judgment no. 2, 1974

IN THE PRIVY COUNCIL No. 15 of 1971

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

BETWEEN:

THE GEELONG HARBOR TRUST COMMISSIONERS
Appellants
(Plaintiffs)

- and -

GIBBS BRIGHT & CO. (A Firm) Respondents
(Defendants)

CASE FOR THE RESPONDENTS

Record

1. The Appellants have brought this appeal with the leave of Her Majesty by and with the advice of Her Privy Council given 17th December 1970. P.44
The appeal is against the judgment of the High Court of Australia dated 17th June 1970, by which P.43
that Court dismissed the appeal of the present (and then) Appellants against the judgment and order of The Honourable Mr. Justice Newton, P.20
sitting in the Supreme Court of Victoria, dated 19th August 1969. His Honour's Order was made on the trial of a preliminary point of law which P.2
was raised in the Respondents' Defence as amended and which was ordered to be heard and disposed of before the trial of the action, under Order 25 Rule 2 of the Rules of the Supreme Court. His Honour's Order disposed of the point of law by P.20 LL18-28
declaring that "the provisions of Section 110 of the Geelong Harbor Trust Act 1928 (as amended by Section 10(1) of the Geelong Harbor Trust (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." The question on this appeal is whether this declaration is correct, as both His Honour Mr. Justice Newton and the High Court of Australia held.

2. S.110 of the Geelong Harbor Trust Act 1928 (as substituted by S.10(1) of the Geelong Harbor Trust (Amendment) Act 1951) is as follows :-

> "S.110(1) The Commissioners may recover damages in any court of competent jurisdiction from the owner master and agent of any vessel for any injury caused by such vessel or by any boatman 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.
>
> (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."

3. The point of law as to the extent of the liability imposed by S.110 in respect of which the declaration set out above was made, arose in this way -

P.1 (i) The Statement of Claim in the action alleged that -

(a) On 26th October 1958 the M.V. "Octavian" caused injury to No.12 Beacon in the Corio Channel in the Port of Geelong, in consequence of which the Appellants were obliged to replace it, at a cost of £2,868.19.5;

(b) No.12 Beacon was the property of or was erected maintained or repaired under the Geelong Harbor Trust Acts; and

(c) The Defendants were the agents for the vessel.

(ii) During the argument of the appeal before the High Court and in response to a request from it, the parties submitted an agreed statement of facts to the Court, in which inter alia it is stated - P.25 LL29-38 P.26 LL1-5

"On 26th October 1958 the m.v. "Octavian" was berthed at Refinery Pier Geelong when she was struck by a wind squall and in consequence broke loose and struck Number 12 Beacon in Corio Channel. The "Octavian" was securely moored prior to breaking adrift and the accident resulted from the extreme severity of the squall coupled with a sudden change in wind direction. The wind force rose almost instantaneously from 30 miles per hour to 79 miles per hour and simultaneously the wind direction changed from west-south-west to west.

This combination of circumstances was unusual in the port of Geelong. At no time was the master or any of the crew of or anyone connected with the m.v. "Octavian" negligent or careless."

(iii) The Amended Defence pleaded (Paragraph 6) that the "Octavian" struck No.12 Beacon and it was accordingly damaged - P.3 LL20-34

(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 Defendants were liable.

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The Amended Defence further pleaded that the agent of a vessel was not rendered liable by S.110 for damage caused in such circumstances, and that the Defendants were accordingly not liable in the action.

4. Mr. Justice Newton held that -

PP.9-12

(i) He was bound by the decision of the High Court of Australia in Townsville Harbour Board v. Scottish Shire Lane Ltd. (1914) 18 C.L.R. 306, a decision on S.196 of the Queensland Harbour Boards Act 1892, a section which His Honour thought was not materially distinguishable from S.110. He so held despite later decisions in a contrary sense by the House of Lords in Great Western Railway Co. v. Owners of S.S. Mostyn (1928) A.C.57 and Workington Harbour & Dock Board v. Owners of the Towerfield (1951) A.C.112.

