle, trailer and boat to level ground in a parking lot near the water.

9 To ready the boat for highway transport, the respondent began to secure the engine cover with the bungee cord. The hook at one end of the cord was attached to the boat and the cord was stretched across the width of the boat when it slipped from the respondent's grasp. The cord flew toward Dr. Simms who was standing near the boat. The metal hook at the end of the cord struck him in the eye.

10 The appellants commenced an action against the respondent in the Ontario Superior Court of Justice. Dr. Simms claimed damages in the amount of \$2,000,000, plus pre-judgment interest. His wife claimed damages in the amount of \$200,000 pursuant to the terms of the *Family Law Act*, R.S.O. 1990, c. F.3, plus pre-judgment interest.

11 The respondent denied liability in the Ontario Superior Court of Justice. He also sought a declaration from the Federal Court that in the event he is found liable in the proceedings before the Ontario Superior Court of Justice, his liability to pay damages to the appellants will not exceed \$1,000,000 pursuant to s. 577 of the *Canada Shipping Act*.

### III. Statutory Provisions

12           The *Canada Shipping Act* regulates various matters related to shipping and navigation. The respondent falls within the definition of a “shipowner” and his boat falls within the definition of “ship” set out in s. 576(3) of the Act.

13           Section 577 of the *Canada Shipping Act* creates a limitation of liability for shipowners against claims involving a ship of less than 300 tons:

**577.** (1) The maximum liability of a shipowner for claims arising on any distinct occasion involving a ship with a tonnage of less than 300 tons, other than claims mentioned in section 578, is

(a) in respect of claims for loss of life or personal injury, \$1,000,000;

14           The types of claims that are subject to the limitation in s. 577 are set out in Part I of Schedule VI of the *Canada Shipping Act* including claims “occurring in direct connexion with the operation of [a] ship”.

15           Section 581 of the *Canada Shipping Act* empowers the Admiralty Court, defined in s. 2 of that Act as the Federal Court, to make the declaration sought by the respondent in this case.

16           Section 2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which contains the definition of “Canadian maritime law”, and s. 22 of that Act set out the Federal Court’s jurisdiction over maritime law.

#### IV. Courts Below

A. *Federal Court* ((2004), 247 F.T.R. 233, 2004 FC 227)

17 In Snider J.’s view, while the incident occurred on land, the “handling” of the boat was sufficiently connected to navigation and shipping to bring it within the ambit of maritime law. Snider J. identified four connecting factors: (1) the hooks of the bungee cord were applied to a boat; (2) the cord was used to secure the engine cover of a boat; (3) the incident arose immediately following use of the boat on a lake; and (4) the incident occurred just before the boat was to be transported to another lake.

B. *Federal Court of Appeal* ([2005] 4 F.C.R. 563, 2005 FCA 161)

18 Nadon J.A., for the majority of the court, held at para. 20 that the “launching of a pleasure boat into a lake and its removal from the water after a day of navigation constitute land-based activities that are sufficiently connected with pleasure craft navigation” to bring a matter within the ambit of maritime law. Unlike commercial ships, which do not usually come out of the water, a pleasure craft will, as a matter of course, be removed from the water. Here, the alleged tort occurred near the boat ramp shortly after the boat was taken out of the water. It was the respondent’s intention to return the boat to its usual mooring and it was therefore necessary to secure the engine cover. Thus, in Nadon J.A.’s view, the actions of the respondent were an integral part of the process of removing the boat from the water.

19 In dissent, Décary J.A. held that the fact that the incident involved a boat did not transform the incident into a maritime matter. He held that the focus should be less on the fact that a ship was involved and more on the location where the incident occurred and on the “true essence” of the incident. He concluded that the claim here was not a Canadian maritime law claim.

V. Analysis

20           The constitutional division of powers lies at the heart of this issue. Maritime law falls within Parliament’s jurisdiction over navigation and shipping under s. 91(10) of the *Constitution Act, 1867*: see *ITO — International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752, at p. 777; *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1290. In *ITO*, McIntyre J. confirmed that the ambit of Canadian maritime law is limited by the constitutional division of powers under the *Constitution Act, 1867*. At p. 774, he stated:

In reality, the ambit of Canadian maritime law is limited only by the constitutional division of powers in the *Constitution Act, 1867*. I am aware in arriving at this conclusion that a court, in determining whether or not any particular case involves a maritime or admiralty matter, must avoid encroachment on what is in “pith and substance” a matter of local concern involving property and civil rights or any other matter which is in essence within exclusive provincial jurisdiction under s. 92 of the *Constitution Act, 1867*. It is important, therefore, to establish that the subject-matter under consideration in any case is so integrally connected to maritime matters as to be legitimate Canadian maritime law within federal legislative competence.

21           As Iacobucci and Major JJ. stated at para. 73 in *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, the question of whether a claim falls within the ambit of federal maritime law, i.e., navigation and shipping, involves an examination of the factual context of the claim. In this case, the factual context of the appellants’ claim involves the allegedly negligent acts of the respondent while using a bungee cord to prepare his boat for transport on Ontario’s highways. It must be determined whether this matter falls within Parliament’s jurisdiction over shipping and navigation or within provincial

jurisdiction over property and civil rights under s. 92(13) of the *Constitution Act, 1867*. It is in essence a line drawing exercise.

