BRITISH COLUMBIA ADMIRALTY DISTRICT

MacMILLAN BLOEDEL LIMITED .....PLAINTIFF;

AND

CANADIAN STEVEDORING CO. LTD., and IAN HAUGHTON ..... } DEFENDANTS.

Ottawa 1969
July 23
Aug. 8

Shipping—Admiralty jurisdiction—Action against person for negligently loading ship—Damage to wharf in harbour—Whether action cognizable—Whether claim for "damage done by a ship"—Admiralty Act, R.S.C. 1952, c. 1, s. 18—Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.), s. 22(1)(a)(iv) and (b).

Plaintiff brought an action on the admiralty side against *H* as supercargo, claiming damages for his alleged negligence while in charge of loading a ship in Port Alberni, British Columbia. The ship rolled from side to side during loading, striking plaintiff's wharf and throwing lumber from her decks on to the wharf, which suffered damage. Plaintiff sued the ship in a second action. A motion by plaintiff that the two actions be tried together was dismissed by Sheppard D.J. *H* then applied to dismiss the action against him for want of jurisdiction.

Held (dismissing the application), the action against *H* was within the admiralty jurisdiction of the court both under paragraph (a)(iv) and

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pararaph (*b*) of s. 22(1) of the *Supreme Court of Judicature (Consolidation) Act, 1925 (U.K.) 15-16 Geo. V*, c. 49, which is Schedule A to our *Admiralty Act*.

1. The action against *H* was for "damage done by a ship" within the meaning of s. 22(1)(*a*)(iv) of the U.K. statute.

2. The former jurisdiction of the High Court of Admiralty of England referred to in s. 22(1)(*b*) of the U.K. statute means the jurisdiction which existed prior to the limitations enacted in the reigns of Richard II and Henry IV, and therefore extends to torts committed in an ocean harbour.

The "Zeta" [1893] A.C. 468, referred to.

Quaere, whether jurisdiction is not also conferred by the first part of s. 18(1) of the *Admiralty Act*, which provides that the court's admiralty jurisdiction "extends to and shall be exercised in respect of all navigable waters...although...within...a county or other judicial district...".

Semble: The Exchequer Court's admiralty jurisdiction with respect to an action *in personam* against a person alleged to be responsible for exercising control over a vessel is not conditional upon such action being joined with an action against the vessel or her owner or operator.

The "Sparrows Point" v. Greater Vancouver Water District et al [1951] S.C.R. 396, discussed. *The "Zeta"* [1893] A.C. 468; *De Lovio v. Boit* 2 Gall. 398, considered.

APPLICATION.

Gerard F. Culhane for defendant Ian Haughton (applicant).

D. Brander Smith for plaintiff.

JACKETT P.:—On July 24, 1969, an application was made before me to dismiss this action as against the defendant, Ian Haughton, for want of jurisdiction.

It is common ground that the application must be disposed of on the assumption that the allegations of fact in the statement of claim are true. Those facts insofar as relevant are that, at a time when the defendant Haughton (who is a "supercargo") was in charge of the loading of a ship known as the *Archangel* and was personally supervising the loading of the cargo, "the ship, which was at that time listing to port, rolled over to starboard then back to port several times, striking the wharf", which belonged to the plaintiff[1], "and throwing lumber off her decks onto the wharf", thereby causing loss, damage and expense. The plaintiff alleges that the damage done to

[1] At Somass, Port Alberni, B.C.—ED.

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the plaintiff's wharf was caused by the negligence of the defendant Haughton and gives particulars of the alleged negligence.

It was made clear during the course of argument that this is *not* an application to dismiss on the ground that the facts alleged disclose no cause of action. I must therefore consider the motion on the assumption that the facts alleged, if established, show a cause of action in negligence against the defendant Haughton for damage to the plaintiff's dock.

