Australian Government
Australian Taxation Office

Caltex Oil (Australia) Pty Ltd & Anor v The Dredge Willemstad & Anor

136 CLR 529

11 ALR 227

(Judgment by: JACOBS J)

Caltex Oil (Australia) Pty Ltd
Australian Oil Refining Pty Ltd
v The Dredge Willemstad
Decca Survey Australia Ltd

Court:
High Court of Australia

Judges: Gibbs J
Stephen J
Mason J
Jacobs J
Murphy J

Subject References:
Negligence
Shipping and Navigation

Judgment date: 9 December 1976

SYDNEY

Judgment by:
JACOBS J

In three incidents between October 1971 and March 1972 the dredge "Willemstad" damaged an oil pipeline running across Botany Bay from an oil refinery operated by Australian Oil Refining Pty. Ltd. ("A.O.R.") to a terminal operated by Caltex Oil (Australia) Pty. Ltd. ("Caltex"). The first incident is alone the subject of these appeals. It occurred on the night of 25th-26th October 1971. A.O.R. suffered damage to its pipeline amounting, it was agreed, to $125,000. It sued the dredge itself in an action in rem in the Admiralty Division of the Supreme Court of New South Wales alleging negligence. It also sued Decca Survey Australia Ltd. ("Decca") alleging negligence. Caltex suffered loss amounting, it was agreed, to $95,000. It sued both the dredge and Decca alleging negligence.

In the A.O.R. action against the dredge negligence was in effect admitted at the hearing. The dredge relied on contributory negligence in reduction of damages. The trial judge found in favour of A.O.R. on this issue and found damages of $125,000 in respect of the first incident. Judgment was given in that sum (together with the damages in respect of the second and third incidents) against the company Ballast Trailing N.V. and against the two companies Ballast Australia N.V. and Hollandsche Aarneming Maatschappij N.V. engaged in the joint venture to operate the dredge ("the joint venture"). The trial judge declined to give judgment against the master of the dredge at the time of the first incident, Captain Henneman. He also found for A.O.R. in the action against Decca with damages in respect of the first incident in the sum of $125,000.

In the action by Caltex against the dredge the trial judge found that no damages were payable by the dredge to Caltex in respect of the first incident and likewise that in the action by Caltex against Decca no damages were payable.

The appeals.

(1) A.O.R. appeals to this Court on the ground that judgment should have been given against Captain Henneman also. The importance to A.O.R. of this appeal is that proceedings are currently afoot to limit damages under s. 503 of the Merchant Shipping Act, 1894 (Imp.) and it would be important to A.O.R. to have a judgment against the master who would not have the benefit of that section.

(2) Caltex appeals to this Court on the ground that it was entitled to a verdict against the dredge in respect of its loss in the first incident. The respondent dredge resists the appeal upon the ground that the trial judge was correct in finding that it was not liable because the loss which Caltex suffered in the first incident was economic loss only.

(3) Caltex appeals to this Court on the ground that it was entitled to a verdict against Decca in respect of its loss in the first incident. Decca resists this appeal on the same ground as the dredge and in addition seeks to uphold the judgment on the ground that no lack of reasonable care by Decca was established as a cause of the damage.

It should also be mentioned that Decca has appealed to the Privy Council against the judgment against it in favour of A.O.R.

(1) The appeal by A.O.R.

Upon the subject matter of this appeal I agree with the conclusion of Stephen J. and with the reasons which he has expressed.

(2) and (3) The appeals by Caltex against the dredge and Decca

The common ground of these appeals is that the trial judge was in error in finding that because the loss suffered by Caltex was economic loss only Caltex could not recover damages in respect of that loss. The actual loss suffered by Caltex was, it was agreed, $95,000; but the trial judge found that none of this loss was recoverable. The nature of the loss was described by him as follows:

> "... I propose to indicate shortly the nature of the damage which Caltex has suffered as a result of the damage to the pipeline. I can best do this by setting out part of par. 2 of Caltex's solicitors' letter of 19th October 1973, written to the solicitors for the joint venture. That paragraph is, in part, as follows:

