03/89

SUPREME COURT OF VICTORIA

ALLEN v UNITED CARPET MILLS PTY LTD and ANOR

Nathan J

5-6 May, 12 July 1988 — [1989] VicRp 27; [1989] VR 323

ENVIRONMENT PROTECTION – CAUSING POLLUTION TO WATERS – RUBBER LATEX SPILT DURING UNLOADING – LATEX HOSED BY TANKER DRIVER INTO STORM WATER DRAIN – NEARBY CREEK POLLUTED – WHETHER ACT OF DRIVER RELATED TO OCCUPIER'S BUSINESS – DEEMING PROVISION – *MENS REA* – STATUTORY OFFENCE – WHETHER ABSOLUTE OFFENCE – WHETHER DEFENCE OF REASONABLE PRECAUTIONS AVAILABLE – DRIVER AN INDEPENDENT CONTRACTOR – WHETHER EMPLOYER RESPONSIBLE – "UNRELATED TO ANY COMMERCIAL OR INDUSTRIAL UNDERTAKING": *ENVIRONMENT PROTECTION ACT* 1970, SS39, 63(2).

1. Having regard to the purpose and intent of the *Environment Protection Act* 1970 ('Act'), the language used in s39 of the Act and notwithstanding the severe penalty provided for a breach of it, s39 imposes absolute liability upon an offender, and a defence of reasonable precautions is not available.

***Chiou Yaou Fa v* Morris [1987] NTSC 20; (1987) 46 NTR 1; (1987) 87 FLR 36; (1987) 27 A Crim R 342 ;**

***He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553; and**

***Welsh v Donnelly* [1983] VicRp 79; (1983) 2 VR 173, referred to.**

2. An employer is responsible for a breach of the provisions of s39 of the Act, notwithstanding that the doing of the act leading to the pollution was delegated to a person who was an independent contractor.

***Goodes v General Motors Holdens' Pty Ltd* [1972] VicRp 42; (1972) VR 386; 27 LGRA 287, applied.**

3. In view of the deeming provisions in s63(2) of the Act, once the elements of the offence are established, the occupier bears the onus of establishing that the cause of the pollution was unrelated to any commercial or industrial undertaking.

***Window v The Phosphate Co-operative Co of Australia Ltd* [1983] VicRp 88; (1983) 2 VR 287, distinguished.**

NATHAN J: *[After setting out the facts of the case, relevant parts of ss39(1) and 63(2) of the Act, the Magistrate's decision and the grounds of the order nisi, His Honour continued]* ... **[5]** I now turn to the first ground of the order nisi with respect to R.L. Is the taking of reasonable precautions or reasonable care and due diligence a defence under the Act? In order to consider this question, it is necessary to analyse the character of s39. Does it create an offence of which *mens rea* is an element, or is it one of absolute liability, or, is it in that "halfway house" of strict liability, as described by Asche J in *Chiou Yaou Fa v Morris* [1987] NTSC 20; (1987) 46 NTR 1; (1987) 87 FLR 36; (1987) 27 A Crim R 342, where the defence may be applicable.

The High Court was called upon to consider these various categories of offences in *He Kaw Teh v R* [1985] HCA 43; (1985) 157 CLR 523; (1985) 60 ALR 449; (1985) 59 ALJR 620; (1985) 15 A Crim R 203; [1986] LRC (Crim) 553. The Court examined the *Customs Act* 1981 (Commonwealth) S233B(1), which appropriately edited, reads:

> "Any person who— **[6]**
> (b) imports, or attempts to import, into Australia any prohibited imports to which this section applies or exports, or attempts to export, from Australia any prohibited exports to which this section applies; or
>
> (c) without reasonable excuse (proof whereof shall lie upon him) has in his possession, or attempts to obtain possession of, any prohibited imports to which this section applies which had been imported into Australia in contravention of this Act ... shall be guilty of an offence."

