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SUPREME COURT OF VICTORIA

GOODES v GENERAL MOTORS HOLDENS' PTY LTD

Adam J

10 November 1970 — [1972] VicRp 42; [1972] VR 386; 27 LGRA 287

NAVIGABLE WATERS – POLLUTED BY DISCHARGE OF OIL – SPILLAGE OCCURRED WHEN WASTE OIL WAS BEING TRANSFERRED FROM A STORAGE TANK TO AN OIL TANKER BY MEANS OF A HOSE – PERSON OPERATING HOSE LEFT THE HOSE ATTACHED TO THE STORAGE TANK AND WENT TO THE TOILET – THE FREE END OF THE HOSE FELL TO THE GROUND AND CAUSED A SUBSTANTIAL QUANTITY OF OIL TO FLOW ONTO THE ROADWAY AND INTO AN UNDERGROUND DRAINAGE SYSTEM – PERSON WAS A SERVANT OF AN INDEPENDENT CONTRACTOR – DEFENDANT CHARGED WITH OFFENCE – QUESTION WAS WHETHER THE EVIDENCE ESTABLISHED THAT THE ESCAPE OF OIL WAS DUE TO AN ACCIDENT WHICH COULD NOT HAVE BEEN FORESEEN – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *NAVIGABLE WATERS (OIL POLLUTION) ACT* 1960, S7(2).

HELD: Order nisi absolute. Dismissal order set aside. Fine of $50 imposed on the defendant.
1. The defendant to make effective this defence was required to prove that the escape of the oil or mixture containing oil was due to accident which could not have been foreseen and avoided by any person for whom the defendant company should have been considered responsible in this matter and that that would include any servant of the company, acting in the course of his employment, and also any independent contractor which the defendant company chose should perform operations on its land in connexion with oil and from which an escape of oil might occur. The reason which justified this conclusion was that it was an offence where the liability of the occupier was strict. It was an absolute liability imposed by s6 and it mattered not under s6 who was responsible for the discharge of oil. Liability attached to the occupier in respect of his land if oil escaped from that land.

2. The accident in this case was the detaching of the hose from the tanker and stacking it against the crates or hoppers and leaving the hose unsupervised while the driver went to the toilet. The hose was in the storage tank where the oil was above the level of course of the ground and the prospect that an unfixed hose, having regard to its description, might fall in the absence of anyone watching it, and by siphoning action, siphon the oil out of the storage tank, was something which should certainly have been foreseen by the driver who was the person immediately responsible for this occurring and it might reasonably have been avoided by him either leaving a substitute there while he went to the toilet, or fixing the hose in such a way that it could not come loose or free in his absence.

3. Accordingly, the escape of oil here was not one due to an accident which could not have been foreseen and avoided because a person for whom the defendant company was responsible, having regard to its absolute duty, was one who should have foreseen and avoided what happened, which was the accident that led to the escape of the oil.

4. In the result the Magistrate was in error in holding that the defendant had made out a defence

ADAM J: This matter has been very fully argued before me and as I have arrived at a firm conclusion I think that no good purpose would be served by my reserving my judgment.

It is the return of an order nisi to review a decision of the Court of Petty Sessions at Port Melbourne dismissing an information against General Motors Holdens' Pty Ltd. The decision was given on 9 April of this year and was given at the conclusion of the case for the informant on a submission by defendant's counsel that in view of s7(2) of the *Navigable Waters (Oil Pollution) Act* 1960 a defence was made out on the evidence as it stood.

The information was laid under s6 of that Act. That section provided, so far as material:

"If any discharge of oil or of any mixture containing oil into any waters within the jurisdiction occurs

from any ... place on land ... then subject to the provisions of this Act ... if the discharge is from a place on land, the occupier of that place ... shall be guilty of an offence against this Act and liable to a penalty of not more than £1000."

It is not in dispute that an offence, as provided in that section, was committed by the defendant subject only, of course, to any other provisions of the Act. The section imposes an absolute liability on the occupier of land irrespective of personal fault if there has been a discharge of oil from any place on his land into any waters within the jurisdiction.

