Privy Council Appeal No. 15 of 1971

The Geelong Harbor Trust Commissioners – – – *Appellant*

v.

Gibbs Bright & Co. (A Firm) – – – – – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH FEBRUARY 1974

Present at the Hearing:
LORD DIPLOCK
LORD HODSON
LORD DEVLIN
VISCOUNT DILHORNE
LORD KILBRANDON

[*Delivered by* LORD DIPLOCK]

In their Lordships' view, the real question in this appeal is whether the Judicial Committee of the Privy Council ought to interfere with a majority decision of the High Court of Australia (McTiernan, Kitto and Menzies, JJ.; Barwick C.J. and Owen J. dissenting) that they should follow the *ratio decidendi* of an earlier decision of the High Court, which had stood unchallenged in Australia since 1914, irrespective of whether or not they themselves considered that decision to be wrong.

The relevant facts can be stated briefly.

On 26th October 1958, the M.V. "Octavian" was moored at a wharf in Geelong Harbour. As a result of a sudden squall of unusual violence she was blown from her moorings against a beacon belonging to the Geelong Harbor Board. The damage to the beacon amounted to £2,868.19.5d. The Geelong Harbor Trust Commissioners brought an action in the Supreme Court of Victoria under section 110 of the Geelong Harbor Trust Act, 1928, (as amended) against Gibbs Bright & Co., the agents of the vessel, seeking to recover from them the amount of the damage caused. They pleaded merely the fact of the collision and the resulting damage. They did not allege negligence upon the part of anyone.

Section 110 was in the following terms:—

> "(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."

By their defence, the agents pleaded *inter alia* that the collision between the vessel and the beacon was caused:—

(i) by act of God; alternatively

(ii) by inevitable accident; alternatively

(iii) without negligence on the part of the motor vessel "Octavian" or on the part of any person for whose negligence the defendant is liable.

A question was ordered to be determined as a preliminary question of law. As slightly amended in the course of the hearing in the Supreme Court, it was:

"Whether 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) 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 issue of law which it raises is whether or not the section imposes upon the owner, master or agent of any vessel an absolute liability in all circumstances to compensate the Commissioners for any damage caused by a collision between the vessel and the property of the Commissioners, and, if not, in what circumstances are the owner, master and agent relieved of such liability?

Newton J. rightly considered himself bound by the reasoning of the High Court in *Townsville Harbour Board v. Scottish Shire Line Ltd.* (1914) 18 C.L.R.306. He answered the question in the negative, holding in effect that the liability arose only when the collision was the result of negligence or other tortious act or omission on the part of someone employed in or about the vessel.

On appeal to the High Court, Barwick C.J. and Owen J. considered that the *Townsville* case was plainly wrong. They would have refused to follow it. They would have allowed the appeal and answered the question in the affirmative. McTiernan, Kitto and Menzies JJ. expressed no view as to the correctness of the reasoning or the decision in the *Townsville* case. They were of opinion that it had stood so long unchallenged in Australia that the High Court ought to follow it, whether it was right or wrong. They accordingly dismissed the appeal.

Section 110 of the Geelong Act deals with liability for damage caused by vessels colliding with the property of port authorities. It is in similar terms to corresponding provisions which appear in many statutes in Australia and in England, though there are minor variations of language between one section and another. Upon these differences, however, no distinction has been based in the decided cases. The interpretation of these provisions has given rise to considerable conflict of judicial opinion.

The trouble started with a decision of the House of Lords in *River Wear Commissioners v. Adamson* [1877] 2 A.C.743. A vessel had been driven ashore by storms and abandoned by its crew while endeavouring to make

