INSTITUTE OF ADVANCED LEGAL STUDIES

judgment no 2, 1974

IN THE PRIVY COUNCIL | No. 15 of 1971

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

THE GEELONG HARBOUR TRUST COMMISSIONERS — Appellant

- and -

GIBBS BRIGHT & CO. (A FIRM) — Respondents

APPELLANT'S CASE

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1. This is an appeal by special leave from a judgment and order of the High Court of Australia (Barwick C.J., McTiernan, Kitto, Menzies and Owen JJ.) dated the 17th June 1970 dismissing (by a majority consisting of McTiernan, Kitto and Menzies JJ., Barwick C.J. and Owen J. dissenting) an Appeal from a judgment and order of the Supreme Court of the State of Victoria (Newton J.) answering a preliminary point of law ordered to be tried by Pape J. by order dated the 28th February 1969. [pp.43-45; pp.43-44; pp.20-21; pp.4-5]

2. The Appellant is a body corporate constituted under S.4 of the Geelong Harbor Trust Act 1958 and by that Act is, and by earlier statutes hereinafter referred to at all material times was, charged with the management and control and preservation and improvement of the Port of Geelong as described in the Second Schedule to the said Act. [Statutes of the State of Victoria No.6262]

3. Up to and including the 26th October 1958 the relevant statute in force was the Geelong Harbor Trust Act 1928 as amended by the Geelong Harbor Trust (Amendment) Act 1951. The provision thereof directly relevant to this appeal is S.110, which provides as follows : [Statutes of the State of Victoria No. 3691; Statutes of the State of Victoria No. 5607]

"110.(1) The Commissioners may recover damages in any court of competent jurisdiction from the

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owner master and agent of any vessel for any injury caused by such vessel or by any boatmen or other persons belonging to or employed in or about such vessel to the property or effects of the Commissioners or the banks or wharves or other works erected maintained or repaired under the provisions of this Act.

(2) The owner master or agent of any vessel shall not be relieved of any liability to the Commissioners by reason of the fact that such vessel was under compulsory pilotage at the time any injury was caused as aforesaid. 10

(3) Nothing in this section shall prejudice any other rights which the Commissioners may have or limit any liabilities to which the vessel or the master owner or agent thereof may be subject in respect of any injury caused by such vessel."

4. A provision in almost identical terms is now in force as S.108 of the Geelong Harbor Trust Act 1958, which came into effect on 1st April 1959. 20

pp.1-2 5. By their Statement of Claim endorsed on their Writ issued on the 10th March 1961 the Appellant (the Plaintiff) claimed from the Respondents (the Defendants) the cost of replacement of a beacon, its property, injured in the Port of Geelong on the 26th October 1958 by the M.V. "Octavian", of which the Respondents (the Defendants) were alleged to be the agents.

pp.2-4 6. By their amended Defence the Respondents (the Defendants) claimed, inter alia, that if the beacon was injured or damaged by the "Octavian" as alleged, the injury or damage occurred 30

(i) by Act of God; alternatively

(ii) by inevitable accident; alternatively

(iii) without negligence or other tortious act or omission on the part of the motor vessel "Octavian" or on the part of any person for whose negligence or other tortious act or omission the Respondents (the Defendants) are liable. 40

7. The preliminary point of law ordered by

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Pape J. on the 28th February 1969 to be tried was as follows : p.4 lines 38-46

"whether the provisions of S.110 of the Geelong Harbor Trust Act 1928 as amended operate to impose liability on the agent of the vessel in the event of it being established that the collision referred to in the Statement of Claim occurred by Act of God, inevitable accident or without negligence on the part of the M.V. "Octavian" or on the part of
10 any person for whose negligence the said agent is liable."

8. The preliminary point of law was heard and determined by Newton J. in the Supreme Court of the State of Victoria. By his judgment and order made the 19th August 1969 he declared on the point of law as follows: pp.20-21

"IT IS DECLARED that the provisions of Section 110 of the Geelong Harbor Trust Act 1928 (as amended by Section 10(1) of the Geelong Harbor Trust
20 (Amendment) Act 1951) do not operate to impose liability on the agent of a vessel for injury caused by such vessel to the property of the Plaintiff where the collision in which such injury is done occurs as a result of Act of God or inevitable accident or without negligence or other tortious act or omission on the part of any person employed in or about the vessel." p.20 lines 17 to 28

By the said order the Respondents (the Defendents) were further given leave to amend their Defence
30 by adding after the word "negligence" where it occurred the words "or other tortious act or omission." p.20 lines 35-40

9. In his Reasons for Judgment Newton J. said: pp.5-19

"It appears to me that if S.110 be considered without reference to authority, at least two rival interpretations present themselves. One interpretation is in substance that if a vessel causes damage to property of the Commissioners or to works erected, maintained or
40 repairedunder the provisions of the Geelong Harbor Trust Act 1928, then S.110 imposes upon the owner, master or agent of the vessel an absolute liability to compensate the Commissioners for the damage. I shall call this interpretation p.8 line 40 to p.9 line 21

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"the absolute liability interpretation."