In this case on the undisputed evidence it appears that on 3 December at about 11:20 in the morning there was a spillage of oil on the premises, some of which found its way through an underground drainage into the waters of the Yarra at South Wharf 31. The spillage of oil occurred in circumstances which are not in dispute—in the course of the operations of transferring waste oil from a storage tank on the defendant's property at the east end of the Oil Reclamation plant. This oil was being removed from a storage tank to an oil tanker nearby by means of a hose, of some four inches in diameter and eight to 10 foot in length. The method employed had been to attach the hose through the top of a storage tank and connect it to the oil tanker and to suck the oil from the storage tank into the tanker. When in the process of the operation on this morning the tanker has been filled, but there still remained oil in the storage tank, the person who was performing the operation detached the end of the hose from the tanker leaving the other end in the storage tank. As he intended to return and take the balance of the oil from that storage tank he left the hose attached to the storage tank, but its free end on the tanker side, he stacked against some crates or hoppers nearby. He left then to go to a toilet leaving the free end of the hose unfixed. The hose as left by him had its free end at a higher level than the oil in the storage tank and so long as the hose remained in that position there was no danger of the escape of oil but as was not unexpected, as appeared from the evidence, there being no one there at the time, the free end of the hose fell to the ground. Then the oil in the storage tank siphoned to the lower level of the ground causing a substantial quantity of oil to flow on to the roadway alongside. From there some of the oil, as I mentioned, went through the underground drainage system down to the Yarra and to the wharf.

It is common ground that when the discovery of the discharge or escape of oil was made by some of the officials or servants of the defendant company all reasonable steps were taken to avoid any further discharge into the waters of the river. The oil, so far as possible, was pumped back into tanks from the surface of the roadway and the contaminated roadway surface was washed down with water and detergent and there was a sealing off of drainage pits to prevent any further oil getting into the underground drainage system.

The person primarily responsible was not the defendant company or the servants of the defendant company, but a servant of an independent contractor, the Industrial Collections Pty Ltd. Not much appeared from the evidence as to the nature of the contract made with that waste disposal company but it has been assumed that any relationship between the defendant company and that company was that of an independent contractor. For what it is worth I should add that so far as the underground drainage system from the premises to the river is concerned there were oil interceptor traps provided, but they were quite inadequate to cope with the quantity of oil which spilled on this occasion.

It appears on the evidence that the choice of the independent contractor by the defendant company was a perfectly proper choice; that this contractor was experienced in this work and had been tried over the years by the defendant company. In fact it had been removing oil from these premises at a rate of about 7000 gallons twice a week over the last two years.

It is also, I think, common ground, and in any event no other conclusions seems possible, that the driver of the tanker, the employee of the independent contractor, was foolish and reckless in what he did in the way of leaving unattended this hose with its free end stacked against these crates or hoppers without in some way being securely attached above the level of the ground. It was quite to be foreseen that it would fall and fall onto the ground just as it did and that the consequence would be a spillage of oil from the storage tank onto the ground through siphoning. This conduct of the driver of the tanker was variously described as silly and foolish and all the witnesses agreed that it was inconsistent with reasonable conduct on his part. I should say

that as it does not appear to have occurred before in the history of the relationship between the defendant company and its independent contractor, I am prepared to accept the view that the company could not be expected to foresee such a stupid act on the part of the driver.

Now the primary question which arises for my determination is the applicability or otherwise to these circumstances which I have briefly out-lined of the exculpatory section, s7(2) of the Act. That provides:

> "Where the occupier of a place on land is charged with an offence under section six of this Act it shall be a defence to prove that the escape of the oil or mixture containing oil was due to accident which could not have been foreseen and avoided, and that all reasonable steps were taken for prompt discovery of the escape of the oil or mixture and after such discovery for stopping or reducing such escape."

The matter mainly argued before me was whether the evidence established that this escape of oil was due to accident which could not have been foreseen and avoided. The word "accident" taken by itself is a difficult one to which to assign any precise meaning. It is used in loose and precise senses as is illustrated in the fairly recent case of *Mills v Smith* [1964] 1 QB 30; [1963] 2 All ER 1078.

