Foll
Geelong
Harbour Trust
Comrs v
Gibbs Bright &
Co (1970) 122
CLR 504

[HIGH COURT OF AUSTRALIA.]

THE TOWNSVILLE HARBOUR BOARD . APPELLANTS;
PLAINTIFFS,

AND

SCOTTISH SHIRE LINE LIMITED . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *April* 30; *May* 1.

SYDNEY, *May* 15.

Griffith C.J., Barton and Isaacs JJ.

Harbour Board—Injury to breakwater by ship in charge of pilot—Compulsory pilotage—Absence of negligence or default on part of owner—Vis major—Liability of owner—Demurrer—Harbour Boards Act 1892 (*Qd.*) (56 *Vict. No.* 26), *secs.* 196, 197—*Navigation Acts Amendment Act* 1911 (*Qd.*) (2 *Geo. V. No.* 5), *sec.* 2.

The *Harbour Boards Act* 1892, sec. 196, provides that "When any injury is done by a vessel, or by floating timber, or material, or by any person employed about the same, to any part of the works or property of a Harbour Board, the following persons, namely,—(1) the owner of such vessel, floating timber, or material; and, (2) in case the injury is caused through the wilful act or negligence of the master of such vessel, or of the person having charge of such timber or material, such master or person—shall each be answerable in damages to the Board for the whole injury; but so that a Board shall not be entitled by virtue of this section to recover twice for the same cause of action."

Sec. 2 of the *Navigation Acts Amendment Act* 1911 provides as follows:—"(1) No civil remedy shall lie against any pilot in the employment of the Crown as represented by the Government of the State of Queensland for or in respect of any damage or loss occasioned by his negligence or want of skill, or otherwise for any act, default, or omission as a pilot while in charge of any ship or vessel. (2) The Crown as represented by the Government of the State of Queensland shall not be liable for or in respect of any damage or loss occasioned by the negligence or want of skill of any pilot, or otherwise for any act, default, or omission of any pilot while in charge of any ship or vessel."

By the statement of claim in an action brought by a Harbour Board against the owners of a steamship, the plaintiffs alleged that the steamship had injured a wharf belonging to them, and claimed damages for such injury. The defendants in their defence pleaded that the master of the ship was not exempt from pilotage, and was compelled by law to deliver the steamship into the hands of a duly appointed and qualified pilot, who took sole control and charge of the vessel for the purpose of conducting the same into port; that while in charge of the pilot the steamship struck and injured the wharf, and that the injury was due solely to the acts and defaults of the pilot, and was not due or in any way caused by any default, negligence or want of proper care on the part of the vessel, her owners, master or crew.

Held, on demurrer to the defence, that the owners were not liable for the injuries caused to the wharf by their ship while in charge of a compulsory pilot.

By *Griffith* C.J. and *Barton* J.—This immunity exists irrespective of sec. 2 of the *Navigation Acts Amendment Act* 1911.

By *Isaacs* J.—Owing to the provisions of sec. 2 of the last-named Act the owners were relieved of liability.

River Wear Commissioners v. *Adamson*, 2 App. Cas., 743, discussed and applied.

Townsville Harbour Board v. *Scottish Shire Line Ltd.*, (1914) S.R. (Qd.), 95, affirmed.

APPEAL from the Supreme Court of Queensland.

An action was brought by the Townsville Harbour Board against the Scottish Shire Line Ltd.—the plaintiffs alleging that the defendants' steamship *Banffshire* had injured a wharf of the plaintiffs and claiming damages for such injury.

In that action the statement of claim set out that:—

1. The plaintiffs are the Harbour Board for the Harbour of Townsville constituted under the *Harbour Boards Act* 1892 and the *Townsville Harbour Board Acts* 1895 to 1910, and the defendants are the owners of the steamship *Banffshire*.

2. On 4th July 1913 the said steamship *Banffshire* injured the Eastern Breakwater Wharf at Townsville, the property of the Townsville Harbour Board.

3. The extent of such injury as aforesaid amounted to the sum of £235 14s. 1d.

The plaintiffs claim under sec. 196 of the *Harbour Boards Act* 1892 the sum of £235 14s. 1d. as damages.

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The defence stated that:—

1. The defendants admit that the plaintiffs are the Harbour Board for the Harbour of Townsville constituted under the *Harbour Boards Act* 1892 and the *Townsville Harbour Board Acts* 1895-1910.

2. The defendants are and were at all material times the owners of the screw steamship *Banffshire* of 3,719 tons register, a foreign-going vessel of which the master was not at any time exempt from pilotage.

3. On or about 4th July 1913 the master of the said vessel on arriving off the port of Townsville, in the State of Queensland, under and in pursuance of the *Navigation Act of* 1876 and amendments thereof was compelled to receive and did receive on board one George Lewis M. Willoughby, a duly appointed and qualified pilot for the port of Townsville, and was compelled to deliver and give in charge and did deliver and give in charge to the said George Lewis M. Willoughby the said vessel for the purpose of having the same conveyed and conducted into the said port, and the said George Lewis M. Willoughby as such duly appointed and qualified pilot for the said port as aforesaid, and under and in pursuance of the *Navigation Act of* 1876 and amendments thereof, accepted and took over from the said master the sole control and charge of the said vessel for the purpose of conducting the same into the said port.

4. The said vessel, whilst in the charge and under the control of the said George Lewis M. Willoughby as in the last preceding paragraph hereof set forth, came into collision with and struck and injured the Eastern Breakwater Wharf, the property of the plaintiffs, in the port of Townsville in the statement of claim mentioned; and this is the matter complained of in the said statement of claim.

5. The defendants further say that at the time of the said collision and striking of the said wharf by the said vessel as in the last preceding paragraph hereof mentioned, the said vessel was, as hereinbefore mentioned, by compulsion of law in charge of and under the control of the said George Lewis M. Willoughby, a duly appointed and qualified pilot for the port of Townsville, and that the injury to the said wharf complained of was due

solely to the acts or defaults of the said pilot, who had sole charge and control of the said vessel, and was not due to nor in any way caused by any default, negligence or want of proper care on the part of the said vessel, her owners, master or crew, and that the defendants are not liable for the said alleged injury.