This application arises out of a decision rendered by Honourable F. A. Sheppard as a Deputy Judge of this court on an application by the plaintiff that this action and another action which is against the ship, arising out of the same incident, be tried together. In the course of that decision, Sheppard D.J. said:

> The first question is whether or not the second action is within the jurisdiction of this court. If beyond the jurisdiction, the Court being a statutory court "cannot proceed further in the case", *Mulvey vs. Neosho,* (1919) 19 Ex C.R. 1 at p. 6, and therefore cannot consolidate the second action.
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> The plaintiff relies upon the *Admiralty Act,* Schedule A clause IV which confers jurisdiction in "any claim for damage done by a ship" and cites the ship *Sparrows Point* vs. *Greater Vancouver Water District* and *National Harbours Board* [1951] S.C.R. 396. There the vessel let down her anchor to check her way and to avoid hitting the bridge and thereby damaged the plaintiff's water main. Thereupon the plaintiff brought one action against the vessel and the National Harbours Board alleging that the negligence of the National Harbours Board in failing to signal that the bridge was open, caused the anchoring at that spot. The Supreme Court of Canada held that the Admiralty Court had jurisdiction against both parties under Clause IV of the Schedule to the *Admiralty Act* for the following reasons. Kellock J. stated:
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> > "In my opinion, the statute, which *prima facie* confers jurisdiction upon the Admiralty Court in a case of this kind, should be construed so as to affirm the jurisdiction, at least in a case where the ship is a party."
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> and at p. 404:
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> > "On the other hand, all claims arising out of the damage occasioned by the ship should be disposed of in one action so as to avoid the scandal of possible different results if more than one action were tried separately. I therefore think that the statute is to be construed as clothing the Exchequer Court on its Admiralty side with the necessary jurisdiction."
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> Rand J. stated on p. 411:
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> > "As the jurisdiction of the Exchequer Court for this purpose is the Admiralty jurisdiction of the High Court in England, if the

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action had been brought against the Harbour Commission as for an individual tort, the point taken might be formidable; but the cause of action alleged is, strictly, one against joint tort feasors: *The "Koursk"* [1924] p. 140; i.e. both the vessel and the Commission have concerted in directing and controlling the movement of the vessel down the harbour: it was a single act with joint participants. In such a case, a judgment against one merges the cause of action and would be an answer to an action brought against the other in another court."

That case is quite distinguishable.

1. Kellock J. stated that he construed clause IV to intend "to affirm the jurisdiction at least in cases where a ship is a party". The ship is not a party to the second action.

2. Rand J. made merger a basis for jurisdiction and stated: "it was a single act with joint participants. In such a case a judgment against one merges the cause of action".

In the two actions under consolidation the plaintiff alleged damage not caused by a ship but by each of the several defendants, that is for "individual torts" referred to by Rand J.

The cases hold that clause IV applies where a ship is the active cause of damage, where physical injury be done by a ship; where some act of navigation be the cause of the damage; where the ship be the instrument of mischief; *Mulvey vs. Neosho* (supra), *St. Lawrence Transportation Co. vs. Schooner Amedee T.*, [1924] Ex. C.R. 204.

In the latter judgment Maclennan L.J.A. stated at p. 105:

"The question to decide is: was the damage to the scow done by the schooner by any wrongful act or manoeuvre or negligent navigation on her part in such a manner that it could be said that the schooner was the active cause of mischief in what happened to the scow."

In *Toronto Harbour Com'rs* v. *The Ship Robert C. Norton et al* [1964] Ex. C.R. 498, Wells D.J.A. stated at p. 503:

"It is to be observed that in all these cases it is some use or action of the ship in the course of its operation or navigation as a ship which must be the cause of the damage."

The two actions which plaintiff seeks to consolidate are founded on the several negligences of the various defendants and actions in negligence require that the damage be caused by the alleged negligence of the party to be charged. *Thompson* vs. *Ontario Sewer Pipe Co.* (1908) 40 S.C.R. 396. In such actions the damage is not necessarily restricted to that caused by the ship "in the course of its operation and navigation as a ship".

Therefore the plaintiff has not brought the second action within the clause IV of the Schedule to the *Admiralty Act* and not being within clause IV is not within Rule 44.

The conclusion so reached was only one of two grounds upon which Sheppard D.J. relied for dismissing the application. He has since made it clear to the parties and to me that he was only deciding that the plaintiff had failed to show him that the claim was within the court's jurisdiction and that in his view the decision so reached is tentative

and should be reconsidered on an application to dispose of the action whether such an application were to come before him or some other judge. In addition, Sheppard D.J. has indicated that he prefers not to participate in any decision disposing of the action because he has an interest as a shareholder in the plaintiff company.