As illustrated by that case, the interpretation of this word in the absence of some assisting context is a very frustrating exercise, but we have to view that word here in a context which practically provides a definition for the word "accident". The context includes the adjectival phrase accident "which could not have been foreseen and avoided". I would think it proper to conclude that when taken in this context the word "accident" itself is almost colourless referring to any occurrence or event. What gives the colour and the meaning in this context are the words "which could not have been foreseen and avoided". Therefore it refers to what you might call an unforeseeable, unexpected event and one which is not avoidable. I would agree with what, I think both counsel have suggested, that the words "could not have been foreseen and avoided" imports the notion of reasonableness—could not have been foreseen and avoided" by the exercise of any reasonable care. I say that because the Act is directed to human beings and should be understood, I think, reasonably. If the word "could not have been foreseen" were read absolutely and without qualification it would apply a standard which is far beyond what can be required from human beings. Reading it in the context in this Act I think it fair to treat it as importing the notion of not reasonably foreseeable and likewise not reasonably avoidable. But this conclusion as to the meaning of the expression "accident which could not have been foreseen and avoided" of course leaves open the critical question by what person it "could not have been foreseen and avoided".

One notices that it is employed in the passive—there being what appears to be a deliberate omission of any reference to the person who should have foreseen and avoided the accident. One view that was submitted on behalf of the defendant company was that it is the position of the defendant company personally, that is to be regarded in determining whether there was an accident which could not have been foreseen and avoided, so that if to the General Motors Holdens' there could not be imputed any reasonable foreseeability of what actually happened then there was an accident which could not have been foreseen, and, consequently, avoided. On the other hand, it is submitted on behalf of the informant that the words used here, not in terms linked, as they are not, to the defendant company apply quite readily to what might be foreseen and avoided by others than the defendant company itself, for instance the servants of the defendant company. The accident could not be treated as an accident which could not be foreseen, it was said, if the servants of the company might reasonably have foreseen the accident and taken steps to avoid it; and further than that, that there was no reason as a matter of language for excluding from the expression used in s7(2) as persons who might have foreseen and avoided the accident an independent contractor or servant of an independent contractor where the defendant company has elected to employ independent contractors in the operation from which the escape occurred.

It is interesting to notice that in the English legislation to the *International Convention of 1954* such an offence was not committed if reasonable steps were taken by the person charged with the offence. There is a contrast here in that there is no such linking with the person charged. The question really is whether having regard to the nature of the offence here and having regard in particular to the mischief which the Act was obviously designed to meet there is a preference to be given to one or other of the suggested interpretations of this expression. On this I have come

to a clear conclusion that the defendant to make effective this defence must prove that the escape of the oil or mixture containing oil was due to accident which could not have been foreseen and avoided by any person for whom the defendant company should be considered responsible in this matter and that that would include any servant of the company, acting in the course of his employment, and also any independent contractor which the defendant company chose should perform operations on its land in connexion with oil and from which an escape of oil might occur. The reason which I feel justifies this is that we are here dealing with an offence where the liability of the occupier is strict. It is an absolute liability imposed by s6 and it matters not under s6 who is responsible for the discharge of oil. Liability attaches to the occupier in respect of his land if oil escapes from that land.

When one turns to the exculpatory section I think it proper to have regard to well-established principles which apply where there is a statutory duty of an absolute and strict character and that principle which has been enunciated in a number of cases is that the person charged with the duty at law cannot relieve himself of that duty by delegating its performance to another person. Certainly that principle applies where there is an attempt to delegate the entire performance of such a duty 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. That general principle is illustrated by such cases as *Linnett v Metropolitan Police Commissioners* [1946] KB 290, at p295; (1946) 1 All ER 380; *Quality Dairies (York) Ltd v Pedley* [1952] 1 KB 275; [1952] 1 All ER 380; *Bretnall v London County Council* [1945] KB 115; [1944] 2 All ER 552; *United States v Parfait Powder Puff Inc.* 163 F 2nd L 1008; and I would add the more recent case of *Series v Poole*, [1969] 1 QB 676; [1967] 3 All ER 849. Now when that principle is recognized and applied in the interpretation of s7(2), I think, in the absence of anything in that section which would relieve the party under the absolute liability from any consequences of a delegation, it leads inevitably to the conclusion that by use of the expression "due to accident which could not have been foreseen and avoided", it includes a case where there has been a delegation, that the delegate could not reasonably foresee and avoid the accident in question. In this case, I think, the real point is whether the defendant company can show that *qua* the independent contractor and its servants to whom it delegated the task of removing the oil from the storage tank, this was an accident which could not have been foreseen and avoided.