Generally PP.11-18 Espec. P.11 LL45-47 P.15 LL26-36 P.17 LL14-32

(ii) In view of the particular legislative history of S.110 he would have come to the same conclusion, even if he had not been bound by authority to come to that conclusion.

5. The Appellants appealed from the decision of Mr. Justice Newton to the High Court of Australia. The High Court dismissed their appeal, by a majority (McTierman, Kitto & Menzies J.J., Barwick C.J. and Owen J. dissenting).

PP.39-40, 41-42

The majority held that, although the High Court was not bound to follow the Townsville Harbour Board case, in the light of the fact that that decision had stood unchallenged for over 50 years and was a decision of the highest Australian court, the better course was to follow it and to adopt the construction of S.110 indicated by it for it must have been present to the minds of those responsible for S.110.

PP.26-39, 43

The minority held that the reasoning in the Townsville Harbour Board case should not now be followed by the High Court, for a number of reasons -

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(a) The Townsville Harbour Board case was based on an erroneous view of authority, namely the view that the ratio decidendi of River Wear Commissioners v. Adamson (1877) L.R.2 App.Cas.743 was to be found in the opinion of Lord Cairns. This view was "clearly untenable" since The Mostyn. — P.32 LL13-21, P.33 LL25-28, P.36 LL20-30

(b) The Townsville Harbour Board case was also based partly on the view that Lord Cairns' construction of S.74 of The Harbour, Docks & Piers Clauses Act 1847 was correct. That view (and Lord Cairns' construction of the section) was wrong. The sections (and S.110) unambiguously and intractably imposed absolute liability without any qualification. — P.34 LL16-30

(c) The fact that S.110 was first enacted after the decision in Adamson's case and before the decision in The Mostyn was of little significance since the words of the section were themselves so plain and the decision in Adamson's case was so unclear and unsatisfactory. — P.35 LL25-50, P.36 LL1-12

(d) The view of the minority did not mean the reversal of the actual decision in the Townsville Harbour Board case. The actual decision in that case was irrelevant to the present case because the damage in question there had arisen in a compulsory pilotage situation. This was specifically dealt with in S.110(2). And, in any case, the view of the majority of their Lordships in The Mostyn and of Lord Porter in The Towerfield was sufficient to sustain the decision in the Townsville Harbour Board case, if a ship under compulsory pilotage was equated with a ship over which the owner or master had ceased to have any control. — P.36 LL17-20, LL38-49, P.37 LL1-6

(e) Nor did commercial convenience dictate that the Townsville Harbour Board case should be followed, not least because after The Mostyn the status of that decision must have been doubtful. Uniformity of the law on the subject-matter of S.110 is desirable. But as the law stands the Townsville Harbour — P.37 LL9-47, P.38 LL1-31

Board case is inconsistent with The Mostyn; and it is likely that the House of Lords, no longer bound by its own prior decisions, will disown Adamson's case, even as interpreted in The Mostyn.

P.39 LL4-14 The conclusion of the minority was that S.110 is unqualified in any respect and enables the Appellants to recover from the owner, agent or master damages for any injury in fact caused to its property by the "Octavian". Adamson's case is wrong.

6. It is submitted that on the proper construction of S.110, especially in the light of its legislative history, the order of Mr. Justice Newton is correct.

7. S.110, in the form here material, was introduced into the Geelong Harbor Trust Act 1928 by S.10 of the Geelong Harbor Trust (Amendment) Act 1951, which repealed SS.110 and 111 of the 1928 Act and substituted the subject section for the old S.110: no new section was put in the place of the old S.111. The old S.110 made "the owner of every vessel" (but not the master or agent) "answerable for all trespasses damages spoil or mischief that are done by such vessel or by any boatman or other persons belonging to or employed in or about the same" to the property of the Commissioners and liable to pay "damages satisfaction and compensation" therefor. In the new section S.110 the Commissioners are empowered to "recover damages" .... "for any injury caused" to such property. The old S.111 enabled an owner who paid damages for trespasses, etc. done by boatmen or others to recover over the amount of such damages from such boatmen or others.