the port of Sunderland. While derelict she was driven by wind and waves against a pier belonging to the harbour and damaged it. The relevant section under which the harbour authorities sued the owners of the vessel was section 74 of the English Harbours, Docks, and Piers Clauses Act 1847. The terms of this Act, so far as relevant to the instant appeal, are in substance similar to those of the Geelong Act though there are minor differences of wording. The English Act of 1847, however, contains an express exemption of the owner from liability when the vessel is under compulsory pilotage and it imposes no liability on the agent of the vessel. The House of Lords, by a majority of four to one, held as the Court of Appeal had done unanimously, that in the circumstances the owners of the vessel were not liable. Each of their Lordships was of opinion (*a*) that the section imposed upon owners a greater liability for damage caused by their vessels coming in contact with the property of the harbour authorities than would have existed at common law, and (*b*) that, notwithstanding the apparently plain words of the section, Parliament could not have intended to impose upon the owners of such vessels, an absolute liability in every possible circumstance in which a vessel might cause damage to the property of the port authority.

Unfortunately, the *rationes decidendi* vary widely. They are difficult to reconcile with one another, in particular, as respects the circumstances in which the owner is relieved from liability. For present purposes it is, however, only necessary to notice that Lord Cairns L.C. construed the relevant section as imposing liability upon the owner of the vessel only where the damage to the property of the port authority resulted from some actionable wrong upon the part of someone. In his view all it did was to make the owner of the vessel vicariously liable for that other person's tort even though he was not a servant or agent of the owner but a stranger for whose acts or omissions the owner would not have been liable at common law. The speeches of the other members of the House of Lords appeared to place narrower limits upon the exemption of the owner of the vessel from liability under the section.

A valiant attempt to identify the highest common factor in the reasoning of the various speeches in the *River Wear* case was made by the House of Lords in 1927 in *Great Western Railway Company v. Owners of S.S. Mostyn* [1928] A.C.57. In that case a vessel, while navigating under the control of its owners, damaged a cable belonging to the harbour authorities but without negligence on the part of anyone. The minority (Viscount Dunedin and Lord Phillimore) adopted Lord Cairns's construction of section 74 of the English Act of 1847 and would have held the owners to be exempt from liability; but the majority (Viscount Haldane, Lord Shaw of Dunfermline and Lord Blanesburgh) rejected Lord Cairns's construction as constituting the *ratio decidendi* of the majority of the House in the *River Wear* case. They considered the exemption of the owner from liability under the section was much narrower though they were divided as to whether it was limited to cases where the vessel was derelict at the time of the collision or whether it extended to all cases where the collision resulted from an act of God. The Mostyn was not derelict, no act of God was involved, so on either view the owners were liable. The later decision of the House of Lords in *Workington Harbour and Dock Board v. Towerfield* [1951] A.C.112 did not resolve this difference.

In the meantime, however, in Australia there had been the decision of the High Court in the *Townsville* case in 1914. The relevant statute was The Habour Boards Act, 1892, of Queensland. Section 196 was in substantially the same terms as section 74 of the English Act of 1847 but contained no express exemption for compulsory pilotage. In the *Townsville* case the vessel was under compulsory pilotage when owing to

the negligence of the pilot it collided with a wharf belonging to the harbour authority. All three members of the High Court (Griffith C.J., Barton and Isaacs JJ.) considered that the Queensland Act was to be construed in the same way as the English Act of 1847. All three adopted Lord Cairns's construction of the English Act as being the true construction of the Queensland Act. But there their unanimity of reasoning ended, though they concurred in the result. Since compulsory pilotage was an express ground of exemption from liability of the owner under the proviso to section 74 of the English Act of 1847, Lord Cairns's speech in the *River Wear* case threw no direct light on whether on his construction of the section apart from the proviso the owner would have been exempted. Griffith C.J. and Barton J. held that the owner was exempted under Lord Cairns's construction; the former by equating compulsory pilotage with *vis major*, the latter for reasons which are not clearly articulated. Isaacs J. on the other hand was of opinion that under Lord Cairns's construction of the section the owner would have been liable for a collision resulting from the negligence of the compulsory pilot, but that he was relieved of liability under another statute, the Navigation Acts Amendment Act 1911.