The provisions of the *Admiralty Act*, R.S.C. 1952, c. 1, upon which the plaintiff relied before me for the jurisdiction of the Court are:

> s. 18(1) The jurisdiction of the Court on its Admiralty side extends to and shall be exercised in respect of all navigable waters, tidal and non-tidal, whether naturally navigable or artificially made so, and although such waters are within the body of a county or other judicial district, and, generally, such jurisdiction shall, subject to the provisions of this Act, be over the like places, persons, matters and things as the Admiralty jurisdiction now possessed by the High Court of Justice in England, whether existing by virtue of any statute or otherwise, and be exercised by the Court in like manner and to as full an extent as by such High Court.
>
> (2) Without restricting the generality of subsection (1) of this section, and subject to the provisions of subsection (3) thereof, section 22 of the *Supreme Court of Judicature (Consolidation) Act, 1925,* of the Parliament of the United Kingdom, which is Schedule A to this Act, shall, in so far as it can, apply to and be applied by the Court, *mutatis mutandis,* as if that section of that Act had been by this Act re-enacted, with the word "Canada" substituted for the word "England", the words "Governor in Council" substituted for "His Majesty in Council", the words "Canada Shipping Act" (with the proper references to years of enactment and sections) substituted, except with relation to mortgages, for the words "Merchant Shipping Act" (and any equivalent references to years of enactment and sections) and with the words "or other judicial district" added to the words "body of a county" wherever in such section 22 of such *Supreme Court of Judicature (Consolidation) Act, 1925,* any of the indicated words of that Act appear
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> . . .
>
> SCHEDULE A
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> *Section twenty-two of Chapter forty-nine of 15-16 Geo. V of the Parliament of the United Kingdom, being the Supreme Court of Judicature (Consolidation) Act, 1925.*
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> 22. (1) The High Court shall, in relation *to Admiralty matters,* have the following jurisdiction (in this Act referred to as "admiralty jurisdiction") that is to say:
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> (*a*) Jurisdiction to hear and determine any of the following questions or claims
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> . . .
>
> (iv) Any claim for damage done by a ship;
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> . . .
>
> (*b*) Any other jurisdiction formerly vested in the High Court of Admiralty;

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Counsel for the plaintiff bases the Court's jurisdiction in this case as falling

(a) within section 22(1)(*a*)(iv) of the *Judicature (Consolidation) Act, 1925*, as being a "claim for damage done by a ship", and

(b) within section 22(1)(*b*) of the 1925 Act as being a claim falling within "jurisdiction formerly vested in the High Court of Admiralty".

The latter ground was referred to by counsel as being based on the "inherent jurisdiction" of the Court[2].

The first of these grounds is that already considered by Sheppard D.J. The second was apparently not advanced before him. It may be more convenient to deal with the second ground first as it necessarily involves an examination of the history of admiralty jurisdiction in order to discover the jurisdiction "formerly" vested in the High Court of Admiralty.

Much has been said about the history of the High Court of Admiralty and its jurisdiction. Most of it is controversial and there is little that can be said that is not debatable. In what follows, therefore, while, for simplicity and conciseness, I will generally express my conclusions in unqualified terms, it must be borne in mind that I am aware that there is usually another view of any particular aspect of the matter to which I refer and that I am merely setting out, with regard to each aspect of the matter, the view that seems to me, on the best consideration that I can give the matter, to be the better one.

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[2] Another possible ground which was not argued and on which I come to no conclusion, is that this Court has jurisdiction in this case by virtue of subsection (1) of section 18 of the *Admiralty Act*, which provides that the jurisdiction of this Court on its Admiralty side extends to and shall be exercised in respect of all navigable waters "although such waters are within the body of a county or other judicial district". If one reaches the conclusion, as I do in these reasons, that the jurisdiction of the High Court of Admiralty originally extended over torts committed on the high seas and that, until cut down by the statutes of Richard II and Henry IV, this included torts committed in ocean ports, the obvious purpose of these words in section 18(1) would seem to be to restore to the Canadian successor of the High Court of Admiralty jurisdiction over torts committed on the high seas within the body of a county or other judicial district. Before reaching a final view on these words alone, however, a conclusion would have to be reached as to the effect of the latter half of section 18(1).