8. A provision corresponding to the new S.110 first appeared in Victorian legislation in 1926 when S.153 of the Melbourne Harbor Trust Act 1915 was repealed and a new section inserted in its place identical in terms with the new S.110 save that it related to the Melbourne Harbor Trust and referred to boatman in the singular instead of the plural. This provision has been retained in the

Melbourne Harbor Trust legislation ever since, subject only to very minor amendment. When the new S.153 was introduced into the Melbourne Harbor Trust legislation in 1926, a new S.154 was also introduced (the old one being at the same time repealed) providing - as the old one had done - for recovery over where someone was made liable to pay damages under S.153 for the act of some third person. As has been pointed out, although S.110 of the Geelong Harbor Trust Act as introduced in 1951 corresponded exactly, mutatis mutandis, with S.153 of the Melbourne Harbor Trust Act as introduced in 1926, and although S.111 of the Geelong Harbor Trust Act 1928 was repealed in 1951 (as was S.154 of the Melbourne Harbor Trust Act 1915 in 1926), no such provision as the new S.154 introduced into the Melbourne Harbor Trust Act in 1926 was introduced into the Geelong Harbor Trust Act in 1951, and no such provision has been subsequently introduced. The Geelong Harbor Trust Act has thus since the introduction of the new S.110 in 1951 lacked any provision for recovery over from "guilty" third parties.

9. The Courts below have accepted - and, it is submitted, have correctly accepted - that the new S.110 of the Geelong Harbor Trust Act should receive the same interpretation as the new S.153 of the Melbourne Harbor Trust Act.

10. S.153 is not identical in terms with either S.74 of the Harbour Docks and Piers Clauses Act 1847 (the section at issue in Adamson's case) or with S.196 of the Harbour Boards Act 1892 (the section under consideration in the Townsville Harbour Board case), but any differences favour the Respondents' case (c.f. Kitto J.) and it is convenient to consider this matter first on the basis that the terms of the sections are not materially distinguishable. The significance of the changes in terminology is referred to - and relied on - below. P.41 LL45 P.42 LL1-13

11. It is submitted, on this basis, that when the new S.153 was introduced in 1926, the Victorian Parliament must have intended that it be construed to impose liability only for damage caused by a tortious act or omission by some person connected with the vessel. For in 1926 The Mostyn had not been decided, and, whatever doubts may have been felt in England about what Adamson's case decided, there was a clear and

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unambiguous decision by the High Court of Australia holding that the ratio decidendi of Adamson's case was to be found in the opinion of Lord Cairns and applying that ratio: the Townsville Harbour Board case, a decision made in 1914 and which had thus by 1926 stood - and stood unchallenged - for 12 years. S.153, enacted as it was in the light of Adamson's case and the Townsville Harbour Board case, was therefore enacted in circumstances where Parliament must be taken to have been aware of the opinion of the courts about the meaning born by such a section - the House of Lords and the High Court of Australia both having pronounced on the subject - and can have been in no doubt about what that opinion was.

P.35 LL25-50
P.36 LL1-12

12. The minority in the High Court treats the argument based on legislative history as if it were merely based on the prior decision in Adamson's case, and ignores the effect of the Townsville Harbour Board case. It is respectfully submitted that their rejection of this argument is therefore based on an essential misconception of it.