> 'By reason of the breakage of and damage to the pipelines caused by the Defendants' negligence, the Plaintiff lost its normal means of obtaining deliveries of petroleum products at its Banksmeadow Terminal while the pipelines were being repaired and restored to service. In order to obtain deliveries from the refinery of Australian Oil Refining Pty. Limited at Kurnell, it arranged for petroleum products to be taken from the refinery to the Banksmeadow Terminal of the Plaintiff either by ship or road transport. It was also necessary, because of the impossibility of sending low sulphur fuel oil to Banksmeadow Terminal, to deliver supplies of low sulphur fuel oil to the Balmain Terminal of the Plaintiff by ship and to supply the Plaintiff's customers with fuel oil by road transport from the Balmain Terminal.'

> The letter goes on to detail precisely the expense to which Caltex was put in respect of such matters as the modification of its Banksmeadow terminal, the modification of its Balmain terminal, additional handling charges, additional port and bunkering charges, additional tonnage, wharfage and harbour dues, certain discharge costs and a number of other charges and costs incurred of a similar nature."

On the question whether the loss of Caltex, which is reflected in the costs and expenses incurred by it in arranging alternative methods of obtaining delivery of the oil when it had been refined, was recoverable, Sheppard J. felt himself bound by the decision of the majority of the New South Wales Court of Appeal in French Knit Sales Pty. Ltd. v. N. Gold & Sons Pty. Ltd. (1972) 2 NSWLR 132 . He held that damages for the loss were in law too remote or that no duty was owed in respect of such loss.

The question of remoteness of damage in the tort of negligence and the relationship of remoteness and duty of care have been the subject of a number of decisions and of academic writing after the decision of the Privy Council in Wagon Mound (No. 1) [1961] AC 388 and again after Wagon Mound (No. 2) [1967] 1 AC 617 . These and the earlier cases have been discussed in a number of the recent decisions. See, for instance, Weller & Co. v. Foot and Mouth Disease Research Institute [1966] 1 QB 569 and Stephenson v. Waite Tileman Ltd. (1973) 1 NZLR 152 . In particular there is the decision of the Court of Appeal in Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd. [1973] 1 QB 27 . I shall refer later to some of the authorities including this recent decision of the Court of Appeal. As will appear, I have some difficulty in accepting the approaches to the problem made in the last mentioned case.

When a duty of care is found to exist in law one element in that finding is foreseeability of the risk of injury. A defendant is liable to pay damages in respect of the kind of injury the foreseeability of which was the necessary element enabling a finding to be made that a duty of care existed. A defendant is not liable to pay damages for causing a kind of injury which is not foreseeable. Such damage can be described as too remote or it may be said that there is no duty of care to avoid the risk of that kind of injury. That is the principle established by Wagon Mound (No. 1) [1961] AC 388 and Wagon Mound (No. 2) [1967] 1 AC 617 .

> "In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e. to the question of compensation not culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e. to the question of culpability not compensation."

Bourhill v. Young [1943] AC 92 , at p 101 , per Lord Russell of Killowen.

The measure of damages in negligence is thus inter-related with the duty of care. As a result the damages recoverable may differ depending on the kind of injury against the risk of which the duty of care is erected. For example, the foreseeable risk of injury which may give rise to a duty not to make a negligent misstatement will often (though not always) be different in kind from the foreseeable risk of injury which may give rise to a duty not to do a negligent physical act. Consequently the kind of injury for which damages are recoverable may be different in the one case from the other. The difference in the kind of injury for which damages are recoverable lies not in the nature of the negligent act but in the nature of the injury which is foreseeable and which gives rise to the duty of care.

The relevant duty of care in the present case is the duty of care owed to those whose persons or property are in such physical propinquity to the place where an act or omission of the defendant has its physical effect that a physical effect on the person or property of the plaintiff is foreseeable as the result of the

plaintiff's act or omission. The damages for the breach of such a duty of care are those which result from the physical effect on the plaintiff's person or property of the defendant's act or omission.

A question of central importance in the present case is whether the physical effect in this context is limited to actual physical injury. In my opinion it is not. Person or property may be injured not only physically but also by physical effect thereon short of physical injury: e.g. by an act or omission which prevents physical movement of a person or which prevents physical movement or operation of property.

