HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND HAYNE JJ

ANTHONY MORRISON APPELLANT

AND

HAROLD ANTHONY PEACOCK & ANOR RESPONDENTS

Morrison v Peacock [2002] HCA 44
9 October 2002
S184/2001

ORDER

1. *Appeal allowed.*

2. *Set aside order of the New South Wales Court of Criminal Appeal made on 30 October 2000 in so far as it ordered that question (i)(a) of the questions reserved be answered "Yes", and in its place order that question (i)(a) be answered as follows:*

   Question (i)(a):

   As a matter of law can the wear and tear in consequence of which oil escapes come within the word "damage" under s 8 of the Marine Pollution Act *1987 (NSW)?*

   Answer to question (i)(a):

   In that section, "damage" means a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some event, whether the event was external or internal to the ship or its equipment. The Court considers the question otherwise not appropriate to answer.

On appeal from the Supreme Court of New South Wales

Representation:

R J Ellicott QC with A L Hill for the appellant (instructed by Abbott Tout)

C G Gee QC with G J Nell for the respondents (instructed by Ebsworth & Ebsworth)

Intervener:

R J Meadows QC, Solicitor-General for the State of Western Australia with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for the State of Western Australia)

CATCHWORDS

Morrison v Peacock

Environmental law – Marine pollution – Discharge of oil from ship – Exception where discharge in consequence of damage other than intentional damage.

Statutes – Construction – Damage – Damage to the ship or its equipment – Wear and tear.

Words and phrases – "damage".

Marine Pollution Act 1987 (NSW), ss 7, 8, 8(2)(b).
International Convention for the Prevention of Pollution from Ships 1973, Annex 1, reg 11.

1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND HAYNE JJ. The Land and Environment Court of New South Wales stated a case to the Court of Criminal Appeal of that State asking inter alia:

> "(i)(a) As a matter of law can the wear and tear in consequence of which oil escapes come within the word 'damage' under s 8 of the *Marine Pollution Act* 1987?"

2 The Court of Criminal Appeal (Spigelman CJ, Wood CJ at CL and Barr J) answered the question in the affirmative[1].

3 In our opinion, the question stated did not formulate the issue that arose upon the facts of the case. The true issue was not whether wear and tear that results in the escape of oil is "damage" under s 8 of the *Marine Pollution Act* 1987 (NSW) ("the Act"). It was whether, upon the facts of the case, the expression "damage ... to the ship or its equipment" in s 8 covered the rupture of the ship's hose that was brought about by the abrading and chafing of the hose over a period of time. In our opinion the expression "damage ... to the ship or its equipment" in s 8 did not cover the rupture of the ship's hose in the present case.

The material facts

4 In December 1996, the vessel *Sitka II* was using a crane to unload cargo at a jetty on Lord Howe Island. During the unloading, an hydraulic hose that was fitted to the crane ruptured. The rupture caused 15 litres of oil to escape. Five litres went into the sea. The hose ruptured because it turned in excess of 400 degrees. The turning caused a sawing motion at the base of a steel sleeve in the crane column. Because the sleeve was heavily corroded and rough, the turning caused abrasion and chafing of the hose and its eventual rupture.

5 The appellant prosecuted the respondents in the Land and Environment Court alleging that the discharge of oil was a breach of s 8(1) of the Act. The first respondent was the master of the *Sitka II*; the second respondent was its owner.

6 Section 8(1) of the Act provides:

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1 *Morrison v Peacock* (2000) 50 NSWLR 178.

"Subject to subsections (2) and (4), if any discharge of oil or of an oily mixture occurs from a ship into State waters, the master and the owner of the ship, and any other person whose act caused the discharge, are each guilty of an offence punishable, upon conviction, by a fine ..."

7 "State waters" means the territorial sea adjacent to the State of New South Wales, the sea on the landward side of the territorial sea that is not within the limits of the State, and waters within the limits of the State that are prescribed by regulation for the purpose of the definition[2].

8 The respondents asserted that s 8(2)(b) of the Act gave them a defence to the charge. It states:

"Subsection (1) does not apply to the discharge of oil or of an oily mixture from a ship:

...

(b) if the oil or oily mixture, as the case may be, escaped from the ship in consequence of damage, other than intentional damage, to the ship or its equipment, and all reasonable precautions were taken after the occurrence of the damage or the discovery of the discharge for the purpose of preventing or minimising the escape of oil or oily mixture, as the case may be ..."