The plaintiffs demurred to the defendants' defence as being bad in law on the ground that it disclosed no defence to the claim of the plaintiffs.

The demurrer was heard by the Queensland Full Court, and was overruled: *Townsville Harbour Board* v. *Scottish Shire Line Ltd.* (1).

From this decision the plaintiffs now appealed to the High Court.

Feez K.C. (with him *Hart*), for the appellants. The provisions of the Queensland Acts do not support the defence. The *Harbour Boards Act* 1892 was passed to enable the larger harbours to make ports when it was very important for them to have ports and their own means were very small. It is a public Act making provision for all matters material to such Harbour Boards as the plaintiffs. Where the legislature wish to deal with a negligent act they do so in express words, and not only show that damage was meant, but cover all cases where anyone was really liable at common law.

[ISAACS J. Suppose, for instance, a chain broke and the vessel became unmanageable, and bumped up against the wall: it would not be an act of God.]

Someone has to suffer. The Act says the shipowner is liable. If he could recover from anyone else, well and good.

[GRIFFITH C.J. Is not the principle that put by Lord *Blackburn* in *River Wear Commissioners* v. *Adamson* (2)?]

Sec. 196 of the Queensland Act is not stronger than sec. 74 of the English Act 10 & 11 Vict. c. 27. The English Act does not in any way draw the distinction, as the Queensland Act does, between negligent and wilful acts. That being so, what is the meaning of the word "injury"? If it means, as the appellants submit it does, "damage or loss," here is a distinct statutory

(1) (1914) S.R. (Qd.), 95.

(2) 2 App. Cas., 743, at p. 771.

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enactment of liability. It cannot reasonably be contended that this Act merely re-enacts the common law. The English Act does not include compulsory pilots, and the Queensland Act, which was subsequently passed, expressly left out the part exempting acts done by compulsory pilots.

[ISAACS J. If the decision in the *River Wear Commissioners' Case* (1) is applicable, can you show a cause of action ?]

The plaintiffs, having alleged that on 4th July the steamship *Banffshire* injured the breakwater, come within the exact words of the section. Taking it that the accident was caused through the negligence of a compulsory pilot, the parties have both come here to get a decision on the point as to whether the owners of a ship are liable for an injury which has been caused without any negligence on their part, and as to whether the passing of the Act of 1911 has altered the position of the parties.

[GRIFFITH C.J. You have to show that your statement of claim is good before we can give judgment for you.]

The question resolves itself into this, whether the Court is to put a forced construction on the section or whether it is to interpret it in the ordinary way according to the words contained in it. At the time of the passing of the Act of 1911 there was a cause of action against someone.

[ISAACS J. referred to *Ashby* v. *White* (2).]

The fact of the omission from the Queensland Act of the words which are in the English Act exempting pilots should have great weight with the Court.

[ISAACS J. referred to *Ricket* v. *Metropolitan Railway Co.* (3).]

There is no express exemption from liability where the vessel is in charge of a compulsory pilot. On the pleadings as they stand this accident occurred by human agency, and this is sufficient to distinguish it from *River Wear Commissioners* v. *Adamson* (4).

Stumm K.C. (with him *Real*), for the respondents. Whatever meaning is given to the word "injury" in sec. 196 of the Act, it denotes something more than actual loss; it must mean action-

(1) 2 App. Cas., 743.
(2) 2 Ld. Raym., 938, at p. 955.
(3) L.R. 2 H.L., 175.
(4) 1 Q.B.D., 546.

able damage. The widest meaning that can be attached to the section, so far as the liability of the owners is concerned, can only extend so far as to make them liable where they, or somebody under contract to them, have caused the injury—that is, they or their servants or agents or someone with whom they have voluntarily contracted. The House of Lords decided that this section in the English Act was a procedure section. The respondents are only liable where they are entitled to bring an action against somebody in respect of the injury.

[GRIFFITH C.J. Whether you have a remedy against somebody else is surely not the test.]

It is submitted that the civil remedy against the pilot being abolished by the Act of 1911, the appellants' remedy went with it. The word "injury" in sec. 196 must be given as restricted a meaning as that given to the word "damage" in the English section by the *River Wear Commissioners' Case* (1)—that is, it must be interpreted as "actionable wrong." There is no authority in the Queensland Act as in the English Act to detain the vessel until security is given for the damage done.

[ISAACS J. referred to *The Sinquasi* (2).]

If damage has the wide meaning of "loss" at large and not "actionable wrong," the owners would be liable if the Harbour Commissioners in raising, under sec. 195, at the owners' expense, the owners' ship which had been wrecked, did it so negligently as to injure their own property. It is clear, therefore, that the damage must be actionable damage.

The judgment of Lord *Cairns* L.C. in the *River Wear Commissioners' Case* (3) shows that this section is a procedure section only, and is limited to a case where there already exists without it a right of action against somebody. The true construction is that the owners are only responsible when the master or some person freely chosen by them or their agent is in charge. The English section at first, when speaking of a master, included pilot, but it afterwards excepted pilots: *The Maria* (4). Where there are two meanings that can be put on the words of a section the Court will not put a meaning on them that will produce a

(1) 2 App. Cas., 743.
(2) 5 P.D., 241.
(3) 2 App. Cas., 743, at pp. 750-752.
(4) 1 Wm. Rob., 95, at p. 106.

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manifest injustice, hardship, or inconsistency: *In re Brockelbank*; *Ex parte Dunn & Raeburn* (1); *River Wear Commissioners* v. *Adamson*, *per* Lord *Blackburn* (2). If the line of distinction to be drawn were simply between an act of God and an act of man, the owner would be liable if his ship were taken by a foreign power and used as a battering ram. *The Clan Gordon* (3) shows how far the Court will struggle against the charging of the owner for the act or default of a compulsory pilot. [He also referred to *Conservators of the Thames* v. *Hall* (4).]