The accident in this case I take to be the detaching of the hose from the tanker and stacking it against the crates or hoppers and leaving the hose unsupervised while the driver went to the toilet. The hose was, so I have already mentioned, in the storage tank where the oil was above the level of course of the ground and the prospect that an unfixed hose, having regard to its description, might fall in the absence of anyone watching it, and by siphoning action, siphon the oil out of the storage tank, was, in my opinion, something which should certainly have been foreseen by the driver who was the person immediately responsible for this occurring and it might reasonably have been avoided by him either leaving a substitute there while he went to the toilet, or fixing the hose in such a way that it could not come loose or free in his absence. Accordingly, I consider the escape of oil here was not one due to an accident which could not have been foreseen and avoided because a person for whom the defendant company was responsible, having regard to its absolute duty, was one who should have foreseen and avoided what happened, which was the accident I consider that led to the escape of the oil.

Mr Liddell was at one stage, I think, driven to the proposition that the defence would have been available to the defendant company in this case even if it had been one of its own servants who had been responsible for the conduct of the driver of the tanker, but that, I think, is clearly wrong. It is well settled in a case like this that a company is responsible for the acts of its own servants acting within their employment and it seems to me, in the absence of any words in subs(2) excluding that, that the carelessness or negligence of a servant of the company causing the escape of oil would not provide the company with a defence, however careful the company personally might have been in the selection and choice of experienced and competent servants.

The question is whether the same does not apply where the careless act causing the escape was that of an independent contractor rather than a servant. The conclusion I have come to, which

is based on the authorities which I have mentioned, is that it makes no difference here because the principle on which the liability founds is that of being responsible for the conduct of one's own *alter ego* in the matter, one's delegate, one's agent, whether he be a servant or whether he be an independent contractor or an agent of some other sort. The position is he is authorized to do what he did and the liability being absolute, what I might call the principal is not relieved from his absolute liability and s7(2) should be construed in that light. It is unnecessary for me to proceed further and deal with other cases as, for example, where the accident has been caused by some trespasser, other unauthorized person and I would prefer to leave that for another occasion, but as at present advised I think quite different considerations apply there as the notion of delegation is out of it.

Further matters relevant to making out a defence were discussed before me. One was that all reasonable steps were taken for prompt discovery of the escape of the oil or mixture, and the other that after such discovery all reasonable steps were taken for stopping or reducing such escape. The magistrate found as to that latter item that all reasonable steps had been taken after discovery for stopping or reducing such escape and the reasonableness of that finding was not really attacked by the informant and I say nothing more of it. The other one which preceded that in the section – the requirement before the defence is made out, that all reasonable steps were taken for prompt discovery of the escape of the oil has given rise to debate and I agree with what has been said that it is not altogether easy to assign any precise meaning to this.

But I am disposed to agree with what Mr Griffith submitted a few moments ago that what is contemplated is that there should be some system, in so far as the having of a system is reasonably required in the circumstances, for detecting the escape of oil and that that system, normally anyway, is one which should exist of course before the horse has bolted from the stable. It should be there so that if there is an escape of oil, such escape will be promptly discovered. What would be required in the circumstances of any particular case of course is impossible to lay down in advance, but in the particular case here where the escape of oil has been due to the carelessness of the driver in leaving unattended the free end of this hose, one would think that there had simply been no steps taken at all for the prompt discovery of the escape of oil if it happened to escape. What immediately suggests itself to one is that at least the hose should not have been left unattended, having regard to the great risk that there would be an escape of oil just in the way it happened, once the driver acted in the way he did, and no steps in fact at all were taken to guard against the escape of oil, should the hose fall, and no other steps taken for any prompt discovery of the escape. It happened that the escape was discovered fairly soon after it occurred because the pipe or the hose was not left unattended for any substantial period, but quite enough damage was done before it was discovered and I would not be prepared to say that there was a prompt discovery of the escape in the circumstance of this case. But the important point here seems to be that no steps at all were taken to ensure that the discovery of any escape would be prompt other than the fact that the driver who was conducting this operation presumably did not intend to be absent for very long, but he was absent and exposed the premises to the risk and nothing was done by him at all to avoid what did happen or to ensure that if what did happen would be promptly discovered. It was purely by accident, it seems to me, that the escape was discovered when the driver happened to return to the tanker. And as far as the servants of the company were concerned, they were not watching for this in any way, but they happened to find the oil escaping in the course of other duties.