13. It may be suggested that the minority do not ignore the effect of the Townsville Harbour Board case in this connection, because in another connection they conclude that its view of the ratio of Adamson's case is "clearly untenable" and its acceptance of Lord Cairns' reasoning is contrary to the plain meaning of the unambiguous and intractable words of the section. But it is respectfully submitted that the question is not what view of the ratio of Adamson's case is tenable now, but what view of it was tenable in 1926, before The Mostyn. And not only did all members of the High Court in 1914 decide that the ratio was to be found in Lord Cairns' opinion, but this was a view which was held in 1926/7 by Lord Merrivale (1926 P.46 at 59-60), Lords Justice Bankes, Atkin and Sargant (1927 P.25 at 31-2, 41 and 45-6) and Lords Dunedin and Phillimore (1928 A.C.57 at 76 and 94), although the majority of the House of Lords (Lords Haldane, Shaw and Blancsburgh) disagreed. In 1926, therefore, the High Court's view in the Townsville Harbour Board case of the ratio of Adamson's case was not "clearly untenable", and there was no reason

P.32 LL13-21
P.33 LL25-28
P.36 LL25-30
P.34 LL16-30

for the Victorian Parliament to regard it as doubtful, though it is true that from time to time doubt had been expressed in England as to the effect of the decision in Adamson's case e.g. The Arrow Shipping Company Ltd. v. The Tyne Improvement Commissioners (1894) A.C.508 at 515-6 per Lord Herschell. As for the suggestion that in 1926 the Victorian Parliament might have regarded the proper interpretation of such a section as S.153 as doubtful, because, despite the decisions in Adamson's case and the Townsville Harbour Board case to the contrary, its words unambiguously and intractably imposed absolute liability, without any qualification, it is enough to say that those decisions stood and that "words in an Act of Parliament mean what a majority of a judicial committee of this House say that they mean" per Lord Diplock in Albert v. Motor Insurers' Bureau (1971) 3 W.L.R. 291 at 314. And it was not, in fact, clear in 1926 - and it is not now clear - that the words of S.153 intractably and unambiguously imposed absolute liability, leaving the question of binding authority aside: for the High Court in 1914 regarded Lord Cairns' views as correct, apart from authority, as the minority of the High Court in the instant case point out; and Lord Justice Sargant also thought them correct (1927 P.25 at 42-3). Compare Lord Porter's view (1951 A.C. at 135) that the "procedural" construction of S.74 is one of the two broad constructions of the section which might have been adopted, if the matter were free from authority. There was therefore no reason for the Parliament of Victoria, when in 1926 it enacted S.153 for the first time, to have any doubt about the correctness of the decision in the Townsville Harbour Board case.

P.34 LL16-30

14. This being so, the proper principle of interpretation to apply is that expressed by Griffith C.J. and approved by Lord Halsbury when delivering the judgment of the Privy Council in Webb v. Outrim (1907) A.C.81 at 89: "When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice, is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted

were intended by the legislature to bear the meaning which has been so put upon them". Compare Barras v. Aberdeen Steam Trawling & Fishing Co.Ltd. (1933) A.C.402 in which the House of Lords adopted an interpretation of the word "wreck" in S.1 of the Merchant Shipping (International Labour Conventions) Act 1925 which was determined by the meaning given to the same word, used in the same context, in S.158 of the Merchant Shipping Act 1894 by the majority of the Court of Appeal (Vaughan Williams and Buckley L.JJ. Kennedy L.J. dissenting) in 1913.

15. The rule of construction invoked in Barras' case, is, of course, not absolute e.g. Re Yeovil Glove Co.Ltd. (1965) 1 Ch. at 183, Reg. v. Bow Road Justices (1968) 2 Q.B. at 583 but it provides a presumption and guidance which are, it is submitted, applicable here, for the circumstances calling for its application are stronger than in Barras' case.

16. There is, moreover, an additional circumstance which points to the fact that the Victorian Legislature had the Townsville Harbour Board case in mind when it enacted the new S.153. That circumstance is this: S.153(2) deals with the effect of the fact that the vessel is under compulsory pilotage when the injury in question is caused and provides that this fact shall not relieve the owner, master or agent from liability under S.153(1). The old S.153 did not refer to or in any way deal with the effect of compulsory pilotage. The explanation of the introduction of the new S.153(2) appears to be that the Townsville Harbour Board case itself had concerned injury done by a vessel while under compulsory pilotage (the pilot was negligent) and the High Court had held the owner not to be liable for the damage under the Queensland section. The purpose of the new S.153(2) is therefore, it is submitted, to exclude this particular aspect of the decision in the Townsville Harbour Board case, while the new S.153(1) accepts the general principle of the decision. Indeed, more than this, if the view of the minority of the High Court in the instant case is correct and S.153 (like S.110) imposes absolute liability, unqualified