Feez K.C., in reply.

Cur. adv. vult.

The following judgments were read:—

May 15.

GRIFFITH C.J. The appellants (plaintiffs) are the Harbour Board duly constituted under the Queensland *Harbour Boards Act* 1892 and local Act. The respondents (defendants) are the owners of the steamship *Banffshire*.

Sec. 196 of the *Harbour Boards Act* 1892 is as follows:—"When any injury is done by a vessel, or by floating timber, or material, or by any person employed about the same, to any part of the works or property of a Harbour Board, the following persons, namely,—(1) the owner of such vessel, floating timber, or material; and, (2) in case the injury is caused through the wilful act or negligence of the master of such vessel, or of the person having charge of such timber or material, such master or person—shall each be answerable in damages to the Board for the whole injury; but so that a Board shall not be entitled by virtue of this section to recover twice for the same cause of action."

By the interpretation clause the term "master" does not include a pilot. Sec. 197 provides that where the owner of a vessel is lawfully required to pay and actually pays any money in respect of injury done to the works or property of a Harbour Board by a master or other person, he shall be entitled to recover the money paid with costs from such master or other person.

(1) 23 Q.B.D., 461, at pp. 462-463.
(2) 2 App. Cas., 743, at p. 764.
(3) 7 P.D., 190.
(4) L.R. 3 C.P., 415.

The statement of claim merely alleges that the defendants' ship *Banffshire* injured a breakwater the property of the plaintiff Board, following the words of sec. 196.

The statement of defence alleges that the *Banffshire* was in charge of a pilot the employment of whom was compulsory under the Queensland law, and that the injury was due solely to the acts or defaults of the pilot.

A demurrer to the defence was overruled by the Supreme Court (1), and this appeal is from their decision. The plaintiffs contend that under sec. 196 the liability of the owners is absolute, and extends to all cases of injuries done by a ship under whatever circumstances.

Secs. 196 and 197 are, as pointed out by the Supreme Court, adopted with some verbal modifications from secs. 74 and 76 of the English *Harbours, Docks and Piers Clauses Act* of 1847, which was under the consideration of the House of Lords in the case of *River Wear Commissioners* v. *Adamson* (2), and the substantial question is whether the present case is governed by that decision, which it becomes necessary to examine with some care.

Sec. 74 of the English Act is as follows:—"The owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber, or by any person employed about the same, to the harbour, dock, or pier, or the quays or works connected therewith, and the master or person having the charge of such vessel or float of timber through whose wilful act or negligence any such damage is done shall also be liable to make good the same; and the undertaker may detain any such vessel or float of timber until sufficient security has been given for the amount of damage done by the same: Provided always, that nothing herein contained shall extend to impose any liability for any such damage upon the owner of any vessel where such vessel shall at the time when such damage is caused be in charge of a duly licensed pilot, whom such owner or master is bound by law to employ and to put his vessel in charge of."

In the *River Wear Commissioners' Case* (2) there was great

(1) (1914) S.R. (Qd.), 95. (2) 2 App. Cas., 743.

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divergence of opinion amongst the learned Lords who decided it. Lord *Cairns* L.C. was of opinion that sec. 74 did not create a new liability for an act or default in respect of which an action did not previously lie against any person, but was what he called a "clause of procedure" only, making the owners answerable as principals for an act or default of the person in charge of the vessel for which that person was already liable at common law. With all respect, it may be suggested that the word "procedure" does not exactly express this idea, but the general meaning of the Lord Chancellor is plain enough. Lord *O'Hagan* did not in terms adopt this argument, but he thought that the language of the section, especially the word "such" in the phrase "master of such vessel," indicated that the section pointed to something done by the act of man or to the act of the person in charge. He relied also upon the exception contained in sec. 74 of the case of a ship in charge of a compulsory pilot. Lord *Blackburn* pointed out that at common law the owner of property abutting on a highway has no remedy for damage done to his property by the property of a person lawfully using the highway unless he can establish that that person is in fault, and that he does not establish that fact by merely showing that he is the owner of the property by which the damage is done. He thought the remedy intended by the Act was that the owners of a ship by which damage is done, who were generally liable (though it was difficult and expensive to prove it), should be made liable without proof either of negligence or of agency on the part of the person guilty of negligence, on merely proving how the mischief was done, and that this was expressed by saying that the owners should be "answerable for any damage done by the vessel or by any person employed about the same" to the harbour. In conclusion, he said he thought that the mischief was the expense of litigation, the remedy that the owners should be liable without proof of how the accident occurred. Lord *Hatherley* concurred in the opinion of Lord *Cairns* with extreme doubt and hesitation. Lord *Gordon* dissented. I think that the proper conclusion to be drawn from the decision is that in the opinion of the majority of the House sec. 74 of the Act did not create a new kind of liability, but merely declared that the owner of a ship should be liable for an injury done by his ship

under such circumstances that someone was liable for it at common law.

In that case the injury was done by a derelict, which was carried by force of wind and wave against the harbour works. The House, therefore, held that the owners were not answerable for the loss, which arose from the act of God or *vis major*.

This interpretation of the English enactment having been given before the passing of the Queensland Act, which adopted it with variations, I think that it must be taken that the Queensland legislature adopted it as interpreted by the House of Lords unless they showed by the variation of language that they intended to exclude that interpretation. The principal variation relied upon by the plaintiffs is that, whereas the English Act says that "the owners shall be answerable for the damage" and the master "shall also be liable" to make it good, the Queensland Act says that the owner and the master or other person through whose wilful act or negligence the injury is caused "shall each be answerable" in damages for the injury. This, they say, suggests a concurrent original liability for the injury rather than a liability to answer for an existing liability of another person.

In my judgment the variation is not sufficient to displace the presumption that the Queensland legislature intended to adopt the English Statute as interpreted by the House of Lords. I think, therefore, that the defendants would not be liable for an injury done by their ship if the immediate cause of the injury were *vis major*.