The damages for immobilization of property may frequently be quantified as the cost of mobilizing the property and the loss of the use of the property during its immobilization. Such damage may be called pecuniary or economic loss. However, it is an error to concentrate attention on the question whether a particular loss is pecuniary or economic. Rather it is necessary to examine the circumstances of the loss. If the loss arises from the physical effect of an act or omission on the person or property of a plaintiff and that physical effect is one which was foreseeable and that foreseeability gives rise to a duty in the defendant to take reasonable care to avoid that physical effect, it is no answer to the plaintiff's claim for damages that his loss was pecuniary or economic. Nor is there any need or place for such a concept as has been expressed in the term "parasitic damages". Cf. Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd., per Lord Denning M.R. (1973) 1 QB, at pp 34-36 .

The risk of causing a loss to another which arises solely from a relationship of that other with a third party does not generally give rise to a duty of care to avoid the risk to the other of that per quod servitium amisit, cases which stand apart for historical reasons, A cannot recover damages from B for the loss which he suffers as a result of physical injury to a third person. Thus an employer has no right of action for damage suffered by him as a result of injury to his employee which prevents that employee rendering to the employer the services which the employee has agreed to render: Attorney-General (NSW) v. Perpetual Trustee Co. Ltd. [1955] AC 457 ; (1955) 92 CLR 113 . In the absence of statutory provision, a wife or child has no right of action for injuries caused to husband or father. In each case the contractual, marital or parental relationship is an insufficient ground for supporting such a right of action. Although the measures of damages in contract and in negligence are necessarily different because of the different circumstances out of which the rights of action arise, this principle runs through the law on damages for breach of contract as well as damages for negligence.

Exceptions are apparent but not real. An injured worker receives damages for past and future loss of earnings. These damages appear to be damages arising out of his relationship with a third party, his employer. But, as has often been observed, the damages are not strictly for loss of earnings but for loss of earning capacity. The sums which would probably have been earned enable the loss of earning capacity to be quantified. Likewise in other cases it is necessary to distinguish between profit under a contract with a third party and profitability. The actual loss of profit may be evidence of the profitability of the affected property.

Because economic loss commonly arises out of the loss of the benefit of a contract with a third party, and because the loss of the benefit of a contract with a third party is not a kind of injury which of itself gives rise to a duty of care, there has been a tendency of late to express the principle to be that in an action for negligence by a physical act or omission economic loss is not recoverable. Such an expression is incorrect because in every case it is necessary to go further and to examine how the so-called economic loss arises. If it arises in a way which can only be characterized as the loss of the benefit of a contract with a third party it will not be recoverable. However, if it arises out of a physical effect on the person or property of the plaintiff, it will not be irrecoverable simply because it is economic loss.

In Cattle v. Stockton Waterworks Co. (1875) LR 10 QB 453 the act of the defendants carelessly caused a water pipe owned by them to leak. Thereby water entered a tunnel which the plaintiff was building under a road for the owner of the land on which the road was built. The plaintiff lost much of the benefit of this contract because of the additional costs to which he was put. It was held that he could not recover.

> "In the present case the objection is technical and against the merits, and we should be glad to avoid giving it effect. But if we did so, we should establish an authority for saying that, in such a case as that of Fletcher v. Rylands (1866) LR 1 Ex 265; (1868) LR 3 HL 330, the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes destroyed, but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply might be suggested."

(Per Blackburn J. (1875) LR 10 QB, at p 457.)

It might be thought that there is an imperfect analogy between water obstructing work of the plaintiff which he was actually in course of performing under a contract which necessitated him taking at least temporary possession of the site of the work and damage to a place of work whereby a worker could not work at his place of work and thereby earn his wages. However, the principle applied was that loss of the benefit of a contract with a third party was not of itself recoverable. It is not suggested in the example taken by Blackburn J. that a worker who was, by a negligent act which immobilized but did not physically injure his person, prevented from attending at his place of work would not be entitled to damages.