I have indicated, I think, my views on the main issues which were submitted to me and it remains to consider what I should do with the grounds of the order nisi. The first ground taken was "That the stipendiary magistrate was in error", and I will read from the amended form of this ground, "was in error in that there was no evidence upon which he could find that the escape of oil from the defendant's land was due to accident which could not have been foreseen and avoided". Well as will be seen from my reasons it is not necessary, I think, for me to deal with this ground. As I understand this ground in so far as it is distinct from ground two, it is a ground taken on the assumption that the defendant would have been exculpated if the defendant personally could show that the escape was due to an accident which could not have been foreseen and avoided by the defendant. That is, of course, not how I construe s7(2) and so it really becomes unnecessary, perhaps wrong, for me to determine whether, were the magistrate's views as to the interpretation of s7(2) correct, there was evidence which would have justified his finding for the defendant. I may say the magistrate quite clearly found from his reasons that what was relevant for him to

determine was the personal fault of the defendant company as distinct from any fault there might be in the independent contractor or the employee of the independent contractor and it was on that interpretation of s7(2) that he ultimately dismissed the information against the defendant company. It appeared to me that ground one really assumed the correctness of the stipendiary magistrate's interpretation of the ambit of this s7(2) and invited me to conclude that this being so there was not evidence on which he could have upheld this defence. Anyway I do not propose, in view of my answer to the next ground, to deal further with that first ground.

The second ground was that the stipendiary magistrate was in error in holding that the defendant had made out a defence under s7(2) of the Act where the driver of the independent contractor employed by the defendant had been reckless in propping up an oil tanker hose without securing it so that it fell and oil escaped therefrom. I took that ground to mean in effect that the magistrate was in error in holding that the defence had been made out where it appeared and was conceded in effect that there had been so far as the driver of the independent contractor was concerned something which was not an accident which could not have been foreseen and avoided because of course if the independent contractor's driver was reckless in doing what he did that in effect negatives the notion that there was *qua* him an accident which could not have been foreseen and avoided. Well, in my view, as already stated, we are concerned not merely with the defendant company personally when we are looking to what could have been foreseen and avoided, but we are looking to the position of anyone, be he servant or agent of the defendant acting in the matter with the defendant's authority. As I construe it that way I must say that this ground two is upheld.

As to ground three, I found some difficulty. That reads:

> "That the stipendiary magistrate was in error in upholding the defendant's defence under s7(2) of the Act and in dismissing the information without making any finding as to whether or not the defendant had taken all reasonable steps for prompt discovery of the escape of oil from its land."

Clearly from a reading of his reasons he does not expressly make any finding on this relevant matter— whether reasonable steps were taken for prompt discovery of the escape of the oil. Mr Liddell suggested that I should assume that he has made a finding in favour of the defendant on this matter on the general principle that where possible a decision below should be upheld unless it is clear that there has been error. Mr Griffith has indicated that while in general that is true and if the magistrate gave no reasons at all it might well be proper, if there was evidence at least, to assume that he made any findings consistent with that evidence in support of his own decision, in this case where the magistrate has condescended to findings in detail and in apparently orderly fashion the presumption should be that having been silent as to this particular matter he should be considered to have made no finding on it. To supplement that Mr Griffith submitted that in fact there was no evidence on which in this case he could find that all reasonable steps were taken for the prompt discovery of the escape of the oil and that being so it provides ground for presuming that the magistrate made no finding whether or not the defendant had taken all reasonable steps.

I cannot consistently with the wording of ground three treat it as a ground of objection that there was no evidence on which the magistrate could have made such a finding because Mr Griffith has not applied for any amendment of this ground and I have to take it as it is; but he uses this submission of his indirectly in support of the ground actually taken that the magistrate did uphold the defence without making any finding on that matter. All I will say is, although it is not, I think, necessary to my ultimate conclusion, that I am disposed to uphold what Mr Griffiths has submitted on this third ground and I would be prepared in this case to uphold the order to review on that ground also.

[His Honour then made the order nisi absolute with costs and granted to the defendant a certificate under the *Appeal Costs Fund Act* 1964. By agreement of the parties the matter was not remitted to the Magistrates' Court for further hearing and his Honour imposed a fine of $50 upon the defendant.] Orders accordingly.

APPEARANCES: For the informant/applicant Goodes: Mr RG DeB Griffith QC with Mr WF Ormiston, counsel, Messrs Madden, Butler Elder & Graham, solicitors. For the defendant/respondent General Motors Holdens' Pty Ltd: Mr PA Liddell, counsel. Messrs Blake & Riggall, solicitors.