The High Court of Admiralty was a court whose origins probably went back as far as the reign of Richard I. It had *inter alia* jurisdiction over torts committed on the high seas and, while the limit of the high seas for this purpose is not too clear, it would seem that this jurisdiction extended to torts in ports within the ebb and flow of the tide. See *De Lovio v. Boit*[3] per Story J., and *The "Zeta"*[4] per Herschell L.C. at pp. 480 *et seq.*

By two statutes in the reign of Richard II and one in the reign of Henry IV, the Admiralty Court was prohibited from taking jurisdiction with regard to anything done "within the realm" and restricted to taking jurisdiction over things "done upon the sea" and was further prohibited from taking jurisdiction in *inter alia* "quereles" arising within the bodies of counties "as well by land as by water". As interpreted by the English courts, these statutes prohibited the Admiralty Court *inter alia* from taking jurisdiction over torts in ports even within the ebb and flow of the tide. See *De Lovio v. Boit* (*supra*).

By two statutes, one passed in 1840 and the other in 1861, the jurisdiction so taken away from the High Court of Admiralty was partially restored.

For purposes of the present discussion, reference need only be made to two of the provisions enacted in 1840 and 1861. In 1840, by c. 65 of the Imperial Statutes of that year, it was provided, *inter alia,* that the High Court of Admiralty "shall have jurisdiction to decide all claims and demands whatsoever in the nature of...damages received by any ship or sea going vessel...whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the...damage received, in respect of which such claim is made". In 1861, by c. 10 of the Imperial Statutes of that year, it was provided *inter alia* that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship".

The jurisdiction of the High Court of Admiralty remained substantially unchanged by statute from 1861 to 1875.

By the *Supreme Court of Judicature Act, 1873,* (c. 66) which came into force November 1, 1875, the jurisdiction

[3] 2 Gall 398

[4] [1893] A C 468.

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of the High Court of Admiralty was transferred to the High Court of Justice that was created by that Act. The High Court was divided into divisions, one of which was called the Probate Divorce and Admiralty Division and dealt *inter alia* with all matters that would have been within the exclusive cognizance of the High Court of Admiralty if the 1873 Act had not been passed. While this statute conferred no new Admiralty jurisdiction on the High Court, a judge of the Probate Divorce and Admiralty Division could, under that statute, exercise any jurisdiction conferred on the High Court so that there was, thereafter, no limitation on the English Court exercising Admiralty jurisdiction insofar as jurisdiction in a cause was vested in a superior court. See *Bow, McLachlan & Co. et al v. The Ship "Camosun"*[5] per Lord Gorell.

This was the situation when the provision contained in Schedule A of our *Admiralty Act* was enacted in England in 1925.

The *Supreme Court of Judicature (Consolidation) Act, 1925,* was enacted by c. 49 of the Imperial Statutes of that year to consolidate the *Judicature Act, 1873 to 1910,* and other enactments relating to the Supreme Court of Judicature in England and the administration of justice therein. Section 22(1) of this Act which is quoted, in part, above, sets out the "admiralty jurisdiction" of the High Court. Paragraph (*a*) of section 22(1) apparently consolidates the 1840 and 1861 jurisdiction provisions (I have not made a textual comparison to satisfy myself that there are no additions) and paragraphs (*b*) and (*c*) then provide for the court having

> (i) any other jurisdiction "formerly" vested in the High Court of Admiralty, and
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> (ii) all admiralty jurisdiction conferred by unrepealed statutes passed since 1873.

The first question that has to be decided is whether section 22(1)(*b*) is so worded as to extend to any jurisdiction that the High Court of Admiralty possessed at any time in the past or whether it refers only to jurisdiction vested in the court at the time when its jurisdiction was transferred to the High Court.

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[5] [1909] A.C. 597 at 608.

My conclusion is that section 22(1)(*b*) when it was enacted in 1925 was intended to sweep within the concept of the "admiralty jurisdiction" of the High Court any jurisdiction which at any time in the past was vested in the High Court of Admiralty.

In the first place, that view is the view that flows from the plain ordinary meaning of the word "formerly" in the context of section 22(1)(*b*) enacted in 1925 with reference to a court that ceased to exist in 1875.

In the second place, it is apparent from section 22(1)(*c*) that Parliament had in mind how to identify a particular point of time, and it is therefore a fair inference that if Parliament had intended to refer to the situation as it was in 1873, it would have done so.