The defendants also contended that the use of the word "injury" in the Queensland Statute in place of the word "damage" in the English Statute suggested that the idea of a legal and actionable wrong was connoted. I do not accept this argument. I think that the words "when any injury is done by a vessel" and "in case the injury is caused through" show that the word injury is used in the sense of harm or damage and not in any technical sense. The defendants also relied upon the provisions of the Queensland *Navigation Acts Amendment Act of* 1911, which provides that no civil remedy shall lie against a pilot in the employ of the Government of Queensland, or against the Government, in respect of any damage occasioned by his want of skill,

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or otherwise for any act, default or omission of his while in charge of a ship, and contended that the civil remedy against the pilot being taken away, his act could no longer give rise to a cause of action in favour of anyone. If their defence rested on this contention I should be against them, for taking away the civil remedy does not make the act lawful. But in my opinion the employment of a pilot by obligation of law cannot be distinguished in principle from *vis major*. (See *The Maria* (1); *The Halley* (2)). In each case the owner is equally driven or compelled by necessity.

In my judgment, therefore, apart altogether from the Act of 1911, the defendants are not responsible for injury done to the plaintiffs' breakwater by their ship while in charge of a compulsory pilot.

I am disposed to think that the statement of claim itself is bad; but, whether it is or not, the defendants are entitled to judgment.

The appeal must therefore be dismissed.

BARTON J. The question in this appeal arises on demurrer. The plaintiff Board, now appellants, claim from the respondent Company, specifically under sec. 196 of the *Harbour Boards Act* 1892, damages payable by them as the owners of the steamship *Banffshire*, on the naked ground, set out in the statement of claim, that "on 4th July 1913 the said steamship *Banffshire* injured the Eastern Breakwater Wharf at Townsville, the property of the Townsville Harbour Board."

The defence pleaded is that on the day in question the master of the ship, on arriving off the port of Townsville, was compelled to receive on board a duly appointed and qualified pilot for that port, into whose charge he was compelled to deliver the ship to be conducted into the port; that the pilot took over the sole control of the vessel for that purpose; and that the ship was, by compulsion of law, under his control when it struck and injured the wharf. The defendants say that the injury to the wharf was due solely to the act and default of the pilot while in control, and not to any default or negligence of the ship, her owners, master or crew.

(1) 1 Wm. Rob., 95.

(2) L.R. 2 P.C., 193, at p. 201.

It is upon this defence that the demurrer is raised, but the whole record is before the Court, and even if the defence discloses in law no answer, that is immaterial if the claim itself discloses no cause of action.

The principal subject of debate before us was the question, to what extent the case of *River Wear Commissioners* v. *Adamson* (1) was an authority for the construction of secs. 196 and 197 of the Queensland Act. The case arose under secs. 74 and 76 of the *Harbours, Docks and Piers Clauses Act* of 1847 (10 & 11 Vict. c. 27). His Honor has just read the sections of the English Act as well as those of the local Act. There are differences in the phraseology of the respective Statutes, and the effect of these differences was keenly and ably discussed before us. In addition, there was much discussion as to the effect of the decision itself. The House of Lords declined to reverse the decision, in the same case, of the Court of Appeal (2), and it must be admitted that there was considerable diversity in the reasoning of the learned Lords. I do not propose to add much to the analysis which my learned brother the Chief Justice has made of the judgments, but I think that I must agree with him in the conclusion that in the opinion of the majority of the House sec. 74 of the English Act did not create a new kind of remedy, but merely provided that where the injury was done by a ship to the harbour, dock, or pier, under such circumstances as created a liability in some person under the pre-existing law, the owner of the ship should be liable for that injury. Lord *Cairns*, then Lord Chancellor, said (3):—"By the common law, if a pier were injured by a ship sailing against it, the owner might be liable if he was on board and directing the navigation of the ship, or if the ship was navigated by persons for whose negligence he was liable. But the owner would not be liable merely because he was the owner, or without showing that those navigating the vessel were his servants. In my opinion, it was to meet this state of the law that this section was introduced. It proceeds, as it seems to me, upon the assumption that damage has been done of the kind for which compensation can be recovered at common

(1) 2 App. Cas., 743. (2) 1 Q.B.D., 546.
(3) 2 App. Cas., 743, at p. 751.

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law against some person; that is to say, damage occasioned by negligence or wilful misconduct, and not by the act of God. The section relieves the undertakers from the investigation, always a difficult one for them to pursue, whether the fault has been the fault of the owner, or of the charterer, or of the persons in charge. It takes the owner as the person who is always discoverable by means of the register, and it declares that he shall be the person answerable; that is to say, the person who is to answer, or is to be sued for the damage done. It does not absolve the master or crew, if there has been wilful fault or negligence on their part. They, in that case, may be sued as well as the owner, but if the owner is thus in the first instance made to pay the damage where there has been wilful or negligent conduct on the part of the master or crew, the owner may, under the subsequent sections of the Act, recover over against the master or crew."

The differences in the phrasing of the English and the Queensland Acts do not appear to me to displace the effect of his Lordship's reasoning, which, taking his whole judgment together, seems to me, speaking with great respect, to be adequate and convincing, and I feel bound to accept the conclusion expressed in the following words (1):—"I cannot . . . look upon this section of the Statute as intended to create a right to recover damages in cases where, before the Act, there was not a right to recover damages from someone." I cannot find any such difference in the words of the later and local enactment as would lead to the belief that the legislature of Queensland intended by such difference to obviate the interpretation placed upon the English Act by the House of Lords, which must, I think, be taken to have been known to the framers of the local Act. It was contended for the appellant Harbour Board that sec. 196 established a liability upon the mere proof of injury to the wharf by the ship, or by any person, and from any cause. That construction at any rate is, I think, negatived by the judgments of Lord *O'Hagan* and Lord *Blackburn* as well as that of Lord *Cairns*.