It was held by the Court, Wilson J dissenting, the presumption that *mens rea* is required before a person can be held guilty of a criminal offence was not displaced by this section. Further,

the prosecution has the onus of proving that the accused knew he was importing a prohibited import. The High Court recognized a tripartite categorization of statutory offences, so far as the mental ingredient necessary for conviction was concerned. They are conveniently summarized by Asche J in *Chiou Yaou Fa's Case* as follows (p19):

> "(i) that *mens rea* applies in full;
>
> (ii) that the offence is one of strict liability so that the prosecution does not have to rebut *mens rea* in proving the *actus reus*; but if the evidence raises a likelihood of honest and reasonable mistake the prosecution must rebut that beyond reasonable doubt;
>
> (iii) that the offence creates absolute liability."

It was conceded by all parties before me that s39 offences do not fall within the first category, namely, offences in which *mens rea*, *per se*, is an element. The respondents have submitted the offence is one of strict not absolute liability, therefore the defence of honest and **[7]** reasonable mistake is available. The defence, it was contended, should also be extended to a defendant who has acted with all reasonable and proper care and diligence. Such an extension of the defence of honest and reasonable mistake was suggested by the Full Court of the Canadian Supreme Court in *R v Sault Ste Marie* [1978] 2 SCR 1299; 3 CR (3d) 30, where Dickson J, reading the judgment of the Court, said (pp181-2):

> "1. The defence (to an offence of strict liability) will be available if the accused reasonably believes in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event."
> (my emphasis)

This decision was considered in *Teh's Case* and *Chiou Yaou Fa's Case* and followed in New Zealand in *Hastings City v Simons* [1983] NZLR 78; 1 CRNZ 38. I consider that a defence of taking all reasonable care and diligence is within the scope of the concept of honest and reasonable mistake and should be available to offences carrying strict liability. This being so, if s39 is an offence of strict liability, the Magistrate would have been entitled, (subject to satisfactory evidence being available), to dismiss the charge against R.L. I should add here, that although the term "defence" has been used by me and in other authorities when discussing honest and reasonable mistake, the accused has an evidentiary onus only to discharge, so as to raise a defence of honest and reasonable mistake or reasonable and proper care and diligence. Once the evidentiary onus is discharged by the accused, it is then required to be displaced by the prosecution beyond reasonable doubt.

[8] The applicant submitted the offence was of the third category, namely, one of absolute liability, where no defence of honest and reasonable mistake or any extension of that concept was available. He referred to *Alphacell Ltd v Woodward* [1972] UKHL 4; [1972] AC 824; [1972] 2 All ER 475; [1972] 2 WLR 1320. In *Alphacell's Case*, the House of Lords was required to examine a *Prevention of Pollution Act* 1951 S2(1), which appropriately edited, reads:

> "Subject to this Act, a person commits an offence punishable under this section—
> (a) If he causes or knowingly permits to enter a stream any poisonous, noxious or polluting matter."

Alphacell, a paper manufacturer, was charged with causing effluent to enter a river contrary to this section. The defendant argued it should be acquitted as the overflow of effluent into the river was caused without its knowledge and without its negligence. Their Lordships, however, on a reading of this section, held that the word "causes" did not include the concept of *mens rea*. Therefore, even assuming the escape of effluent occurred without the defendant's negligence, that was not sufficient to exclude it from the force of the section.

I consider this case to be of limited assistance. Their Lordships, in the interpretation of the word "causes", gave great weight to the fact that the legislature had chosen the phrase "knowingly permits" in the same section. As the legislature had not elected to put "knowingly" prior to the word "causes", it was considered inappropriate to read into the meaning of "causes" the concept of *mens rea*. A further difficulty with the English authorities in this area is that they have not developed, to the same extent and clarity, the tripartite categorization of criminal offences as was adopted **[9]** in *Teh's Case* and accordingly, the terms "strict liability" and "absolute liability" have tended to be used by the English authorities interchangeably.

It was submitted by the respondent I should adopt the interpretation of "cause" as held in *O'Sullivan v Truth and Sportsman Ltd* [1957] HCA 8; (1956-57) 96 CLR 220; [1957] ALR 180. In this case the High Court was required to interpret the meaning of "cause" as found in the *Police Offences Act* 1953 (SA), s35(1), which made it an offence to "offer for sale, sell or cause to be offered for sale or sold to any person" any newspapers containing a report relating to sexual morality which occupied more than a given space or carried type exceeding a given size. The court held that "cause" included the notion that the accused must "contemplate or desire that the prohibited act will ensue" (joint judgment of Dixon CJ, Williams J, Webb J and Fullagar J at p228). This approach tends to suggest that some degree of *mens rea* is required in an interpretation of the word "cause".

