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SUPREME COURT OF NEW SOUTH WALES

MAJURY v SUNBEAM CORPORATION LTD

McClemens CJ

27 June 1974 — (1974) 1 NSWLR 659

ENVIRONMENT PROTECTION – POLLUTION – NO DELIBERATE ACT BY DEFENDANT – WHETHER DEFENDANT "CAUSED" – SENTENCE – SERIOUS OFFENCE – NO NEGLIGENCE – APPROPRIATE PENALTY HAVING REGARD TO PUBLIC INTEREST: CLEAN WATERS ACT (NSW), S16(1).

On the defendant's land there were three tanks, interconnected, containing potassium cupro cyanide. This chemical, used in electro-plating, is extremely toxic. On Christmas Eve 1973, the chemical was safely contained in the tanks and there was no leak. Early on the 27th December, it was found that a valve, which had apparently been intact earlier, had cracked allowing the contents of the tanks to leak out and escape into Cooks River. There, the cyanide killed considerable quantities of natural life, such as fish, eels and birds. The system of drainage from the tanks was such that if there were a major leak the material from the leak would get into Cooks River – there was no other place where the discharge could go.

HELD: It is sufficient to establish that a pollutant in the possession of the defendant and on his land gets into the water as a direct result of being where it is. In this case the defendant caused the pollution. In relation to penalty a fine of \$3000 would indicate the seriousness of what happened and at the same time justly weigh up the fact that this was an unforeseen and unintended accident.

McCLEMENS J: According to counsel, the defendant had placed the pollutant in a position in the tank 4½ days earlier and had not placed it in or on the water. There was no causal connection, it was claimed, between the placing in the tank and the pollution. With that I am unable to agree. Counsel's argument, as I understand it, involved this that before there could be a conviction there has to be an active act of placing in or on the water, such as would happen if a man went to the side of a river and threw in the contents of a garbage tin. With this I am unable to agree. In my opinion there is a placing in or on the water if the pollutant in the possession of the defendant and on his land gets into the water as a direct result of its being where it is; in other words, if the defendant causes it to get there.

The next question is not whether the defendant polluted the waters or permitted them to be polluted but whether it caused the waters of Cooks River to be polluted. On any reasonable view of s16(1) I think the defendant caused the waters to be polluted and in my opinion this view of mine is supported by the decision of the House of Lords in *Alphacell Ltd v Woodward* [1972] UKHL 4; [1972] AC 824; [1972] 2 All ER 475; [1972] 2 WLR 1320. That was a prosecution under the *English Rivers (Prevention of Pollution) Act 1951* ... I only rely on it for the purpose of considering the proper definition of the word 'cause'. At AC p834 Lord Wilberforce analysed the distinction between 'causing' and 'knowingly permitting' and emphasized that 'causing' must be given a commonsense meaning. He used certain words which in my opinion are equally applicable to the facts here:

"In my opinion, this is a clear case of causing the polluted water to enter the stream. The whole complex operation which might lead to this result was an operation deliberately conducted by the appellants and I fail to see how a defect in one stage of it, even if we must assume that this happened without their negligence, can enable them to say they did not cause the pollution. In my opinion, complication of this case by infusion of the concept of *mens rea*, and its exception, is unnecessary and undesirable. The section is clear, its application plain."

In the same case, Viscount Dilhorne said:

"What, then, is meant by the word 'caused' in the subsection? If a man, intending to secure a particular result, does an act which brings that about, he causes that result. If he deliberately and intentionally does certain acts of which the natural consequence is that certain results ensue, may he not also be said to have caused those results even though they may not have been intended by him?"

I find as a question of fact that the defendant caused the pollution here. In fairness to the defendant I also find specifically that there is no evidence of want of proper care on its part, but that is not the test. The test is whether it caused the pollution. In my opinion it did. There is no question here of the act of a third party or the act of God. The consequence, therefore, is that the defendant ought to be convicted on the charge that has been made against it.

I turn now to the question of penalty. I have made it plain that in my opinion I would be unjustified in finding negligence against the defendant. The defendant also showed commendable degree of concern and co-operation with public authorities in minimising the effects of this accident. Nevertheless, it is a serious matter. The public interest requires that the polluting of waters be prohibited and if caused by a defendant to the extent that pollution was caused here, even if purely accidentally and without negligence, in my opinion it requires one to look at the matter seriously but to impose a penalty which, as far as one can, do some justice between the prosecution and the defendant ...

The maximum penalty provided by s16 of the Act is \$10,000 and a further daily penalty of \$5000 for each day the offence continues. The question of the daily penalty does not arise at all but as against the maximum of \$10,000 I have to weigh up the seriousness of the occurrence which took place here. Were there any solid grounds for finding negligence or impropriety, the fine would be much heavier, but in my opinion if I imposed a fine of \$3,000 I would be indicating the seriousness of what happened here and at the same time justly weighing up the fact that this was an unforeseen non-negligent and unintended accident.