The argument founded upon the use in sec. 196 of the Queensland Act of the word "injury," in place of the word "damage"

(1) 2 App. Cas., 743, at p. 750.

as used in sec. 74 of the English Act, seems to me to have no substance. The one word does not of itself suggest a cause of action any more than the other does, if the words are taken by themselves and in their ordinary sense. A comparison of sec. 196 with several other sections of the same Part, such as 183, 185 and 194, tends to show that the word was used in the popular sense, and not in the legal sense connoted by the Latin word "*injuria*." The position of the respondents more properly rests upon the argument that the section of the Queensland Act, like that of the English Act, is open to two constructions: one being that the owner shall pay the damage done by the ship to the pier even if the happening would not at common law give a right of action against anyone, and the other construction, which they urged upon us, being that the section is, as Lord *Cairns* puts it (1), "a clause of procedure only, dealing with the mode in which a right of action for damages already existing shall be asserted," or as it might, as I respectfully suggest, more properly be called, "an evidentiary section, dispensing with proof of certain facts." As between these two constructions, while conceding as to both, in the words of Lord *Blackburn* (2), that "the object of the legislature was to give the owners of harbours, docks, and piers more protection than they had," that object would be secured by giving preference to the meaning which does not involve a wide departure from ordinary principles of justice in legislation, or entail consequences which when considered in their ultimate bearings would be startling.

On the whole, I am of opinion as to this part of the case that the construction on which the statement of claim is founded is not the correct one, and I am more than inclined to think that the statement of claim itself discloses no cause of action.

But there is still the question whether the defence is well pleaded. As to this it is to be observed that sec. 74 of the English Act has a proviso that it shall not extend to impose liability on the owners where the vessel was at the time of damage in charge of a duly licensed pilot whom the owner or master was bound by law to employ. There is no such proviso in the Queensland enactment. But I do not think that on a fair

(1) 2 App. Cas., 743, at p. 751. (2) 2 App. Cas., 743, at p. 768.

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construction the liability, whatever it is, imposed by sec. 196 of that Act upon the owner extends to the case of compulsory pilotage.

If it is a correct view that the portion of the English sec. 74 preceding the proviso was only intended to create a right to recover damages against the owner "in cases where before the Act there was a right to recover damages from someone"—and I think that is a construction which prevails independently of the proviso—then I think, as I have already said, that the Queensland sec. 196 should be construed in the same sense, and I think it does bear that meaning although it lacks the proviso. I do not rely on the provisions of the local *Navigation Act Amendment Act of* 1911, but upon the principle laid down in *The Maria* (1) that the owner is not responsible for the default of a pilot to whom the law compels him to surrender control of his ship. I cannot extract from the local section any trace of an intention to give a new remedy against the owner in that case more than in any other, since my view is that the section aims not at the creation of new remedies but at the facilitation of proof where a right of action against someone already existed. The Chief Justice has suggested that the compulsory surrender to a pilot stands on the same principle as *vis major*. But whether it does or not I cannot think that the section turns the pre-existing exemption into a new liability.

I think, therefore, that the judgment of the Supreme Court is correct: that the defence set up is a good one, and that it is sufficiently pleaded, so that the demurrer cannot be allowed.

I agree, therefore, that the appeal must be dismissed.

ISAACS J. All the learned Judges of the Supreme Court held that an action under sec. 196 of the *Harbour Boards Act of* 1892 against the owner of a ship, which by the negligence of its compulsory pilot damaged a pier, would have lain before, but does not lie since, the passing of the *Navigation Acts Amendment Act of* 1911.

1. *As to the Act of* 1892.—Secs. 196 and 197 are, notwithstanding some important variations from the English Act of 1847,

(1) 1 Wm. Rob., 95.

so clearly modelled upon secs. 74 and 76 of that Statute as to make the case of *River Wear Commissioners* v. *Adamson* (1) a valuable and, as far as it applies, a practically ruling guide to the interpretation of the Queensland Act. Besides the similarity of subject matter and verbiage, the manifest remoulding of some of the language of the legislation in apparent accordance with the prevailing views expressed in the *River Wear Commissioners' Case* (1), attract the long established rule of interpretation that "when an Act of Parliament uses a word which has received a judicial construction it presumably uses it in the same sense" (*per* Lord *Loreburn* L.C. in *North British Railway Co.* v. *Budhill Coal and Sandstone Co.* (2)). The virtual authority in Australia of a decision of the House of Lords makes this rule applicable here. With respect, then, to that case, Mr. *Feez* greatly relied on the judgment of Lord *Gordon*, as favouring his construction that however or by whomsoever damage to the pier was caused, so long only as the vessel was the instrument by which the damage was occasioned, the law made the owner responsible. Lord *Gordon's* opinion, however, did not prevail, although the word in sec. 74 of the English Act was "damage" —not "injury"—and not "damages," which latter term might import the idea of an action.

None of the other learned Lords—whatever their open statement of doubts may be—ultimately cast their judgment as the appellants now would have it.

Lord *Blackburn* stated at length the very powerful considerations in favour of the view he originally held, and summed up the result of those considerations in these words (3):—". . . the mischief being the expense of litigation; the remedy that the owners should be liable without proof of how the accident occurred." But necessarily he did not then hold to that view, or his final judgment would have been the opposite of what he ultimately held. He was still pressed by the hardship of the case and the injustice worked (4), and was thereby led to put what he thought a strain on the words. He was influenced also by the opinion of *Mellish* L.J., and probably by that of Lord

(1) 2 App. Cas., 743.
(2) (1910) A.C., 116, at p. 127.
(3) 2 App. Cas., 743, at p. 769.
(4) 2 App. Cas., 743, at p. 771.

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Cairns, and by the word "injury" in the covering words of the group of sections beginning with sec. 69, though the word "injury" in that collocation seems to me to be but little, if at all, removed from "damage." That last circumstance, however, makes the ultimate conclusion of the learned Lord still stronger —namely, that damage by misfortune or *vis major* was outside the scope of the section.