However, the difference in legislative subject matter in *Truth and Sportsman Ltd* and this case is stark, and to my mind critical. The section in *Truth and Sportsman Ltd* involved "causing" the sale, or offering for sale, involved creating contractual relations between parties. It would be difficult to contemplate how such transactions could take place without a party's intent to achieve such a result. In contrast, pollution is frequently "caused", not only intentionally, but also unintentionally and accidentally. The prohibition here is the social and environmental detriment of pollution. In the *Truth Case* it was regulating the salacious content and concomitant sale of prurient newspapers.

[10] Returning to *Teh's Case* and *Chiou Yaou Fa's Case*, both pointed out the *prima facie* presumption that *mens rea* is an element of any criminal offence, and that the onus rests on the prosecution at all times to establish that element beyond reasonable doubt. A court requires good grounds for moving away from such a presumption. Further to this proposition, as stated by Asche J in *Chiou Yaou Fa's Case* (p22):

> "If, however, *mens rea* can be shown to have been displaced, it does not follow that the court should leap to the opposite extreme of absolute liability. Rather the presumption, if *mens rea* is displaced, should be of strict liability unless the words of a statute are so clear and unambiguous as to admit of no other construction."

Gibbs J in *Teh's Case* considered four matters in assessing whether the presumption of *mens rea* was displaced (pp528-530), namely:

1. The language of the section creating the offence;
2. The subject matter of the statute;
3. The consequences for the community of an offence;
4. Potential consequences for an accused, if convicted.

Similarly, Brennan J approached the issue of *mens rea* thus (at p576):

> "Principally, by reference to the language of the statute and its subject matter. From those sources, the mischief at which the statute is aimed is derived, and the purpose of the statute is perceived. The purpose of the statute is the surest guide of the legislature's intention as to the mental state to be implied." (my emphasis)

In *Teh's Case*, it was considered by the majority that the severe penal provisions under the *Customs Act* enforced the **[11]** presumption that *mens rea* was required and should not be displaced. In the instant case the parties have conceded that *mens rea* is not an essential element, the issue is whether reasonable precaution offers a defence, and to that extent the High Court's reasoning is pertinent. This is because the defence springs from the concept of offering an explanation for the offence based on an honest and reasonable belief in a state of facts, which if true, would be exculpatory. Therefore, if a "reasonable precaution" defence is to be made out, a Court needs to examine the state of mind of the accused to ascertain whether it was his belief, that the steps taken were reasonable in the circumstances.

Thus I am guided by the criteria of *mens rea* set out in *Teh's Case* in ascertaining whether a defence of reasonable precaution is available under the terms of this Act, or whether the legislation imposes absolute liability. Further assistance, and also from a Court which binds me, is the Full Court decision of *Welsh v Donnelly* [1983] VicRp 79; [1983] 2 VR 173. A provision of the *Motor Car Act* 1958 (s35(5)) made it an offence to overload a trailer above axle weights of stated levels.

The Court unanimously held that the provision imposed strict liability although that term was used synonymously with absolute liability which is to be understood in view of the fact it was decided prior to *Teh's Case*.

The language and intendment of the Act made it plain that an honest and reasonable belief in a state of facts which if true, did not provide a defence to a prosecution. The Court thoroughly and extensively considered the authorities and academic writings concerning *mens rea* and reasonable mistake but concluded the defence was excluded by **[12]** the terms of the Act. The Court gave particular attention to *Proudman v Dayman* [1941] HCA 28; (1941) 67 CLR 536 per Dixon J at 540; *Kain & Shelton Pty Ltd v McDonald* [1971] 1 SASR 39; *Iannella v French* (1968) 119 CLR 84; [1968] ALR 385; 41 ALJR 389; *Sweet v Parsley* [1969] UKHL 1; [1970] AC 132; [1969] 1 All ER 347; 53 Cr App R 221; [1969] 2 WLR 470; *Strict Liability in the High Court of Australia* by Professor C Howard (1960) 76 LQR 546.