9 The respondents contended that the oil had escaped in consequence of damage to the ship's equipment. They asserted that the rupture of the hose constituted damage to the ship's crane, that the oil had escaped because of the damage and that the damage was not intentional damage. Section 8(3) of the Act declares that damage to a ship or to its equipment is to be taken to be intentional damage if, and only if, the damage arose in circumstances in which the master or owner of the ship:

"(a) acted with intent to cause the damage, or

(b) acted recklessly and with knowledge that damage would probably result."

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2 Section 3(1).

10 The respondents bore the onus of proving the matters referred to in s 8(2)(b). Section 8(6) declares:

> "In proceedings for an offence against subsection (1) in relation to a ship, it is sufficient for the prosecution to allege and prove that a discharge of oil or of an oily mixture occurred from the ship into State waters, but it is a defence if it is proved that, by virtue of subsection (2) or (4), subsection (1) does not apply in relation to the discharge."

11 The appellant denied that the facts came within s 8(2)(b). He contended that "damage ... to the ship or its equipment" refers to damage caused by a force external to the ship or its equipment.

The genesis of the Act

12 The Act is based on the International Convention for the Prevention of Pollution from Ships 1973 ("the 1973 Convention"). Australia is a party to that Convention. Ordinarily, the Commonwealth and not the States would enact legislation to give effect to the Commonwealth's obligations under the 1973 Convention. However, in accordance with a co-operative agreement between the Commonwealth and the States, the States have legislated to give effect to the 1973 Convention for waters within their jurisdiction[3].

13 Section 7 of the Act provides:

> "Except in so far as the contrary intention appears, an expression that is used in this Part or in Part 6 and in Annex I to the Convention (whether or not a particular meaning is assigned to it by that Annex) has, in this Part and in Part 6, the same meaning as in that Annex."

14 Section 8 of the Act and equivalent sections in other State legislation are based upon reg 11 of Annex I of the 1973 Convention. Regulation 11 declares:

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3 *Pollution of Waters by Oil and Noxious Substances Act* 1986 (Vic); *Protection of Marine Waters (Prevention of Pollution from Ships) Act* 1987 (SA); *Pollution of Waters by Oil and Noxious Substances Act* 1987 (Tas); *Pollution of Waters by Oil and Noxious Substances Act* 1987 (WA); *Transport Operations (Marine Pollution) Act* 1995 (Q).

"Regulation 11

Exceptions

Regulations 9 and 10 of this Annex shall not apply to:

(a) the discharge into the sea of oil or oily mixture necessary for the purpose of securing the safety of a ship or saving life at sea; or

(b) the discharge into the sea of oil or oily mixture resulting from damage to a ship or its equipment:

(i) provided that all reasonable precautions have been taken after the occurrence of the damage or discovery of the discharge for the purpose of preventing or minimizing the discharge; and

(ii) except if the owner or the Master acted either with intent to cause damage, or recklessly and with knowledge that damage would probably result; or

(c) the discharge into the sea of substances containing oil, approved by the Administration, when being used for the purpose of combating specific pollution incidents in order to minimize the damage from pollution. Any such discharge shall be subject to the approval of any Government in whose jurisdiction it is contemplated the discharge will occur."

15 The direction in s 7 of the Act requires that the word "damage" be given the same meaning in s 8 as it has in the 1973 Convention, unless the contrary intention appears[4]. Article 31 of the Vienna Convention on the Law of Treaties 1969 declares:

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4 The 1973 Convention was established in a single copy in the English, French, Spanish and Russian languages. Each text is equally authentic (Vienna Convention on the Law of Treaties 1969, Art 33). Despite inquiries in France, Russia, Spain, Japan, Italy and Egypt, the parties were unable to locate any authoritative academic article or discussion of the French, Spanish or Russian texts that would assist the Court in construing the relevant provisions of the Convention.

"(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

..."

16 The effect of Art 31 is that, although primacy must be given to the written text of the 1973 Convention, the context, objects and purpose of the treaty must also be considered[5]. The need to give the text primacy in interpretation results from the tendency of multilateral treaties to be the product of compromises by the parties to such treaties. However, treaties should be interpreted in a more liberal manner than that ordinarily adopted by a court construing exclusively domestic legislation[6].

17 In this Court, as in the Court of Criminal Appeal, the appellant submitted that "damage ... to the ship or its equipment" did not include a defect in a part that resulted from wear and tear. The appellant relied on the definition of "to" in the *Shorter Oxford English Dictionary*, which defines "to" as "expressing motion directed towards and reaching. (The opposite of from.)" Accordingly, the appellant contended that the phrase "damage ... to the ship or its equipment" signified harm brought about by an external force that is directed towards and reaches the ship or its equipment. The Court of Criminal Appeal thought that neither the preposition "to" nor anything in the Regulations in the Annex warranted a reading down of the meaning of the term "damage". The Court held that the term should not be given a meaning less than "the full scope of its dictionary meaning".