In Societe Anonyme de Remorquage a Helice v. Bennetts [1911] 1 KB 243 the plaintiffs were the owners of a tug which was towing a ship pursuant to a contract. The ship was sunk through the negligence of a vessel owned by the defendants. The plaintiffs claimed loss of profits on the contract of towage. They failed because the loss of profits on the contract with the third party was not recoverable. There was no physical effect on the property of the plaintiffs. If the towed ship, instead of being sunk, had parted and drifted away so that the tug owners had been put to the expense of recovering the tow, the result might well have been different. The effect on the tow itself reflected in the need to restore the tow would be a

physical effect which would be foreseeable not because of any pre-existing contractual obligation but because of the fact that the tow was in course at the time of the defendant's careless act. Cf. The Zelo (1922) P 9 .

The time charter cases do not establish that if a loss is pecuniary or economic it is not recoverable. In Chargeurs Reunis Compagnie Francaise de Navigation a Vapeur v. English & American Shipping Co. (1921) 9 Ll LR 464 the time charterer failed in a claim for damages for the loss through damage to a ship of the benefit of a right to have the ship carry out voyages to its order. To the like effect is the decision in The World Harmony (1967) P 341 . A similar principle was applied in Elliott Steam Tug Co. Ltd. v. The Shipping Controller [1922] 1 KB 127 . In these cases the ships contained no property of the plaintiffs. There was therefore no physical propinquity of any property of the plaintiffs to the place where the act or omission of the wrongdoer had its physical effect. But in the earlier case of The Okehampton (1913) P 173 the time charterer succeeded in a claim for loss of bill of lading freight on a cargo which was actually on the chartered ship at the time that the ship was lost. The physical propinquity of the cargo to the physical act which sank the ship gave rise to a duty to take care to avoid the risk of a physical effect on the cargo itself. The charterer was held to be a bailee of the cargo so that it had a special property therein which was physically affected. I do not think that the decision would have been different if the ship but not the cargo had been physically damaged and if in those circumstances the bill of lading freight had been lost through failure to perform the contract of carriage. See The Minnetonka (1905) P 206 .

In Simpson and Co. v. Thomson (1877) 3 App Cas 279 Lord Penzance stressed that what could not be recovered as damages for negligence was loss which arose simply from the existence of a contract with a third party whose person or property is physically injured by a careless act. He said (1877) 3 App Cas, at pp 289-290 :

> "The principle involved seems to me to be this - that where damage is done by a wrongdoer to a chattel not only the owner of that chattel, but all those who by contract with the owner have bound themselves to obligations which are rendered more onerous, or have secured to themselves advantages which are rendered less beneficial by the damage done to the chattel, have a right of action against the wrongdoer although they have no immediate or reversionary property in the chattel, and no possessory right by reason of any contract attaching to the chattel itself, such as by lien or hypothecation.

> This, I say, is the principle involved in the respondents' contention. If it be a sound one, it would seem to follow that if, by the negligence of a wrongdoer, goods are destroyed which the owner of them had bound himself by contract to supply to a third person, this person as well as the owner has a right of action for any loss inflicted on him by their destruction.

> But if this be true as to injuries done to chattels, it would seem to be equally so as to injuries to the person. An individual injured by a negligently driven carriage has an action against the owner of it. Would a doctor, it may be asked, who had contracted to attend him and provide medicines for a fixed sum by the year, also have a right of action in respect of the additional cost of attendance and medicine cast upon him by that accident? And yet it cannot be denied that the doctor had an interest in his patient's safety. In like manner an actor or singer bound for a term to a manager of a theatre is disabled by the wrongful act of a third person to the serious loss of the manager. Can the manager recover damages for that loss from the wrongdoer?"

In the examples given by Lord Penzance none of the losses under the contracts with persons who were or whose property was physically injured would be recoverable, not because they were economic or pecuniary losses but because the losses were not injury of a kind which gave rise to a duty to take care to avoid the risk of physical injury to person or property. There would be neither person nor property in that physical propinquity to the place where the act or omission had its physical effect which would be the foundation of the only relevant duty of care.