in any respect, there can be no explanation for the introduction of S.153(2) (or S.110(2)) - except that it was introduced ex abundantia cautelae - - for it would clearly serve no functional purpose. But if this suggestion is made, the whole basis of the prior arguments in favour of the absolute construction of S.153 is destroyed, for these arguments depend on the assertion that, despite the decision in the Townsville Harbour Board case, the Legislature by S.153(1) must be taken to have intended in 1926 unambiguously and intractably to impose absolute liability. How then could there be any call for caution? Or, in other words, how then, if this is so, could there be any need for S.153(2)?

17. Further support for the same conclusion is to be found in S.154. The old S.153 made the owner of every vessel answerable for trespasses damages spoil and mischief done by such vessel or "by any boatmen or other persons belonging to or employed in or about the same" to the Commissioners' property, and obliged the owners, upon conviction of the person committing the same before a court of petty sessions, to pay to the Commissioners compensation (up to £20) as fixed by the court: this remedy was not available where the damage exceeded £20, and the Commissioners were obliged to sue the owner. By the old S.154 "every such boatman or other person so offending ..... shall be answerable for and shall repay all such damages ... to .... such owner". The new S.154 provides that where damages for any injury have been recovered by the Commissioners from the owner, master or agent under S.153, the latter may if the injury was due to the negligence of some other person recover the amount of such damages from that person. Thus under the old S.154 recovery over was provided where the damage was committed by any of the boatmen or other persons belonging to or employed in or about the vessel: under the new S.154 recovery over is provided only where the damage is caused by the negligence of some third person. It is submitted that this limitation on recovery over in the new S.154 (by itself, but especially in the light of the recovery over provisions of the old S.154 which were co-extensive - so far as they went - with the liability imposed by the old S.154 for

damage caused by a third person) strongly suggests that the new S.153 relates only to damage tortiously caused.

18. Although the equivalent of the old S.154 of the Melbourne Harbor Trust Act appeared as the old S.111 in the Geelong Harbor Trust Act, the new S.154 does not appear in the latter Act, S.111 having been repealed in 1951 and not replaced. The explanation probably lies in the enactment in 1949 of the provisions of S.2 of the Wrongs (Tort-feasors) Act 1949 which would enable an owner, master or agent liable under S.110 for injury caused by the negligence or other wrongful act of some third person, to obtain contribution or indemnity from such person. The submissions made above in relation to S.154 therefore apply to the Geelong Harbor Trust Act.

19. The foregoing submissions are made on the basis that the terms of S.110 of the Geelong Harbor Trust Act are materially indistinguishable from those of S.74 of the Harbour Docks and Piers Clauses Act and S.196 of the Queensland Harbor Boards Act (see paragraph 10 above); but there are differences -

(i) The persons named as liable in S.110 are the owner, master and agent of the vessel: in S.74 and S.196 they are the owner, and, where the damage is done (S.74) or the injury is caused (S.196) by his own wilful act or negligence, the master of the vessel.

(ii) S.110 provides that the Commissioners may recover damages for injury caused by a vessel or by persons employed about a vessel; S.74 provides that the owner of a vessel is to be answerable for (and in some cases the master is to be liable to make good) damage done by the vessel or by persons employed about her; S.196 provides that the owner and, in case the injury is caused by his wilful act or negligence, the master are to be answerable in damages for injury done by a vessel or by persons

employed about a vessel.

(iii) Under S.110 recovery may be had in respect of injury "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"; under S.74 it is in respect of damage done "to the harbour, dock or pier, or the quays or works connected therewith"; under S.196 it is in respect of injury done "to any part of the works or property of a Harbor Board".