[After referring to passages in Welsh v Donnelly*, His Honour continued]* ... **[13]** This Act recites "any person shall not cause" pollution. It would be difficult to frame language in more absolute and embracive terms. The phrase echoes commandments given elsewhere and is just as explicit. I find the terms of the Act impose absolute liability. I now turn to some supplementary reasons for this conclusion.

In s39 of the Act, the severity of the penalty is one indice which can be used to assess whether the offence is one of strict or absolute liability. Section 39(5) of the Act provides for a maximum penalty of not more than 100 penalty units ($10,000), and in the case of a continuing offence, a daily penalty of not more than 40 penalty units each day the offence continues after conviction. At first blush, this may be viewed as quite a severe financial penalty and thus suggest a categorization of strict liability is appropriate. But as Gibbs J indicated, the potential penalty needs to be assessed in the context of the consequence for the community of the offence. That observation, which I find compelling, brings me to reflect upon the potential damage that may be incurred by the release of pollutants into waters, the potential hazard to health that may result, and the social costs which may be incurred by failing to dispose of pollutants in a safe manner. Viewed from that perspective the penalties are not oppressive.

I turn for assistance to the Parliamentary Debates where The Honourable EH Walker, Minister for Planning and Environment, in presenting the Bill to the Legislative Council in his second reading speech on 4th April 1984, indicated the purpose and intent of the Bill as follows:

> **[14]** "The Bill is an essential element in the Government's programme to establish effective and enforceable controls for the purpose of protecting and enhancing the quality of the environment."

Examining the Act as a whole and the purpose it is designed to serve, I conclude it is directed at penalizing all those persons in control of potential pollutants who allow, whether by design, neglect or sheer inadvertence, the escape of those pollutants into the environment which then cause damage. The legislature has deliberately used the word "cause" and has avoided using language such as "knowingly cause" or "negligently cause" (pollution) which would have been expected, if the intention had been to create an offence of merely strict and not absolute liability. This is a strong indication that absolute liability was intended.

I am further drawn to this conclusion after considering the subject matter of the Act. It is primarily concerned with pollution of the air or water, both are in the nature of common property, as distinct from property held in private hands. The usual constraints which prevent persons from intruding upon the property rights of others (e.g. actions in trespass or nuisance) are not effective in creating a regime which protects the general environment. The Act is social regulatory legislation designed to protect the environment. Pollution of the environment usually results in a burden and cost to the community. The Act penalises those who have "caused" pollution and, thereby brought a detriment to the community as a whole. Based on these conclusions, the Magistrate erred in law in finding that R.L. had a defence under the Act, in that it took reasonable precautions to prevent the **[15]** pollution. Section 39 creates offences of absolute liability. I should add, if it is found R.L. took reasonable precautions to prevent pollution, it may be a relevant consideration as to penalty.

I now turn to the remaining grounds of the order nisi with respect to R.L. Ground 3 is encapsulated in ground 2. The issue is whether R.L. is vicariously liable for the actions of its independent contractor, Mr Davis. It was submitted by Mr McArdle for the applicant that as the legislation is regulatory in character, a person cannot delegate his/her duties and obligations. It was conceded that Davis was not a servant or agent of R.L. at common law, but was an independent contractor. It was contended, however, that the civil law principle of vicarious liability should be extended beyond responsibility for a servant or agent to encompass liability to a principal for any person doing any act in pursuit of that principal's business enterprise. Thus, it was contended, an accused person should be liable for the acts of its delegate.