I come now to Morrison Steamship Co. Ltd. v. Greystoke Castle (Cargo Owners) [1947] AC 265 . This decision on my view of it supports two presently relevant propositions; first, that a physical effect, short of physical injury, is a kind of injury the risk of which, if it be foreseeable, there may be a duty of care to avoid; and secondly that there will be such a duty where there is physical propinquity of the plaintiff's property to the place where the defendant's act or omission has its physical effect. The cargo was at the place where the careless act or omission of the other ship had its physical effect. The cargo was not physically damaged but there was the physical effect on it of being immobilized in a damaged ship. The price of its mobilization included the general average contribution. The amount of the contribution was part of the quantification of the damage of immobilization. In that way the example of the truck and its load which was taken by Lord Roche was precisely in point (1947) AC, at p 280 .

> "On the other hand, if two lorries A and B are meeting one another on the road, I cannot bring myself to doubt that the driver of lorry A owes a duty to both the owner of lorry B and to the owner of goods then carried in lorry B. Those owners are engaged in a common adventure with or by means of lorry B and if lorry A is negligently driven and damages lorry B so severely that whilst no damage is done to the goods in it the goods have to be unloaded for the repair of the lorry and then reloaded or carried forward in some other way and the consequent expense is by reason of his contract or otherwise the expense of the goods owner, then in my judgment the goods owner has a direct cause of action to recover such expense. No authority to the contrary was cited and I know of none relating to land transport. As regards the sea, The Minnetonka (1905) P 206 , The Toward (Shipping Gazette, 8th May 1899.) , and in the United States of America The Sucarseco (1935) 51 LI L Rep 238, at p 241 are authorities completely opposed to this contention of the appellants."

I do not think that Lord Roche's reference to "common adventure" was more than a statement of commercial reality. It introduced no special qualification of law.

Lastly I come to the decision of the Court of Appeal in Spartan Steel & Alloys Ltd. v. Martin & Co. (Contractors) Ltd. [1973] 1 QB 27 . It is, I think, sufficiently clear from the views which I have expressed above that in my opinion, assuming that a duty of care arose in the circumstances, the plaintiff was entitled to damages not only for the physical loss in the spoiled "melt" and the loss of profit from the sale of the metal from that melt but also to damages for the loss of profitability of the plaintiff's property during the time that it was physically affected by being made inoperative by the negligent act of the defendant. I respectfully agree with the dissenting conclusion of Edmund Davies L.J. (as he then was). I would however avoid characterizing recoverable damage as direct or proximate in favour of relating the damage to the nature of the duty of care in any given circumstances. In result there may not be a substantial difference though I would avoid as far as possible the test of causation which is perhaps implicit in tests of directness or proximateness.

Before I consider application of these principles in the present case, it is necessary to say something more of the facts. In the present case the loss suffered by Caltex may be described as a pecuniary or economic loss but that in itself tells us nothing. It is necessary to examine the circumstances out of which the loss arose and whether any, and if so what, duty of care existed on the part of the dredge and Decca towards Caltex. Caltex was the owner of the crude oil which was delivered to be processed at the refinery of A.O.R. There was current at the time of the incident a processing agreement between A.O.R. and Caltex for the refining by A.O.R. of crude oil owned by Caltex at the former's Kurnell refinery in order to produce petroleum products required by Caltex for marketing in Australia. By cl. 3 it was provided that Caltex should supply crude oil landed at the A.O.R. Kurnell refinery with all freight, insurance, duties and wharfage paid by Caltex. Clause 4 provided that the quantities of crude oil to be processed during each year of this Agreement should be such quantities as would yield substantially all refined petroleum fuels required by Caltex for marketing in Australia from time to time.

Then it was provided that crude oil should be delivered by or on behalf of Caltex in accordance with schedules set by A.O.R. in terms of the agreement. Delivery of crude oil by Caltex to A.O.R. was to be made by ship at marine unloading facilities nominated by A.O.R. and was to be effected and received at the permanent hose connexion of the vessel and was to be pumped ashore at the expense of Caltex.

Clause 14 provided that all product deliveries should be made in bulk and should be delivered to Caltex either into a vessel at the A.O.R. wharf or, at the option of Caltex, from time to time, at Banksmeadow Terminal. It also provided that delivery of the finished products by A.O.R. to Caltex should be made at the permanent flange of the carrier, in the case of a coastal distribution vessel or at the boundary fence of Banksmeadow Terminal, by pipeline, and should be pumped into such carriers or terminal at A.O.R.'s expense.