I do not think Lord *Blackburn's* judgment helps either the appellants or the respondents further. The only judgment which entirely affects the present question is that of Lord *Cairns*. His view may be summarized as follows:—

(i.) That at common law the owner was not liable except for his own conduct or that of his employees—that is, he was not liable for the conduct of others except as their *employer*;

(ii.) That harbour authorities, though able in case of damage to establish wilfulness or negligence on the part of some person actually doing the injury, were frequently in a serious difficulty to prove either the identity of that person or that he was the servant of the owner;

(iii.) That if facts could be established disclosing a common law right of action against someone connected with the vessel, the owner was, by the section, and as a matter of procedure, made answerable, leaving him to recover over against the person in fault;

(iv.) That the compulsory pilot was expressly excepted, but otherwise would have been a person "employed" so as to make the owner answerable;

(v.) That the "act of God" was not to be regarded as an implied exception from the statutory obligation, but, on the true construction of the provision as stated in the third proposition, it did not fall within the section.

His opinion was clear and distinct, and the change in the Queensland Act from "damage" to "injury" makes the view taken by Lord *Cairns* apply *à fortiori* to the local Statute.

There is, however, in sec. 196 of that Statute no exception of a compulsory pilot as in the English Act. True, "master" is defined (sec. 7) so as to exclude him from the operation of par. (2) of sec. 196, but that has no relation to the obligation on the

"owner" in par. (1); and consequently Lord *Cairns'* judgment may be applied to sec. 196 in order to justify the conclusion that apart from any effect of later legislation the owner would be liable for the negligent act or default of the compulsory pilot I agree, therefore, with the view taken by the Supreme Court of Queensland of sec. 196.

But distinctions were adverted to and relied on between the English and Colonial enactments, and altogether in the circumstances I have thought it proper to further examine the language of the section critically, independently of Lord *Cairns'* opinion.

(*a*) The word "*injury*" itself naturally suggests wrongfulness when used in connection with a civil remedy. For instance, Lord *Holt* said "every injury imports a damage:" *Ashby* v. *White* (1). The case of *Ricket* v. *Metropolitan Railway Co.* (2) is a modern example. The context may, of course, alter this primary meaning; and so I come to the next expression.

(*b*) "*By a vessel.*"—This is said to be in the most absolute form, and that nothing more is requisite than to show the vessel collided with the pier.

But the expression "by a ship" or "by a vessel" in connection with a suit for recovery of damages was well known, particularly in Admiralty. The Supreme Court of Queensland has possessed since the coming into operation of the *Colonial Courts of Admiralty Act* 1890 (53 & 54 Vict. c. 27) the jurisdiction of a Court of Admiralty. Even under the *Judicature Act of* 1876 actions for damages for collision were provided for in Order XX., r. 28, and in Appendix C., form No. 10, are given the statement of claim and of defence in such an action. There is found the allegation that "the *Australian* struck the *Katie* on her port side almost amidships cutting her nearly in two," &c. The *Australian* is alleged to have been negligent. And in the defence the *Katie* is charged with default. The later Rules of Court 1900, making more specific rules in Admiralty, still more clearly evidence the idea of the vessel committing the injury. See Schedule 1, Part 1, sec. 1, No. 4, form of writ of summons in Admiralty action *in rem*, "A.B. plaintiff against the Ship X."

The *Vice-Admiralty Courts Act* of 1863, which by Schedule A

(1) 2 Ld. Raym., 938, at p. 955. (2) L.R. 2 H.L., 175.

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included Queensland, gave jurisdiction in certain enumerated matters, including "(6) Claims for damage done *by any ship.*" And by sec. 2 "ship" includes every description of vessel used in navigation not propelled by oars only.

What, then, was the legal signification of "damage done by a ship," or, as in sec. 196 under consideration, "injury done by a vessel"? Lord *Watson* in *Currie* v. *M'Knight* (1), speaking of damage done by want of skill or negligence of persons navigating ships, says:—"It is, in the language of maritime law, attributed to the ship, because the ship in their negligent or unskilful hands is the instrument which causes the damage." So Lord *Herschell* says (2):—"The vessel on which the lien was enforced had, in maritime language, done the damage." Lord *Shand*, says (3) that a certain act "does not make the *Dunlossit* an offending ship in the course of navigation or the instrument which caused the damage." Lord *Selborne* L.C. in *Seward* v. *Vera Cruz* (4) says:—"Damage done by any ship" was a form of expression naturally applicable to that description of damage, maritime damage, as to which, in cases falling within the jurisdiction of the Admiralty Court, the ship was treated as, so to say, *in delicto.* Referring to the case of the *Vera Cruz* (5), Sir *F. Jeune* in *The Swift* (6) observes:—"It appears to me clear that the moment it is said that you may have an action, either *in rem* or *in personam* for damage done by a ship, there is brought in damage done not only to other ships, but to other property. No doubt the fact that damage was done to piers was mainly had in view when actions for damage done by ships to other kinds of property were introduced," &c. See also *The Veritas* (7).

These and other cases establish, then, that "damage by a ship" is a metaphorical expression for damage *wrongfully* done by persons navigating the ships; and the next question is: Who according to the principles of the common law are answerable for that damage?

Clearly, as Lord *Cairns* says, the owner was not liable except

(1) (1897) A.C., 97, at p. 107.
(2) (1897) A.C., 97, at p. 108.
(3) (1897) A.C., 97, at p. 110.
(4) 10 App. Cas., 59, at p. 69.
(5) 10 App. Cas., 59.
(6) (1901) P., 168, at pp. 172, 173.
(7) (1901) P., 304, at p. 311.

as the employer—that is, as the *principal* of the person actually in fault.

He was not so regarded unless the Act or omission complained of was within the scope of the employment of the person in fault. This was trite law: See *The Druid* (1), where Dr. *Lushington* applied the ordinary common law laid down in *M'Manus* v. *Crickett* (2) and other cases. It must be observed that, as recognized at p. 403 and subsequent pages, that doctrine excludes liability for mere wilful injury without direction from or privity of the master.