22 Commercial shipping was traditionally viewed as within the scope of Parliament’s jurisdiction over navigation and shipping. Shipping contracts involve not only the safe carriage of goods over the sea, but also the movement of goods on and off a ship. It was these commercial realities that led McIntyre J. to hold in *ITO* that the short-term storage by a stevedoring company occurring in the port area and contemplated under the contract for carriage of goods by sea fell within Parliament’s jurisdiction over shipping. As McIntyre J. stated, there was a “close, practical relationship [between] the terminal operation [and] the performance of the contract” (p. 775).

23 As this case involves the potential tortious liability of an owner of a pleasure craft, it does not involve the shipping considerations that were relevant to McIntyre J.’s analysis in *ITO*. We are concerned here with navigation. This Court held in *Whitbread* that it was a practical necessity for Parliament to have jurisdiction over the tortious liability of pleasure craft for negligent navigation on Canadian waterways. As commercial ships and pleasure craft share the same navigational network across Canada, a uniform federal body of law governing the navigational “rules of the road”, standards of “good seamanship”, and any tortious liability resulting from the use of the waterways is necessary: see *Whitbread*, at pp. 1295-96.

24 Parliament does not have jurisdiction over pleasure craft *per se*. The mere involvement of a pleasure craft in an incident is not sufficient to ground Parliament’s jurisdiction. Rather, in cases such as this, a court must look at the allegedly negligent

acts and determine whether that activity is integrally connected to the act of navigating the pleasure craft on Canadian waterways such that it is practically necessary for Parliament to have jurisdiction over the matter. Given that the focus is on the acts that form the basis of the negligence claim, where or when those acts occurred is not determinative.

25           Nadon J.A. pointed out that pleasure craft will, as a matter of course, be removed from the water. I agree with him that the launching of pleasure craft and their removal from the water are matters that fall within Parliament's jurisdiction over navigation. These acts are necessary for and may involve the navigation of such craft in Canadian waters. A uniform federal law respecting the launching and removal of pleasure craft is practically necessary as such activities can pose a hazard to and interfere with the navigation of other vessels using the waterway. Moreover, the standard of care applicable to these acts, whether it arises from boating regulations or negligence law, is unique to the maritime context.

26           However, I am unable to agree with Nadon J.A. that the securing of the engine cover was a part of the removal process. The actions of the respondent had nothing to do with navigation of the boat on water and everything to do with preparing the boat to be transported on Ontario's highways. Once the boat was being secured for highway transport it was no different than any other type of cargo that is transported on the highway. It is the provincial legislatures that have jurisdiction over the carriage of cargo on provincial highways. The fact that the cargo is a boat does not bring under federal law a matter that is, in pith and substance, subject to provincial law.

27           Bungee cords or other devices are often used to secure cargo prior to road transport to ensure the cargo is not damaged during road transport and does not pose a hazard to other users of the road. The law concerning the standard of care and liability of the respondent in this situation should be that applied to other users of Ontario highways who make preparations to transport some form of cargo. Indeed, it is the other users of the road who may collide with, or otherwise be affected by, a trailered boat and/or non-secured cargo while on the highway. It would be anomalous that provincial law would apply to the carriage of other goods on Ontario highways, but that maritime law would apply when the goods are a boat.

28           I am in substantial agreement with the analysis of Décary J.A. which he summarized at para. 98 of his dissenting reasons:

The accident occurred on land. The injury was caused on land by a person who was neither on the boat nor in the water. There is no contract for carriage of goods by sea. There are no goods at issue. Nothing has happened on water which could be said to be directly or even indirectly related to the accident. There is no issue as to the seaworthiness of the ship, the issue at best being one as to the roadworthiness of a boat being prepared on land for road transportation. There are no *in rem* proceedings. There are no concerns of good seamanship. *There are no specialized admiralty laws, rules, principles or practices applicable.* The accident has nothing to do with navigation nor with shipping. There is no practical necessity for a uniform federal law prescribing how to secure the engine cover from flapping in the wind when a pleasure craft is transported on land in a boat trailer. The sole factor possibly connected to maritime law is that the pleasure craft had just come out of the water and was still being secured on the trailer when the accident happened. This, clearly, is not enough to constitute an integral connection with navigation and shipping and an encroachment of civil rights and property. [Emphasis in original.]

## VI. Conclusion

29 For these reasons, I conclude that the allegedly negligent acts giving rise to Dr. Simms' injuries are governed by provincial law. As the matter is outside Parliament's jurisdiction, Parliament cannot extend jurisdiction over the matter to the Federal Court, nor can it purport to regulate the liability of the respondent.

30 The appeal is allowed with costs here and in the courts below.

*Appeal allowed with costs.*

*Solicitors for the appellants: Thomson, Rogers, Toronto.*

*Solicitors for the respondent: Adair Morse, Toronto.*