20. The minority in the High Court regarded these differences as differences in detail and as without significance; Mr. Justice Kitto regarded them as, if of significance, tending in favour of the construction adopted in the Townsville Harbour Board case. P.34 LL13-15 P.41 LL45 P.42 LL1-13

21. It is submitted that the differences are significant and strongly support the conclusion that S.110 does not impose absolute liability. S.74 simply makes the owner answerable for damage done by his vessel. S.110 changes almost every part of this formula, making damages recoverable from the owner for injury caused by his vessel. The change and contrast is significant, for injury (iniuria) in contrast to damage (damnum) is limited to actionable wrong: C.F. Crofter Hand Woven Harris Tweed Co. v. Voitch (1942) A.C.439 at 442 per Lord Simon. For actionable wrong, "damages" are properly in S.110 said to be recoverable, that being a usual remedy (see Isaacs J.'s comment on this word in the Townsville Harbour Board case (1914) 18 C.L.R. at 321): but S.74 "is confined to damage, not damages": The Towerfield (1951) A.C.112 at 161 per Lord Radcliffe, that is to say it covers actual physical damage but not consequential damage. So far at least, then, S.110 must differ in effect from S.74, for it expressly gives a right to "damages". This fact at once makes clear that S.110 is not to be regarded simply as S.74 in another guise and suggests that S.110 is limited to that for which "damages" are an appropriate remedy, namely actionable wrongs: iniuriae. And lastly in S.110 damages are only recoverable where injury is caused by a vessel or person employed in or

about her: it is not enough that damage be done in such a manner. Again it is submitted that the change and contrast are significant, for it introduces the legal notion of cause as a matter of causation into the section, so making each of the terms used in the heart of the section consistent with the others, and inconsistent with the notion that the section imposes an absolute liability for all damage in fact done through the instrumentality of the vessel etc.

22. The view that S.110 is not directed to imposing a new liability not otherwise existing but to providing a convenient means for the recovery of damages to which the Commissioners are otherwise entitled is much easier to sustain than is a comparable view in respect of S.74, because, unlike S.74, S.110 makes damages recoverable from "owner, master, and agent" in all cases to which it applies. S.74 makes only the owner answerable in all cases to which it applies; it makes the master liable where the damage is done through his own wilful act or negligence, but in no other case; and it does not make the agent liable at all. It is easy, therefore, it is submitted, to regard S.110 as directed to the provision of a defendant within the jurisdiction compellable to pay the Commissioners the damages to which they are assumed to be entitled, aliunde, albeit perhaps not from that particular defendant and to regard the section not as directed to extending the circumstances in which they became entitled to damages.

23. Lastly under S.74 recovery may only be had in respect of damage to the "harbour, dock or pier, or the quays or works connected therewith" - but under S.110 recovery may be had inter alia for injury to "the property or effects of the Commissioners". Under S.110 recovery may therefore be had for damage to the Commissioners' personal as well as real property e.g. motor vehicles and launches. And if S.110 imposes absolute liability it would seem that it would provide for recovery -

(i) Where one of the Commissioners' motor vehicles strikes a seaman in one of the public streets of Geelong, for the damage to the vehicle, even though the

accident occurs away from the dock area, and, perhaps, despite the fact that -

(a) the vessel to which the seaman belongs is not in the port of Geelong,

and/or (b) the seaman was not negligent,

and/or (c) the driver of the vehicle was negligent;

(ii) Where one of the Commissioners' launches collides with a vessel, for the damage to the launch, even, perhaps, despite the fact that -

(a) the collision occurs outside the port of Geelong,

and/or (b) the vessel was stationery (e.g. at anchor or tied up to a wharf) and entirely without fault,

and/or (c) the navigation of the launch was negligent.

It is submitted that these results are so surprising that they cannot have been intended, even if public policy may sometimes be thought to dictate the imposition of strict liability for damage to permanent harbour works. But on its express terms S.110 cannot relate only to damage to such works, and, it is submitted, it should accordingly be inferred that the liability the section imposes is not strict.