The delegation concept is more apposite than the concept of a master's responsibility for a servant/agent in the civil jurisdiction. This is particularly so in view of my finding that this legislation is regulatory in character and imposes absolute liability. It is incompatible with these findings to subvert the intention of the Act by qualifying that principle. Therefore, as a matter of law, R.L. is responsible for any infringement by Davis for any of his actions done in furtherance of his business relationship with it. *Goodes v* **[16]** *General Motors Holdens' Pty Ltd* [1972] VicRp 42; (1972) VR 386; 27 LGRA 287 is authority for this proposition. The defendant was charged with an offence under s6 of the *Navigable Waters (Oil Pollution) Act* 1960, which provided that the occupier of land shall be guilty of an offence if any discharge of oil occurs from such land into any waters within the jurisdiction. It was found as a matter of fact that the discharge was caused by a careless act of a servant of an independent contractor engaged by the defendant. Adam J held that the defendant's responsibility extended to its independent contractor engaged by it to perform operations in connection with. oil on its land. Adam J said (p389):

> "Certainly that principle applies where there is an attempt to delegate the entire performance of such a duty [under the Act] to another person – that other person becoming, as it were, the *alter ego* for the purpose of the legislation imposing the offence – but I see no reason at all, and the cases support this, why it should not apply where the delegation is of any matter which is connected with the commission of such an offence. The person subject to the absolute and the strict duty must bear the responsibility for its performance and does not relieve himself by delegation."

His Honour cited in support of this proposition *Lynette v Metropolitan Police Commissioners* [1946] 1 KB 290; *Quality Dairies (York) Ltd v Pedley* [1952] 1 KB 275; [1952] 1 All ER 380; *Brentnall v London County Council* [1945] 1 KB 115; *United States v Parfait Powder Puff Inc* 163 F 2nd L 1008; and *Series v Poole* [1969] 1 QB 676. I therefore find that Grounds 2 and 3 of the order nisi with respect to R.L. are made out.

I turn now to the order nisi with respect to U.C.M., and firstly to the second ground of this order, namely, that the deeming provision applied to it. **[17]** It is of assistance in considering the import of the deeming provision to examine its predecessor, introduced in 1972 by Act No. 8277. That provision read:

> "Where any offence against this Act with respect to the discharge or emission of waste or pollutants occurs in upon or from any premises in the course of any trade carried on in those premises the owner or occupier of the premises (as the case requires), shall be deemed to be guilty of the offence".

The section was central to the judgment of Murphy J in *Window v The Phosphate Co-operative Co of Australia Ltd* [1983] VicRp 88; [1983] 2 VR 287. Phosphate Co-operative carried on the trade of manufacturing superphosphate. Stored on its premises were quantities of sulphur required for the treatment of the phosphate rock. A fire commenced in the pit where the sulphur was stored, it gave off sulphur dioxide which polluted the atmosphere. The company was charged under the Act, the informant relying upon the then deeming provision. The cause of the fire in the sulphur pit could not be ascertained or proven. It was agreed that it was not part of the defendant's trade to ignite or burn sulphur. It was held the deeming provision did not apply where the informant was unable to establish how the fire started, or, whether the fire was caused by an employee of the company or some other unknown persons In this respect, his Honour said (p294):

> "In my opinion, if it is desired to rely upon s63(2) of the Act, it is not sufficient to prove only that certain factual elements of an offence occurred, such as the discharge of pollutants into the atmosphere from premises in the occupation of the defendant. It must also be proved, as the first link, and depending upon what charge is laid under s41(1) of the Act, either that some person actually polluted the atmosphere, or caused the atmosphere to be polluted, or permitted the atmosphere to be polluted."

[18] In this case the prosecution had not discharged its onus negating the suggestion that the fire could have been caused by a trespasser or by an act of God. It was noted there was no obvious explanation how this fire could have occurred in the company's normal course of trade. Murphy, J referred to *Alphacell's Case*, where in the course of their judgments, Lords Wilberforce, Pearson and Salmon recognized it would be a defence under similar legislation, if the pollution was caused by the "intervening act of a trespasser" or by an "act of God": (1972 AC 824 at pp834, 845 and 847). His Honour also referred to *Impress (Worcester) Ltd v Rees* [1971] 2 All ER 357 at p358. As a further ground in finding that s63(2) as it then was did not apply in *Window's Case*, Murphy J noted that the discharge was required to occur in the course of any trade carried on in the premises. Such element was not established.

As a result of *Window's Case*, the deeming provision in s63(2) was amended by the legislature, in the terms in which it now stands.