The case can hardly be regarded as a satisfactory one and relief from liability when the vessel is under compulsory pilotage has been expressly taken away by subsequent legislation. The *Townsville* case nevertheless remains clear authority in Australia in support of Lord Cairns's construction of sections of this kind which impose upon owners and agents of vessels liability for damage caused by the vessel's coming into contact with the property of the port authority. There is no relevant distinction between the wording of section 196 of the Queensland Act and section 110 (1) of the Geelong Act. If the *Townsville* case is to be followed the preliminary question of law in the instant case must necessarily be answered: "No".

It is true, as Barwick C.J. points out, that after the decision of the House of Lords in *The Mostyn* in 1927 where the majority rejected Lord Cairns's construction of section 74 of the English Act of 1847, there was room for doubt as to the status of the judgments in the *Townsville* case as binding authority in Australia, since it would have been open to the High Court to follow the decision of the House of Lords in *The Mostyn* in preference to its own earlier decision in the *Townsville* case. But although there was a majority in *The Mostyn* for rejecting Lord Cairns's construction there was no clear majority for any one alternative and, in particular, there was no majority in favour of a construction which would make the owner liable for damage caused by act of God. What would have happened if the authority of the *Townsville* case had been challenged in the High Court of Australia shortly after 1927 is, in their Lordships' view, a matter of speculation. The case laid down a rule of construction of general application to sections in Harbour Acts throughout Australia dealing with liability for collision damage caused to harbour installations which had the merit that it was comparatively simple, would generally be easy to apply to the facts of particular cases and was not dependent upon niceties of minor variations in the precise wording of particular Acts. In the result despite the conflict between *The Mostyn* and the *Townsville* case, the latter case remained unchallenged in the Australian Courts for another thirty years until the Defence in the instant case was amended in order to challenge it on 28th February 1969. So for more than fifty years its *ratio decidendi* has formed part of the maritime law of Australia and all of its States.

The High Court of Australia has always possessed the power, which the House of Lords itself only assumed as recently as 1966, to refuse to follow its own previous decisions if it thinks fit. This power however

has been used but sparingly. The decision whether or not to exercise it is, in their Lordships' view, one of legal policy into which wider considerations enter than mere questions of substantive law. The fact that the court considers its previous decision to have been plainly wrong is a prerequisite to discarding it, but it is by no means a decisive reason for doing so.

The law laid down by a judicial decision, even though erroneous, may work in practice to the satisfaction of those who are affected by it, particularly where it concerns the allocation of the burden of unavoidable risks between parties engaged in trade or commerce and their insurers. If it has given general satisfaction and caused no difficulties in practice, this is an important factor to be weighed against the more theoretical interests of legal science in determining whether the law so laid down ought now to be changed by judicial decision. The High Court, sitting regularly in the capitals of the various States which are also the main ports and commercial centres of Australia, is much better qualified than their Lordships are to assess the importance of this factor.

If all that the minority of the High Court had proposed had been to follow the decision of the House of Lords in *The Mostyn* in preference to that of the High Court in the *Townsville* case, the effect of this would not have been to clarify or simplify the law in Australia, but to reduce it to the state of uncertainty in which it still remains in England as respects liability for collision damage to harbour installations resulting from act of God, where the vessel which causes the damage is not derelict. To avoid this, Barwick C.J. and Owen J. would have been in favour of holding that the section imposed upon the owner, master and agent an absolute liability, subject to no exceptions. This would have the merit of keeping the law throughout Australia on this subject simple and even easier of application in practice than the existing rule laid down in the *Townsville* case; but it would indubitably change the law to impose upon owners, masters and agents of vessels in Australian ports a more onerous liability than they or the harbour authorities or their respective insurers had any previous ground for thinking might be incurred by them. No doubt, as the Chief Justice pointed out, it would not be difficult to deal with the extended liability as respects future damage, by appropriate adjustments in the insurance policies of those concerned; but any change made by judicial decision would be also retrospective. It would create in harbour authorities new rights of action in respect of collisions which had resulted from act of God at any time within the six year limitation period before the High Court's decision altered the law, though no such right of action had existed at the time of the collision. Whether there would be many, or even any, cases in this category, is not known. The real difference between the minority and the majority in the High Court was one of principle, *viz.*, whether in a matter of this kind involving liabilities which were created by statute, the law as previously understood ought to be altered by judicial decision with retrospective effect or left to the Parliaments of the States to alter as they thought fit and with prospective effect only. The field of law involved in the instant case is not one in which the Parliament of Victoria has been content to leave the liabilities of those who maintain and those who make use of harbours in Victoria for damage to harbour installations to be adjusted in accordance with those general principles of the unwritten common law which it is the function of the courts to expound and to adapt to changing circumstances and developing concepts of social justice. By intervening to change the common law Parliament has relegated the courts within this field to the lesser role of interpreting the written law that Parliament has enacted; but the power to state authoritatively what the words that Parliament has used mean for the purpose of applying them to particular circumstances necessarily involves a power in the courts to make law even though this be, in the phrase of Justice O. W. Holmes, but interstitially. When for