24. Accordingly it is submitted that the wording of S.110 (and S.153) provides strong confirmation for the conclusion drawn from the legislative history of these sections, namely that they were designed by Parliament to adopt the construction of S.196 of the Queensland Harbours Act enunciated by the High Court in the Townsville Harbour Board case.

25. But, the minority in the High Court argues, it is desirable that there be uniformity of the relevant law in such a matter of maritime interest as the construction of a statute relating to the liability of owner, agent and master for damage to harbour installations, and it would not maintain uniformity to accept and act upon the reasoning in the Townsville Harbour Board case, since

P.38 LL.17-31

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it is clearly at odds with that of the majority of the Lords in The Mostyn. It is respectfully submitted that there might be some force in this argument, if all the relevant statutes were in the same or approximately the same terms. But they are not. S.74 and S.110 expressly differ as to the liability of the agent: and as to the master must also operate differently whatever construction of the sections is adopted; and further S.74 is limited to damage to harbour installations, whereas S.110 extends to all the property and effects of the Commissioners. It is submitted that in these circumstances proper judicial policy does not call for uniformity for, far from indicating that it desires uniformity, the Victorian Parliament has indicated that it desires diversity, by enacting S.110 in terms different from those of S.74: and different words prima facie indicate different meanings.

26. And uniformity is impossible of achievement, even amongst the Australian states. For example, in Queensland S.76 of the Harbours Act (the old S.196 amended to include the vessel's agent and to make him and the owner liable "whether the injury is caused through negligence or not") makes the master liable only if the injury is caused by his wilful act or negligence; it provides that each is answerable in damages for injury done in the manner specified to the works or property of a Harbour Board. But S.13 YA of the New South Wales Marine Services Amendment Act applies to damage done in the manner specified "to any installation, structure, or fixed or movable property" of the Board and makes the owner (but not the agent) and the master, if the damage was occasioned by his negligent act or default, liable to pay the cost of repair and reinstatement. In Tasmania, S.87A of the Marine Act 1921 makes the owner (but not the master or agent) liable to pay the amount of any damage caused in the manner specified to any wharf, work or thing the property of the Board. It is submitted therefore that the terms of the Australian Acts are so different that they can never operate uniformly.

27. It is respectfully submitted therefore that the reasoning of the minority of the High Court is unsatisfactory; and that, had the majority of the Court thought it necessary to examine for themselves what construction should be put on

S.110 rather than basing their decision on the doctrine of stare decisis, while acknowledging that strictly they were not bound, they would have come to the same conclusion as the trial judge, who stated that he would have come to the same conclusion as that to which he came, even if he had not been bound by authority to do so.

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28. But it is not to be overlooked that the majority did base their decision on the conclusion that it was desirable, in their view, to adhere to a decision of the High Court which had stood for over 50 years. This is, it is submitted, a conclusion which it was open for them to reach. It is further submitted that it is a conclusion to which the Privy Council should itself come, if it decides that it is appropriate to examine the question itself de novo. But it is submitted that the appropriate course to follow on this point - the question being one of what is appropriate in local conditions - is not to examine the question de novo, but to accept, or at the very least give very great weight to, the opinion of the majority of the High Court that the decision in the Townsville Harbour Board case should be adhered to. It is submitted therefore that in this case, the proper course is, however the question is approached, to adhere to that decision.

29. Finally, it is submitted that if the reasoning in the Townsville Harbour Board case is rejected as determining the interpretation of S.110, then unless the conclusion of the minority in High Court is accepted in its entirety so that S.110 is held to be "unqualified in any respect, not accepting that such facts as formed the basis of the decision in River Wear Commissioners v. Adamson constitute an exception to the operation of the section," the case raises the question of the ambit of Adamson's case as interpreted in The Mostyn and The Towerfield. For the Agreed Statement of Facts shows that No.12 Beacon was damaged when the "Octavian" which until then was securely moored at Refinery Pier Geelong, broke adrift upon being struck by a wind squall in which the wind force rose almost instantaneously from 30 miles per hour to 79 miles per hour and simultaneously

P.39 LL9-14

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changed direction from West-South-West to West. The accident resulted from the extreme severity of the squall, coupled with the sudden change in wind direction, a combination of circumstances unusual in Geelong. At no time was the master or any of the crew of or anyone connected with the m.v. "Octavian" negligent or careless.