18 The appellant also sought support for his submissions in the history of the 1973 Convention. He pointed out that, in the International Convention for the Prevention of Pollution of the Sea by Oil 1954 ("the 1954 Convention"), Art IV exempted a person from liability for:

"the escape of oil, or of an oily mixture, resulting from damage to the ship or unavoidable leakage, if all reasonable precautions have been taken after

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5 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

6 *Shipping Corporation of India Ltd v Gamlen Chemical Co A/Asia Pty Ltd* (1980) 147 CLR 142 at 159; *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 at 412-413; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 255.

the occurrence of the damage or discovery of the leakage for the purpose of preventing or minimising the escape."

19 The genesis of the 1954 Convention was a Report by the United Kingdom Committee on the Prevention of Pollution of the Sea by Oil, issued in July 1953 ("the Faulkner Report"). This report was discussed during the 1954 Convention Conference. The appellant argued that the terms of the 1954 Convention and the discussion showed that the exemption in Art IV was confined to "accidental damage through stranding, collision, etc". Accordingly, he submitted that "damage" and "unavoidable leakage" in the 1954 Convention were confined to catastrophes resulting from collisions and groundings. He submitted they were not apt to cover spills from defects and similar causes resulting from wear and tear. The appellant also submitted that the term "damage" did not apply to cases of "unavoidable leakage". It covered only spills resulting from latent defects and those cases "involving sudden violence of the kind normally associated with maritime casualties and similar occurrences".

20 Given this history, the appellant submitted that the word "damage" in reg 11 and s 8 of the Act should not be understood as referring to defects resulting from wear and tear. It should be given the same meaning as it had in the 1954 Convention. In s 8(2)(b), it meant "some physical injury to the ship or its equipment caused by some positive act". The appellant argued that it was clear from the travaux preparatoires to the 1954 Convention that the principal cause of oil discharge was damage caused by collisions and grounding and that it was unlikely that in the 1973 Convention "damage" was intended to have any different meaning.

21 In our view the submissions of the appellant cannot be accepted. In its ordinary and natural meaning, the expression "damage ... to the ship or its equipment" is wide enough to include any detriment or harm or impairment of the use or function of a ship. The expression is wide enough to include a detriment or harm or an impaired use or function that is the product of a repetitive process as well as a detriment, harm or impairment that results from the application of an external force. In reg 11 and s 8(2)(b), "damage to" describes a condition or attribute of the ship or its equipment. The preposition "to" has no causal connotation. It has nothing to say as to the cause of the condition or attribute. If a ship or its equipment breaks apart, there is damage to the ship or the equipment, irrespective of the cause.

22 Nor do we think that the history of the Conventions supports the appellant's case. Indeed on one view, it tells against it. If the 1954 Convention was influenced by the Faulkner Report, it is curious that Art IV was not limited

to "accidental damage". Instead, it exempted damage of any kind to a ship. We do not think, therefore, that "damage" in the 1954 Convention had the narrow meaning for which the appellant contends. If that is so, the history of the Conventions throws no light on the meaning of reg 11 or s 8(2)(b).

23 Nevertheless, the context of the phrase "damage to" and the objects of the 1973 Convention suggest that the meaning of "damage" is more limited than its natural and ordinary meaning. But the limitation is not found in the preposition "to" or the Convention's history. It is found in the phrase "the occurrence of the damage", the requirement of taking "reasonable precautions" and the objects of the 1973 Convention.

24 The use of the term "occurrence" implies that the detriment or harm or the impairment of use or function of the ship or its equipment is the result of a sudden event – not detriment or harm or impairment of use or function that is caused by a gradual process. The phrase "occurrence of the damage" implies a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some external or internal event. It implies that the condition of the ship or its equipment has suddenly changed from being in a good condition to being in a defective condition.

25 Moreover, the requirement that a person cannot escape liability unless that person has taken "all reasonable precautions" to eliminate further discharges implies a duty to take those precautions once the damage occurs. If "damage" is given its full dictionary meaning, any deterioration in the ship or equipment because of wear and tear would be "damage". If the argument of the respondents is correct, the duty would arise immediately that wear and tear commenced unless in s 8(2)(b) the escape is not to be regarded as "in consequence of" that wear and tear. But continuing wear and tear that results in the defective condition is as much a cause of the discharge of oil or oily-mixture as the ultimate condition. The discharge is a "consequence of" the breakdown or disintegration of each atom of material that constitutes the wear and tear. There is no logical reason for attributing the discharge only to the total condition or last atom of wear.