the first time a court of final instance interprets a written law as bearing one of two or more possible meanings, as the High Court did in the *Townsville* case, the effect of the exercise of its interpretative role is to make law. The issue involved in the application of the doctrine of *stare decisis* to judicial decisions on statutory construction is: at what point as a matter of legal policy should the interpretative role of the court be treated as spent? Ought it to be regarded as exhausted once the court of final instance has expounded the meaning of the statute, as was the practice of the House of Lords in England until it was changed in 1966? Or should it be regarded as continuing so as to entitle the court to correct a previous erroneous interpretation if experience shows that this has caused confusion or difficulty in its practical application?

Under a system of law which admits exceptions to the strict rule of *stare decisis* there is no simple answer to these questions. It depends upon striking a balance between many factors whose relative importance may vary considerably from case to case. If it can be inferred from the terms in which subsequent legislation has been passed that Parliament itself has approved a particular judicial interpretation of words in an earlier statute this would be decisive in both Australia and England in favour of adhering to it. Newton J. in the Supreme Court of Victoria felt able to draw that inference in the instant case, but the majority in the High Court did not rely on this; and in their Lordships' view there is no ground for doing so. So it was for the High Court to form its own conclusion as to where in the particular field of law dealt with by section 110 of the Geelong Act the balance of advantage lay between adhering to an interpretation of the section which had regulated the rights and liabilities of those affected by it for fifty years, and adopting a new interpretation which, though it might well be more consistent with the established rules of statutory construction, might create retrospectively rights of action against owners, masters and agents of vessels which had used Australian harbours. As their Lordships have previously observed, the High Court sitting in Australia is better qualified than their Lordships are to do this.

Apart from those factors which are special to the particular field of law in the instant case, there is however a wider consideration which would make their Lordships reluctant to interfere with the decision of the High Court on a matter of this kind. If the legal process is to retain the confidence of the nation, the extent to which the High Court exercises its undoubted power not to adhere to a previous decision of its own must be consonant with the consensus of opinion of the public, of the elected legislature and of the judiciary as to the proper balance between the respective roles of the legislature and of the judiciary as lawmakers. Even among those nations whose legal system derives from the common law of England, this consensus may vary from country to country and from time to time. It may be influenced by the federal or unitary nature of the constitution and whether it is written or unwritten, by the legislative procedure in Parliament, by the ease with which parliamentary time can be found to effect amendments in the law which concern only a small minority of citizens, by the extent to which Parliament has been in the habit of intervening to reverse judicial decisions by legislation; but most of all by the underlying political philosophy of the particular nation as to the appropriate limits of the lawmaking function of a non-elected judiciary.

The High Court of Australia can best assess the national attitude on matters such as these. Their Lordships would not regard it as proper for them in the instant case to interfere with the decision which the High Court reached to abstain from altering the law in Australia from what it had previously been understood to be. They will humbly advise Her Majesty that this appeal should be dismissed with costs.

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In the Privy Council

THE GEELONG HARBOR TRUST COMMISSIONERS

v.

GIBBS BRIGHT & Co. (A FIRM)

DELIVERED BY
LORD DIPLOCK

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