P.29 LL38-40 30. The minority in the High Court says: "It is apparent from this statement that no question of an act of God in fact arises in the action". But it is respectfully submitted that this is not so, for the "act of God" is a mere short way of expressing this proposition: "A common carrier is not liable for any accident as to which he can show that it is due to natural causes, directly and exclusively, without human intervention, and that it could not have been prevented by any amount of foresight and pains and care reasonably to be expected": Nugent v. Smith (1876) 1 C.P.D.423 at 444 per James L.J. It is submitted that the agreed facts fulfil the requirements of the test so laid down, without the necessity of investigating how "unusual" the squall was, for no one was negligent or careless (i.e. all "foresights and pains and care reasonably to be expected" were exercised) and the accident was "due to natural causes, directly and exclusively, without human intervention". At the very least it is clear that it may be established at the trial, if it is not already established, that the accident happened by "act of God".

31. Thus, even on this hypothesis, if Adamson's case (as so interpreted) establishes an exception limited to the case of an abandoned or derelict ship or of a ship not under control, the Appellants will have established one of the elements essential to their success; but if the exception it establishes is an exception extending to damage not "attributable to human agency" or not attributable to "act of God" (per Lord Radcliffe (1951) A.C. at 158, c.f. Lord Dunedin (1928) A.C. at 77), the Respondents must (or, at least, may) succeed in the action on this point. It is submitted that the second is the preferable view of the exception established in Adamson's case as interpreted in The Mostyn and The Towerfield.

The Respondents respectfully submit that this appeal should be dismissed and that the judgments of the Supreme Court of Victoria and the High Court of Australia should be affirmed

for the following among other

REASONS

(1) Because the view of the majority of the High Court that the reasoning in the Townsville Harbour Board case should be adhered to in Australia, that decision having stood unchallenged for over 50 years, should be upheld.

(2) Because S.110(1) of the Geelong Harbor Trust Act, as amended in 1951, should receive the same construction as S.153(1) of the Melbourne Harbor Trust Act, being in the same terms, mutatis mutandis; and, according to the ordinary rules of construction, the Parliament of Victoria in enacting S.153(1) for the first time in 1926 is to be presumed to have adopted the construction of that section indicated by the Townsville Harbour Board case.

(3) Because the terms of S.153(1), insofar as they differ from the terms of antecedent sections in pari materia, confirm that that construction was intended by Parliament; as do the provisions of S.153(2) and S.154.

(4) Because the construction of S.153 and S.110 so as to impose strict liability would lead to absurd and incongruous results, they differing in this respect from at least their English antecedent section (S.74 of the Harbours Docks and Piers Clauses Act 1847).

(5) Because the reasoning of the minority in the High Court is wrong and should not be accepted.

Alternatively, if the foregoing submissions are not accepted, it is respectfully submitted, that this appeal should be allowed only so as to vary the Declaration of the Trial Judge by omitting the words "or without negligence or other tortious act or omission on the part of any person employed in or about the vessel", for the following reason among others -

(6) Because an exception to the strict liability imposed by S.110(1) (on this hypothesis) of injury caused where the collision in which the injury is done occurs as a result of act of God or inevitable accident is established by authority, viz. by Adamson's case as interpreted by The Mostyn.

B. J. SHAW.

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N:

THE GEELONG HARBOR TRUST COMMISSIONERS — Appellants (Plaintiffs)

- and -

GIBBS BRIGHT & CO. (A Firm) — Respondents (Defendants)

CASE FOR THE RESPONDENTS

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