I now return to the Minister's second reading speech on 4th April 1984 with respect to the amendment of s63(2). Under the heading "Removal of Enforcement Barriers", he said:

> "Clause 26 amends s63(2) and deals with prosecutorial proofs where a polluting discharge occurs from trade premises. The section is amended to provide that where it can be established that pollution has been caused by a discharge from any commercial or industrial premises then the occupier of those premises is deemed to have caused the pollution to occur unless he can establish that the discharge was unrelated to any commercial or industrial undertaking. This represents a significant change as perhaps the most serious **[19]** difficulty confronting the authority in enforcing the Act is to prove that the defendant caused the polluting discharge which emanated from his premises. In most cases the discharge has ceased by the time an inspector has arrived. If the occupier of the premises does not cooperate and provide the authority with sufficient admissible evidence then it is often impossible to establish the precise cause of the discharge. The amendment of s63(2) reverses the onus of proof in cases where the Environment Protection Authority can prove that a particular discharge caused pollution and that the discharge emanated from certain premises, but where it cannot be proved that the occupier of the premises caused or permitted the polluting discharge to occur."
> (my emphasis)

The present deeming provision removes any reference to the emission having to occur "in the course of trade" and clearly sets out the elements to be established by an informant, namely:

> (i) The environment was polluted.
> (ii) Such pollution was a result of a discharge from the premises
> (iii) The premises were used for a commercial or business undertaking.

If these elements are established, the onus shifts to the occupier to establish that the cause of the discharge was unrelated to any commercial or industrial undertaking. The initial onus is no longer on the informant to establish that the cause of the discharge was related to the commercial or industrial undertaking of the occupier and was not because of a trespasser or an act of God. Returning to the fact situation before me, it is clear the informant established the three elements required to shift the burden to the occupier of the premises, i.e. U.C.M.

[20] Mr Hammond for U.C.M., submitted that Davis by hosing down the tanker caused the pollution. It was an intervening act, severing any causal connection between the discharge of pollution and U.C.M.'s commercial and industrial undertaking. He submitted that the concept of intervening acts of a trespasser as enunciated in *Alphacell's Case* was akin to the role of Davis in this case. Davis, although not a trespasser, was in effect an unknown third party. Despite the fact that these submissions were capably and forcefully put by Mr Hammond, I do not find them persuasive. The delivery of latex to U.C.M. was an integral part of its commercial undertaking, namely, the production of carpets. It was clearly within U.C.M.'s contemplation that Davis or some other such person would come on to its premises and deliver latex. In fact, their whole operation relied on such deliveries. Davis was not a trespasser, or an innocent passerby, he was in the nature of an invitee.

The legislature has seen fit by the enactment of the deeming provision, to vest commercial occupiers such as U.C.M. with liability for any acts done by persons such as Davis, coming onto their premises for purposes connected with their commercial and industrial undertakings. I recognise the established principle of law that a court will decline to adopt the effect of a deeming

provision if in any particular circumstances, it would result in injustice and absurdity. Relying upon this proposition, Mr Hammond submitted the deeming provision should only be applied when the facts do not reveal the **[21]** actual polluter. As Davis was known and had already pleaded guilty to the offence, it was contended it would be unjust to also convict U.C.M. I am not attracted by this argument. The deeming provision is embedded in the section which creates offences of absolute liability.

I find it was within the contemplation of the Act, that an occupier is to be responsible for persons coming on to premises in connection with its commercial or industrial undertakings. I see no injustice or absurdity in Davis and U.C.M. both being convicted of offences arising from the discharge of pollution, although their respective capabilities and penalties may differ. Ground 2 of the order nisi with respect to U.C.M. is sustained.

Ground 1 of the order nisi with respect to U.C.M., as to the interpretation of "Cause" in s39 of the Act, is in effect, a restatement of the issues already considered. That ground is sustained by virtue of my previous findings of law, and does not require separate consideration. For the above reasons, the orders nisi with respect to R.L. and U.C.M. will be made absolute on all grounds.

Solicitor for the applicant: P Merrylees, solicitor to the Environment Protection Authority.
Solicitors for the first respondent: Cooper Korbl and Co.
Solicitors for the second respondent: Minter Ellison.