A recent case to the same effect is *The Tasmania* (3), and I refer particularly to p. 116 and following pages. One observation on p. 117 is of special value. Sir *James Hannen* in referring to an earlier case said :—" Sir *James Mansfield* dwells much on the difficulty of the injured person knowing in whose charge the ship is. 'No person,' he says, 'can be supposed to know of any previous arrangement between the owners and the commissioners.' " I refer to that, not as stating the law, but as indicating a practical difficulty that the legislature must have been aware of when enacting the section.

That difficulty is perhaps still more strongly evidenced by another case, *The Protector* (4), approved by the Privy Council in *Hammond* v. *Rogers*; *The Christiana* (5). In *The Protector* (6) Dr. *Lushington* decided that if the owner claims exemption from the consequences of a negligent act on the ground that it was the act of a compulsory pilot, the owner has the burden of proving it as a defence. His reasons are important. He said (4) :—" It may be accidental, or arise from the fault of the master or mariners, or even from some defect of the vessel itself. How can I then throw the *onus probandi* on the owners of the vessel which has received the damage ? It is almost impossible they could prove it. The accidents in cases of this kind most frequently occur in the darkness of the night; in such cases, then, how is the owner of the suffering vessel to prove that the collision arose from the fault of the master, or the neglect or misconduct

(1) 1 Wm. Rob., 391.
(2) 1 East, 106.
(3) 13 P.D., 110.
(4) 1 Wm. Rob., 45, at p. 57.
(5) 7 Moo. P.C.C., 160, at p. 171.
(6) 1 Wm. Rob., 45.

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of the crew on board the vessel by which the damage is occasioned? He has no means of so doing, and it would, I conceive, be an aggravation of the injury, if this Court were to impede the attainment of his redress, by imposing demands upon him which in the majority of instances he would be wholly unable to satisfy."

This, in my opinion, was the mischief the legislature had in view and set itself to remedy, and therefore the phrase "by a vessel," perfectly well understood as importing wrongful conduct, cannot be looked upon as referring merely to the inanimate structure called a vessel.

But I must add that damage by a vessel did not include the act of a compulsory pilot. That is established by several cases—*The Protector* (1); *The Maria* (2); *The Halley* (3); and *The Hibernian* (4).

The reason for this, however, will best be explained in connection with the next relevant phrase in the section.

(*c*) "*Any person employed about the same.*"—Apparently all the learned Lords in the *River Wear Commissioners' Case* (5) thought that but for the express exception as to a compulsory pilot the owner would by virtue of that section have been answerable for the misconduct of such a pilot. The only words in the English Act which could attract that responsibility were identical with those now under consideration.

There can, of course, be no doubt that a pilot, even a compulsory pilot, is a person "employed" about a ship. That is a common and appropriate term to apply. *The Maria* (2) was decided upon the effect of sec. 6 of the general Pilot Act, which required (6) owners and masters of certain ships to "take on board and employ in the piloting and conducting" their vessels. Lord *Cairns* in the *River Wear Commissioners' Case* (7) speaks of "the employment of a pilot"; so does Lord *O'Hagan* (8), and similarly *per* Lord *Gifford* in *Holman* v. *Irvine Harbour Trustees* (9), and so in *The Hibernian* (10). The Queensland *Navi-*

(1) 1 Wm. Rob., 45.
(2) 1 Wm. Rob., 95.
(3) L.R. 2 P.C., 193.
(4) L.R. 4 P.C., 511.
(5) 2 App. Cas., 743.
(6) 1 Wm. Rob., 95, at p. 108.
(7) 2 App. Cas., 743, at p, 752.
(8) 2 App. Cas., 743, at p. 759.
(9) 4 Ct. of Sess. Cas. (4th ser.), 406.
(10) L.R. 4 P.C., 511, at p. 518.

gation Act 1876, in secs. 110 and 118, uses the same word "employ." But we have to inquire why, seeing that the owner in fact "employs" the pilot even when he is compelled to, he should not at common law be responsible for that pilot's acts. The answer is: Because, notwithstanding the fact of employment by the owner, it is in a sense compulsory—that is, if the owner wishes to navigate in those waters, he has no choice of or control over the person who is to direct the navigation. The exemption is nowhere put on the ground of *vis major*, for the owner need not enter the port; but if he does, and is required by law to employ a certain person and leave that person uncontrolled in respect of the navigation, the fundamental principle on which the doctrine of *respondeat superior* rests is wanting. Dr. *Lushington* says in *The Maria* (1):—"Upon general principle, a man is answerable for the acts of his servants, for injuries done by them to others within the scope of their employment; and why? Because he selects them, and the selection is voluntary. But if a man is compelled to employ another the principle upon which liability depends wholly fails." And further on (2) he says: "the pilot was not their servant" if compulsory. *The Halley* (3) laid down the same rule, holding that the compulsory pilot "was in no sense the servant of the appellants." Again, in *The Hibernian* (4), notwithstanding the fact that the pilot was selected by the captain, yet the circle of permitted selection was too small to permit of free choice, and the same rule applied, and prevented the relation of master and servant arising between the owners and pilot. It is obvious, therefore, that in order to make the owner liable for the compulsory pilot as a "person employed about" the ship, something must be found in the section altering the common law. That is found in the next phrase to which I shall refer, namely, par. (1).

(*d*) *The "owner of such vessel."*—This makes the owner answerable, not as "employer" but as "owner." That is the natural import of the word; and if this meaning were not retained, the greater part of the mischief then existing would have remained untouched. Lord *Cairns* laid stress upon this new character of

(1) 1 Wm. Rob., 95, at p. 106.
(2) 1 Wm. Rob., 95, at pp. 107, 108.
(3) L.R. 2 P.C., 193, at p. 202.
(4) L.R. 4 P.C., 511, at p. 518.