Finally, the background against which the legislation was enacted helps one to reach a view as to what was meant. From early times until well into the nineteenth century there was a very strenuous contest between the High Court of Admiralty and the common law courts for jurisdiction and, when Parliament grudgingly gave back jurisdiction to the High Court of Admiralty as it did in 1840 and 1861, it did so in as restricted a manner as was consistent with permitting access to the Admiralty procedures in the cases where that was obviously expedient, apparently because it was deemed wise to encourage resort to the common law courts wherever possible. In 1925, however, there was only one English court in the picture and the apparent purpose of section 22(1), and particularly section 22(1)(*b*), was to make sure that that English court would have all the Admiralty jurisdiction that had ever been exercised in England.

I should say that I have not been referred to, and I have not found, any judicial decision touching on the interpretation of section 22(1)(*b*). This, however, is not as surprising as it might otherwise be in that, the old rivalry between courts having disappeared, it has probably been of no more than academic importance in England to decide a question such as the one arising here, namely whether a tort committed in an ocean harbour should be categorized as falling within Admiralty jurisdiction or not.

My conclusion is, therefore, that section 22(1)(*b*) extends to any matter that was within the jurisdiction of the High

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Court of Admiralty before the enactment of the Statutes of Richard II and Henry IV referred to above; and that, as that jurisdiction extended to torts committed in an ocean harbour (a conclusion that I do not pretend to be able to investigate as carefully as I should like in the time available), the jurisdiction of this court extends to such a tort. I have, therefore, come to the conclusion, not without some hesitation, that this court has jurisdiction over the plaintiffs' claim against the defendant Haughton as that claim is pleaded by the portion of the statement of claim summarized above[6].

I turn now to the question whether the claim in question falls within the words "claim for damage done by a ship" as used in section 22(1)(*a*)(iv) of the 1925 Act. These words, it will be recalled, had their origin in section 7 of *The Admiralty Court Act, 1861,* which gave the High Court of Admiralty jurisdiction over "any claim for damage done by any ship".

Before discussing the application of these words to the claim as pleaded against the defendant Haughton, I propose to refer to some of the authorities.

By 1893, it was established that the words "damage done by a ship" applied to "damage done by a ship to persons and things other than ships". See *The "Zeta"* (*supra*) per Lord Herschell L.C. at p. 478.

In *The Theta*[7], it was held by Bruce J. that, while the word "damage" in section 7 of the 1861 Act included personal injuries, injuries sustained by a sailor falling down a hold in a ship while crossing it to go to his own ship were not "done" by the ship that he was crossing. The words "damage done by a ship" in the view expressed by Bruce J. applied only where the ship was the "active cause". As he saw it, another way of saying the same thing was: "done by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument"[8].

In *Currie v. M'Knight*[9], the appellant had a judgment against the registered owner of a ship for damage to his

[6] I am of course only deciding that a claim has been pleaded within the court's jurisdiction. I am not necessarily deciding that the whole of the statement of claim falls within such jurisdiction.

[7] [1894] P.D. 280.

[8] These expressions were quoted from *The Vera Cruz,* 9 P.D. 96.

[9] [1897] A.C. 97.

ship caused when it was cut loose by the crew of the judgment debtors' ship in order to enable that ship to escape from a gale of exceptional violence. The question to be decided was whether the appellant had a maritime lien and was entitled to the proceeds of a judicial sale of the judgment debtors' ship in preference to a mortgagee. The case decided that there was only a maritime lien for damage "done by the ship" and that, on the facts, the appellant's judgment was not for damage done by the ship. Lord Halsbury L.C. said, at p. 101, "...in order to establish the liability of the ship itself to the maritime lien claimed some act of navigation of the ship itself should either mediately or immediately be the cause of the damage". Lord Watson said at p. 106 "I think it is of the essence of the rule that the damage in respect of which a maritime lien is admitted must be either the direct result or the natural consequences of a wrongful act or manœuvre of the ship to which it attaches". Lord Herschell said at p. 108 that, in all cases where a maritime lien was found to exist "the ground of the decision was...that the vessel... had in maritime language, done the damage". At p. 110, Lord Shand speaks as though the test were that the vessel was "an offending ship in the course of navigation, or the instrument which caused the damage".