The other interpretation is in substance that S.110 imposes liability only where the damage results from a tortious act or omission on the part of some person connected with the vessel, for which that person would be liable to the Commissioners; in such a case S.110 imposes upon the owner, master or agent the same liability. This liability would ordinarily in the case of the owner or agent, and sometimes in the case of the master, be a vicarious liability. I shall call this interpretation "the vicarious liability interpretation". 10

Newton J. then cited Townsville Harbour Board v. Scottish Shire Line Ltd. (1914) 18 C.L.R. 306, in which, he said "the High Court placed the vicarious liability interpretation upon S.196 of the Queensland Harbour Boards Act 1892. Although there are considerable verbal differences between that provision and S.110 of the Geelong Harbor Trust Act 1928 (as amended) I consider that for present purposes those differences are not of importance, and that to adopt the absolute liability interpretation of S.110 would be inconsistent with the decision of the High Court in the Townsville case. 20

(p.9 line 36 to p.10 line 10; Statutes of the State of Queensland 56 Vic. No. 26)

In the Townsville case each of the three members of the Court (Griffith C.J. Barton J. and Isaacs, J.) considered that the majority of the House of Lords in River Wear Commissioners v. Adamson /1877/ 2 A.C. 743 had adopted the vicarious liability interpretation in relation to S.74 of the English Harbours, Docks and Piers Clauses Act 1847, and that the same interpretation should therefore be placed upon S.196 of the Queensland Act, although again there were verbal differences between the two provisions". 30

(10 & 11 Vic C.27)

Later he said, "In particular, their Honours in the Townsville case appear to have thought that the ratio of the decision in Adamson's case was to be found in the judgment of Lord Cairns, who plainly adopted the vicarious liability interpretation". 40

(p.10 line 25 -29)

Later, Newton J. cited Great Western Railway Co. v. Owners of S.S. Mostyn /1928/ A.C. 57, a majority decision of the House of Lords, saying,

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"The majority rejected the view that the ratio of Adamson's case was to be found in the judgment of Lord Cairns, and they also rejected the vicarious liability interpretation of S.74, holding that the absolute liability interpretation was correct, subject only to the general qualification (which they considered was required by Adamson's case and the precise ambit of which may still be open to debate) and there was no liability for damage caused by an abandoned derelict vessel, or (perhaps) for damage caused otherwise than by human agency or caused by an Act of God. The correctness of this view of S.74 was accepted by the House of Lords in Workington Harbour and Dock Board v. Towerfield (Owners) /1951/ A.C.112. It appears to me that there is thus a direct conflict between a decision of the High Court on the one hand, and two decisions of the House of Lords on the other hand, and that in those circumstances it is my duty to follow the decision of the High Court, and to place upon S.110 the vicarious liability interpretation".

p.11 line 21 to p.11 line 43
1877 2AC 743

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Later Newton J. said :

p.11 line 45 - p.12 line 1

"Some independent support for my conclusion that the vicarious liability interpretation should be applied to S.110 may, I think, be found in the history of the provision" (with which he went on to deal).

10. By Notice of Appeal dated the 9th September 1969 the present Appellant appealed to the High Court of Australia against the judgment and order of Newton J. in the Supreme Court of the State of Victoria.

pp.22-25

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11. At the instance of the High Court of Australia a statement of agreed facts was made available to the Court for the purpose of the disposal of the appeal. The agreed facts can be summarized as follows. On the 26th October 1958 the M.V. "Octavian" was securely moored at Refinery Pier Geelong, when in consequence of an unusually severe squall she broke away, and collided with and damaged a Beacon the property of the Appellant. At no time was anyone connected with the M.V. "Octavian" negligent or careless.

pp.25-26

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12. The learned Justices of the High Court gave

pp.26-43

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the following among other reasons for the judgment:

BARWICK C.J. in his dissenting judgment said :

p.30 line 6-14

"This Court, unlike the House of Lords when deciding the meaning of S.74 of the Harbours, Docks and Piers Clauses Act 1847 in Great Western Railway Co. v. Owners of S.S. Mostyn /1928/ A.C.57, is not bound by any authoritative construction of the words of the section it is called upon to construe. It is quite free as far as precedent is concerned to place its own construction upon the section". 10

p.31 line 18 to 27

Later His Honour said :

1877 2AC 743

"But, if I may say so with due respect to those who have and may yet think otherwise, in my opinion, the House of Lords did not decide in River Wear Commissioners v. Adamson (supra) that S.74 was subject to the exception of an act of God causing or contributing to the injury to the Harbour installations. Nor, in my opinion did the House declare that the Act only imposed liability on an owner of a vessel causing injury where someone was liable for that injury at common law". 20

p.34 lines 16-26

Later His Honour further said :

"In my opinion, the words of S.110 are in themselves unambiguous and intractable: and I can find no ground for construing them otherwise than in their plain and unqualified sense, even though the section was passed by the legislature at a time when absolute liability for acts done or omitted was not as familiar a concept as it is today. "The Harbour authority may recover damages from the owner, agent or master of a vessel" which in fact causes injury to the harbour installations". 30

1914 18CLR 306
p.38 line 4
p.39 line 3

Later His Honour further said, with special reference to Townsville Harbour Board v. Scottish Shire Line Ltd. (supra) :-

"In my opinion, the earlier reasoning was plainly erroneous. We should not now accept it. There is, in my opinion, no reason why we should perpetuate error, rather than declare what we consider is the meaning of the statute. 40

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Indeed, there is good reason to act upon our own clear opinion of the statute which we are required to construe".