26 If the argument of the respondents is correct, and "damage" has its full dictionary meaning, then they had a duty to take reasonable precautions to prevent the discharge of oil or oily-mixture as soon as wear or tear commenced. A construction of s 8(2)(b) that gave "damage" its full dictionary meaning therefore would not assist the respondents. They took no precautions in respect of the wear and tear before the discharge occurred. It seems unlikely, however, although not improbable, that such a duty was intended to be imposed on an

owner or master. And it suggests that damage cannot be given "the full scope of its dictionary meaning". But, once "the full scope of [the] meaning" of "damage" is rejected, the better construction is that the section is referring to a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some external or internal event. The objects of the 1973 Convention support this construction of "damage".

The objects of the 1973 Convention

27 By reason of the direction in s 7 of the Act, it is necessary to give terms in the Act the same meaning as they have in the 1973 Convention.

28 The 1973 Convention was a step in a series of international agreements whose object has been the elimination of pollution of the sea by oil and oily substances. The first major step was the enactment of the 1954 Convention. It attempted to prevent oil discharges within specified areas. It was amended in 1962 to extend the classes of ships to which the 1954 Convention applied and the areas where discharges were prohibited.

29 In 1958, the United Nations Conference on the Law of the Sea adopted a Convention which imposed a duty on States to enact legislation to prevent pollution of the seas by ships or pipelines discharging oil. Article 10(1) also required each State party to take measures for ships under its flag to ensure safety at sea with respect to the construction, equipment and seaworthiness of ships.

30 Then, in March 1967 the oil tanker, the *Torrey Canyon*, ran aground off the coast of England. The grounding caused oil pollution which affected beaches not only in England but also on the east coast of the United States. As a result, an Inter-Governmental Consultative Organisation met to consider the problems of maritime pollution. The 1973 Convention appears to have been the product of or at all events the consequence of the work of that organisation[7].

31 Two clauses in the preamble to the 1973 Convention show its chief objects. The first recognises "that deliberate, negligent or accidental release of oil and other harmful substances from ships constitutes a serious source of pollution". The second states that the parties to the Convention desire "to achieve the complete elimination of intentional pollution of the marine

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7 Kern, "No Dumping in this Ocean: Nearing the end of Ship-Generated Pollution", (1974) 7 *Journal of International Law and Politics* 545 at 547-548.

environment by oil and other harmful substances and the minimization of accidental discharge of such substances".

32 To give effect to these objects, the 1973 Convention requires ships above a certain weight to carry a certificate that has been issued by a party to the Convention. The Regulations provide for surveys at intervals not exceeding five years so as to ensure "that the structure, equipment, fittings, arrangements and material fully comply with the applicable requirements of this Annex"[8]. Regulation 4(4) declares that after any survey of a ship under the Regulation has been completed, "no significant change shall be made in the structure, equipment, fittings, arrangements or material covered by the survey without the sanction of the Administration, except the direct replacement of such equipment or fittings". "Administration" means the Government of the State under whose authority the ship is operating[9]. When a ship has been surveyed and found to be in proper order, it receives a certificate from its Administration or person or organisation authorised by the Administration.

33 Furthermore, intermediate surveys at intervals not exceeding 30 months must be made to "ensure that the equipment and associated pump and piping systems, including oil discharge monitoring and control systems, oily-water separating equipment and oil filtering systems, fully comply with the applicable requirements of this Annex and are in good working order"[10].

34 The Regulations also make extensive provision for the equipment that oil tankers and ships must have. They include oil discharge monitoring and control systems, oily-water separating equipment and oil filtering systems[11].

35 The various provisions of the 1973 Convention concerned with certification, survey and the provision of equipment all indicate that ships and tankers are required to be so equipped and maintained that oil will only be discharged in circumstances where the Regulations permit the ship to discharge oil into the sea or where oil escapes through some sudden change in the condition of the ship that could not be foreseen and avoided.

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8 Regulation 4(1)(b).

9 Article 2(5).

10 Regulation 4(1)(c).

11 Regulation 9(1) and (2).

36 For these reasons the appeal should be allowed. In so far as the order of the Court of Criminal Appeal made on 30 October 2000 ordered that question (i)(a) of the questions reserved be answered "Yes", it should be set aside and, in its place, there should be an order that question (i)(a) be answered as follows:

Question (i)(a)

> As a matter of law can the wear and tear in consequence of which oil escapes come within the word "damage" under s 8 of the *Marine Pollution Act* 1987?

Answer

> In that section, "damage" means a sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some event, whether the event was external or internal to the ship or its equipment. The Court considers the question otherwise not appropriate to answer.