In *Toronto Harbour Com'rs v. The Ship Robert C. Norton et al*[10], Wells D.J.A. held that damage done by the handling of cargo after it was unloaded from a ship was not damage "done by a ship".

In *Anglo Canadian Timber Products Ltd v. Gulf of Georgia Towing Co. et al.*[11], Norris D.J.A. held that damage to a wharf caused by a barge listing during loading was "damage done by a ship" for which the owner and master of the tug who docked the barge without letting the owner of the berth know that it had been damaged and that it was dangerous to load it could be sued in this court.

I have left to the end of this review the decision on which the plaintiff mainly relies, namely *The Ship "Sparrows Point" vs Greater Vancouver Water District et al.*[12]. In that case, the owner of water mains that were damaged when a ship let go her anchor sued not only the ship but

[10] [1964] Ex. C.R. 498.
[11] [1966] Ex. C.R. 653.
[12] [1951] S.C.R. 396.

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the operator of a lift bridge for negligently causing the ship to let go her anchor where she did. The jurisdiction of this court to entertain the action against the bridge operator was challenged and it was held that the court has such jurisdiction. Kellock J., who delivered the judgment of the majority of the court, said that, in his opinion the statute, which *prima facie* confers jurisdiction upon the Admiralty Court in a case of this kind "should be construed so as to affirm the jurisdiction at least in a case where the ship is a party". He then discussed the cases concerning claims against pilots, which held that they could not be sued under section 7 of the 1861 Act, throwing some doubt on their soundness, and concluded by saying that all claims arising out of the damage occasioned by the ship should be disposed of in one action so as to avoid the scandal of possible different results if more than one action were tried separately and that the statute was to be construed as clothing the Exchequer Court with jurisdiction. Rand J. after discussing the problem, expresses his conclusion, as I understand him, in the following passage:

> The claim is for damage done "by a ship"; the remedies *in personam* are against persons responsible for the act of the ship; and I interpret the language of the statute to permit a joinder in an action properly brought against one party of other participants in the joint wrong.

In my opinion, there is no doubt that the claim as framed in this case is for damage "done by a ship" by "striking" the wharf and by "throwing lumber off her decks onto the wharf" and that it comes within the most restrictive of the various statements that have been made as to the effect of section 7 of the 1861 Act when those statements are considered in their context. The function of a freight vessel is to receive goods, carry them and discharge them. During all of the time that it is performing such functions, a ship is afloat in water and must be so managed and controlled as to make possible the achievement of her function. It is just as important so to manage a vessel when she is discharging or receiving goods that she will remain stable and not roll over as it is so to manage her when she is moving from one point to another that she will safely reach her destination. If as a result of a failure of those in charge of discharging or loading a vessel, the vessel breaks from her moorings and strikes

the wharf or otherwise does damage, the damage is, in my view, "done by a ship" in exactly the same sense as is damage done by a ship in collision. In my view there could be no question that an action in this case against the ship itself or its operating owner would clearly fall within section 22(1)(*b*) of the 1925 statute.

If this is so, there seems to be no reason why an action against the person who is alleged to have been in charge of loading the vessel would not equally fall within that provision. As I read the allegations in the statement of claim, the plaintiff is asserting that the defendant Haughton was, in fact, in charge of the loading of the vessel and was therefore the person responsible for taking reasonable steps to ensure that the ship would not, during loading, roll over and injure the property of others. In effect, according to the allegation, this defendant was in the same position as the master or the chief officer would have been if one of them had been in charge of the loading of the vessel.

On that view of the matter, which is not the view that was apparently put to Sheppard D.J., I do not have to reach a conclusion as to whether the jurisdiction of this court according to the decision of the Supreme Court of Canada in *The "Sparrows Point"* (*supra*) is subject to the limitations that Sheppard D.J. finds in the judgments in that case. I do not read either judgment in that case as finally deciding that the jurisdiction in an action *in personam* against a person who is alleged to be responsible for exercising a control over the vessel is conditional upon such action being joined with an action against the vessel or her owner or operator. It does seem to me that, as a matter of principle, if the court has jurisdiction when the two actions are joined it must be because it has been vested with jurisdiction over each action taken by itself.

The application is dismissed with costs.