<u>McTIERNAN and MENZIES JJ.</u> in their joint judgment said:

"In our opinion we should adhere to the construction that has stood for so long", — p.40 lines 2-3

and later said :

10 "... in Australia a decision of this Court has stood without question for over fifty years and has, inevitably, been present to the minds of those responsible for legislation made during this time, including the Act now under consideration. Moreover commerce has, no doubt, been conducted on the footing of the correctness of what this Court has decided". — p.40 lines 17-24

and again later said :

"In this field reform is best left to Parliament by means of amending legislation with prospective
20 effect only". — p.40 lines 31-33

<u>KIT[illegible]</u> relied upon the decision in <u>Towns[illegible] Harbor Board v. Scottish Shire Line Ltd.</u> ([illegible]), and said : — 1914 18CLR 306; p.12 lines 31-39

"In my opin[illegible] the proper course to take is to adhere to th[illegible]nstruction which in this country has been settl[illegible] for so long. A legislature whose intention [illegible] different may easily give effect to it by e[illegible]ting a different provision. The ease with which [illegible]his may be done gives, in
30 my opinion, compellin[illegible] significance to the fact that it has not been [illegible]ne yet".

<u>OWEN J.</u> also dissenting said : — p.43

"I have had the opportunity of reading the judgment prepared by the Chief Justice and am in general agreement with the reasons he has given for allowing the appeal. I agree, therefore, with the order which he proposes".

13. The Appellant submits that the judgment of the High Court of Australia should be reversed,

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and that it should be ordered and declared that "the provisions of S.110 of the Geelong Harbor Trust Act 1928 (as amended by S.10(1) of the Geelong Harbor Trust (Amendment) Act 1951) operate to impose liability on the agent of a vessel for injury caused by such vessel to the property of the Appellant where the collision in which such injury is done occurs as a result of act of God or inevitable accident or without negligence or other tortious act or omission on the part of any person employed in or about the vessel" 10

for the following, among other

REASONS

1. Because the decision in River Wear Commissioners v. Adamson (1877) L.R. 2 App.Cas. 743 was wrong and should not be followed in that the words of S.74 of the Harbours, Docks and Piers Clauses Act 1847 are clear and unambiguous and admit of no implied qualification.

2. Because in any event the only proposition for which River Wear Commissioners v. Adamson (supra) is authority is that S.74 of the Harbours, Docks and Piers Clauses Act, 1847 does not apply to cases where a vessel is derelict or abandoned or otherwise not under the direction or control of human agency. 20

3. Because if and insofar as the High Court of Australia in Townsville Harbour Board v. Scottish Shire Line Ltd. (1914) 18 C.C.R. 306 relied on River We[illegible] Commissioners v. Adamson (supra) for any propo[illegible]her than that set out in 2 above, they were wrong [illegible] 30

4. Because the only proposition for which Townsville Harbour Board v. Scottish Shire Line Ltd. (supra) is authority, is that S.196 of the Harbour Boards Act 1892 does not apply to cases where a vessel is under compulsory pilotage or is otherwise by vis major not under the direction or control of the owner.

5. Because in any event the decision in Townsville Harbour Board v. Scottish Shire Line Ltd. (supra) was wrong and should not be followed in that the words of S.196 of the Harbour Boards Act 1896 are clear and unambiguous and admit of no 40

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implied qualification.

6. Because the words of S.110 of the Geelong Harbour Trust Act 1928 (as amended by S.10(1) of the Geelong Harbour Trust (Amendment) Act 1951) are clear and unambiguous and admit of no implied qualification and that to hold otherwise, on the basis of the Townsville Harbour Board v. Scottish Shire Line Ltd. (supra) decision, which itself was based on a misunderstood ratio decidendi, that of River Wear Commissioners v. Adamson (supra), would be to perpetuate not only error but also uncertainty.

7. Because had the legislature of the State of Victoria had the Townsville Harbour Board v. Scottish Shire Line Ltd. (supra) decision in mind, as being rightly decided, when enacting the Geelong Harbor Trust Act 1928 or the Geelong Harbour Trust (Amendment) Act, 1951, they would have been likely to express in one or other of those Acts the qualification which that decision implied.

8. Because if the contention in reason 4 above is right, the legislature of the State of Victoria must be deemed to have so interpreted the decision in the Townsville Harbour Board v. Scottish Shire Line Ltd. case (supra), and must be deemed to have been taken note of and excluded that decision by enacting S.110(2) of the Geelong Harbour Trust Act 1928 as amended by the Geelong Harbour Trust (Amendment) Act 1951.

9. For the reasons appearing in the reasons for judgment of Barwick C.J. in the High Court.

FRANK WHITWORTH

MICHAEL BURKE-GAFFNEY

18.2.72.

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