Clause 18 provided:

> "18. Title and Risk
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> The crude oil, the subject of this agreement, stocks in process and product will normally be intermingled with crude oil being processed by AOR on behalf of others and with the products derived therefrom. Any consequent question as to identity or ownership of a given volume shall be determined on a notional basis computed by reference to current operating data for AOR's storage facilities and refinery. From the time the crude oil is received at the vessel's permanent hose connection in accordance with Section 9, until the time the products are delivered in accordance with Section 14, the risk of damage or loss shall rest with AOR."

By a force majeure clause (cl. 23) it was provided that neither A.O.R. nor Caltex should be liable to the other party for loss or damage of any nature whatsoever incurred or suffered by such other party due to delays or defaults in performance under the agreement caused by force majeure or other circumstances beyond its control and without its fault or negligence, including, inter alia, accident or breakdown of delivery facilities, delays in delivery of products, loss of transportation facilities provided that during the continuance of such hindrance or delay Caltex might obtain elsewhere sufficient quantities of products of a similar kind for the immediate needs of its business.

In short, therefore, Caltex was to deliver the crude oil to the refinery and A.O.R. was to process the oil on behalf of Caltex. The refined material would not necessarily be the product of the actual oil delivered by Caltex but the equivalent thereto in quantity: nevertheless the agreement was a processing agreement only and the property in crude oil or its refined products to the extent of its delivery to A.O.R. would remain the property of Caltex.

The defendants owed no duty of care to Caltex arising simply from a risk that A.O.R. might by the physical injury to its property be unable to supply refined petroleum products to Caltex under a contract for the supply thereof. However that is not the end of the matter. There was a duty of care owed by the defendants to Caltex. The duty of care was that owed to a person whose property was in such physical propinquity to the place where the acts or omissions of the dredge and Decca had their physical effect that a physical effect on the property of that person was foreseeable as the result of such acts or omissions. The physical effect of Decca's act or omission was at the place where the dredge went as a result of navigational error, caused by that act or omission. The physical effect of the dredge's act or omission was at the place where it went in its dredging operation. The property of Caltex in physical propinquity to the place where the acts or omissions of the defendants had their physical effect was its crude oil at the refinery and the products thereof so far as the crude oil had been refined. Though there was no evidence of precisely how much crude oil of Caltex was at the refinery at the time of the incident or of how much refined product was awaiting delivery, there was evidence that some was there. The physical effect on this property of Caltex was the immobilization through the pipeline of the crude oil and the products thereof. The risk of such a physical effect was foreseeable as the result of the act of breaking the pipeline. The damage suffered was the immobilization through the pipeline of the processed crude oil. A quantification of the damage was the cost of arranging alternative means of obtaining delivery of the products processed from the crude oil

provided that so to do was reasonable. Damages, if they were payable at all, were admitted to be $95,000. This was a formal admission (Exhibit N) which relieved Caltex of proof of any matter going only to damages. Therefore no question arose, or now arises, whether the acts or omissions of the defendants had the physical effect of immobilizing all the crude oil and its refined products for which alternative means of delivery were arranged. That is to say, no question arose, or now arises, whether all the crude oil, for the processed products of which alternative means of delivery were arranged, was at the time of the incident already in physical propinquity to the place of the incident. Nor does any question arise whether the incurring of the cost of arranging alternative means of obtaining delivery of the processed products was reasonable. The duty of care having been found, and the injurious physical effect being of a foreseeable kind, the defendants were respectively liable to pay the agreed damages if a breach of the duty of care was proved against either of them respectively. For the dredge it has not been argued on this appeal that the finding of negligence was wrong. However, it has been so argued on behalf of Decca. I am of the opinion that the trial judge's conclusion on this point has not been shown to have been wrong. I agree with the reasons expressed by Stephen J. in this regard.

In my opinion the appeal of A.O.R. should be dismissed with costs. The appeals of Caltex should be allowed with costs, the costs in favour of Caltex against all defendants in the sum of $95,000.