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responsibility. So did Lord *O'Hagan* (1). And once that point is established, the reason of the owner's exemption from liability for the pilot's negligence disappears, the relation of master and servant being no longer essential.

(*e*) *The "wilful act" of the master.*—Not only the master is made liable for the whole injury if he is guilty of a wilful act causing damage, but so is the owner. It is not merely a wilful act within the scope of the master's employment, for which alone the employer would be liable at common law: *The Druid* (2); *Croft* v. *Alison* (3); *Dyer* v. *Munday* (4) and *Lloyd* v. *Grace Smith & Co.* (5).

But the provision does not so limit liability and the wilful act of the ship-master. It is sufficient if he is then employed about the ship. If so the "owner," *as owner*, is liable.

(*f*) "*The whole injury.*"—This expression strengthens the view that the section is a procedure section. I regard it as procedure rather than evidentiary. Where it applies, no evidence to the contrary is of any use or indeed possible.

Until very lately the question of apportionment of damages in Admiralty cases had not been clearly and definitely settled. The Queensland *Judicature Act* 1876, sec. 5, sub-sec. 9, enacted that in certain collision cases Admiralty rules as to damages should prevail. As already observed, collision cases were provided for by Rules of Court. Since 1890 the Supreme Court was a Vice-Admiralty Court. And in 1892 this section was passed.

The doubts as to the apportionment of damages have now been resolved by the House of Lords in the case of the *Owners of the S.S. Devonshire* v. *Owners of the Barge Leslie* (6). The rule is now definitely established that as a general rule joint tortfeasors are in Admiralty treated as at common law and each made liable for all the damage he helps to inflict. Certain special exceptions are preserved by sec. 5 (9) of the *Judicature Act*, but do not affect the present case.

(*g*) "*Cause of action.*"—I regard these words, which end the section, as important. "Cause of action" is not there limited

(1) 2 App. Cas., 743, at p. 760.
(2) 1 Wm. Rob., 391, at pp. 402 *et seq.*
(3) 4 B. & Ald., 590.
(4) (1895) 1 Q.B., 742.
(5) (1912) A.C., 716.
(6) (1912) A.C., 634, see particularly pp. 647, 649, 657.

to the rights given by the section itself. The prohibition against double recovery would, of course, include proceedings against "owner" under par. (1) and against the "master" under par. (2). But it also applies to proceedings against the owner or master under either paragraph, and proceedings at common law against a charterer as the owner *pro hac vice* of the vessel (see *The Tasmania* (1)), or against the compulsory pilot for his own negligence. And the use of that expression "cause of action" does to my mind indicate that the word "injury" in the section means what Lord *Cairns* in the *River Wear Commissioners' Case* (2) calls "damage occasioned by negligence or wilful misconduct."

(*h*) *Sec.* 197.—This section, which gives a right of recovery over, would enable the owner to recover from the charterer or the pilot any moneys the owner was compelled under sec. 196 to pay for their misconduct. See *per* Lord *Cairns* (2). But those persons, as already observed, are not made liable by sec. 196, and it is not in my opinion a just or possible construction of sec. 197 to make it operate against a person not in default without the most express statement to that effect.

The result of this analysis of the Act of 1892 convinces me that Lord *Cairns'* view of the English Act is applicable to the Queensland Statute, and that the owner *quâ* owner is by the latter enactment made liable to the Board for damages caused by the wilful or negligent act of a pilot.

But then the further question arises: How is that position affected by the later legislation?

2. *The Act of* 1911.—This Act (2 Geo. V. No. 5) was in force when the damage complained of was done. It abolishes all civil remedy against the pilot for his act, and also declares that the Government shall not be responsible for it either, though for reasons given by me in *Fowles* v. *Eastern and Australian Steamship Co. Ltd.* (3) I do not think the latter provision necessary. For present purposes, however, the ground is clear with regard to civil remedy against all persons primarily responsible at common law to the Board for such damage.

And there can be no doubt that the existence of a civil remedy

(1) 13 P.D., 110, at p. 118. (2) 2 App. Cas., 743, at p. 751.
(3) 17 C.L.R., 149.

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is part of the essential common law conception of a tort. See *Pollock on Torts*, 9th ed., p. 2; and *Halsbury's Laws of England*, vol. xxvii., pp. 465-467, note (*e*), and authorities there cited. In *Green* v. *Biddle* (1) it is said, "If there be no remedy to recover the possession, the law necessarily presumes a want of right to it."

So here, if there be no civil remedy to recover damages from the pilot, the law necessarily presumes there is a want of right to them from him.

Now, the apex of the position is reached. What is the intent of sec. 196? Is it to guarantee the Board at the owner's risk against the wilful or negligent acts of the vessel and persons employed about it; or is it to guarantee the Board at the owner's risk against complexities of litigation, and difficulties of proving the special relation of employer and employee? If it is the former, the appeal should succeed; but in that case either sec. 197 would enable the owner to defeat the Act of 1911 by enabling him to recover over against the pilot, or else it would act in the most unjust manner by throwing the whole responsibility on an innocent person while allowing the one in fault to go free. That is unthinkable in the absence of the most express language. If the latter alternative is correct, the respondents must succeed. The opinion of Lord *Cairns* (2), which has been adopted by the Supreme Court, is in my opinion the true one to apply here. The mischief to be met is that indicated by him, and as set forth in the passage quoted above from *The Tasmania* (3) and *The Protector* (4), namely, difficulty as to proof of connection between an established cause of action and the owner. But as the act complained of here is manifestly now no cause of action whatever, the basis is absent, and so I agree the appeal must fail.

Appeal dismissed with costs.

Solicitors, for appellants, *Roberts & Roberts* for *Roberts, Leu & Barnett*, Townsville.

Solicitors, for respondents, *Thynne & Macartney* for *Connelly & Suthers*, Townsville.

N. McG.

(1) 8 Wheat., 1, at p. 76.
(2) 2 App. Cas., 743, at pp. 751-752.
(3) 13 P.D., 110.
(4) 1 Wm. Rob., 45