

***Negligence — limitation of liability —  
actual fault or privity — novus actus  
interveniens***

*DREDGE "W H GOOMAI" v AUSTRALIAN OIL REFINING PTY  
LIMITED & ORS*

New South Wales Court of Appeal, 10 February 1989

The case of *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"*<sup>1</sup> is etched on the minds of lawyers as being a landmark decision in the law of tort. It is a decision which has caused much controversy since it allowed a claimant to recover damages in tort for negligence for pure economic loss without the previous requirement that such loss be consequential upon property damage. The Privy Council declined to follow the High Court's decision in the *Caltex* case in the case of *Candlewood Navigation Corporation Limited v Mitsui OSK Lines Ltd.*<sup>2</sup>

Although the *W H Goomai* case involved the same factual situation, namely the fracture of a bunker fuel pipeline by a dredge in Botany Bay, it is not of the same interest as the *Caltex* case, although it does raise the question of "actual fault or privity" in Australia for the first time since the House of Lords' decision in *The Marion*.<sup>3</sup>

**I. NEGLIGENCE**

The preliminary question for the determination of the court was whether or not the dredging company, Westham Dredging Co Limited (Westham), had been negligent. As McHugh JA said in his judgment, with which Hope and Clarke JJA agreed, the issue was whether or not Westham should have been aware when the pipe was fractured on 24 October 1984 that "electronic equipment used to determine the depth of the dredging might be malfunctioning". The electronic equipment was known to have been malfunctioning prior to 24 October and had undergone repair. It was believed to be functioning properly on 24 October. Both Yeldham J at first instance and the Court of Appeal found that Westham had been negligent in proceeding with the work on 24 October "without taking further steps to ensure that the instrumentation was accurate, and without using an alternative or backup method".

<sup>1</sup> (1976) 136 CLR 529.

<sup>2</sup> [1985] 3 WLR 381.

<sup>3</sup> [1984] 2 WLR 942.

## II. FAULT AND PRIVITY

It is unfortunate that the Court of Appeal has delivered only the one judgment, that of McHugh JA, which deals with the interesting question of limitation and "actual fault or privity" in only 2¼ pages of the judgment. His Honour refers to the Sixth Schedule of the Navigation Act 1912, and in particular Article 1 of the 1957 Limitation Convention which provides as follows —

The owner of a seagoing ship may limit his liability in accordance with Article 3 of this Convention . . . unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner.

At first instance Yeldham J declined to permit Westham to limit its liability. He found that the relevant officer of Westham for determining whether there was "fault or privity" was Mr Hoogerwerf, who was the area manager and senior executive of the company in Sydney. He had acknowledged that dredging over the pipeline was the most critical part of the dredging work that was being done near the No 2 berth. It had been found that Mr Hoogerwerf was also aware that the electronic instrumentation had been malfunctioning prior to its use on 24 October. McHugh JA referred to Mr Hoogerwerf's evidence in which he had said to the dredge supervisor that —

We would only dredge anywhere near the pipeline or bucket sweep if the instrumentation was 100%, if the weather had been all right, and with experienced operators on board.

Reference was also made in the Court of Appeal judgment to Mr Hoogerwerf's concession that the grab method of dredging was more hazardous than the sweep method, which the contract with the MSB had required. Mr Hoogerwerf had also conceded that he did not give any instructions to use any alternative methods to backup the electronic instrumentation for ascertaining the depth at which the dredge was operating.

McHugh JA agreed with the decision of Yeldham J in holding that Mr Hoogerwerf was guilty of actual fault in not instructing those involved in the operation to use a backup method and to stop dredging if there was any possibility that the electronic instrumentation was not working satisfactorily. McHugh JA was critical of Mr Hoogerwerf in allowing —

. . . men with no previous experience of dredging over or near a pipeline to dredge over a pipeline with equipment which had been faulty. He allowed them to engage in an operation which, if not performed correctly, could cause severe loss and damage to the pipeline. As a responsible officer of the owner, he gave no instructions as to what those employees were to do after they commenced dredging if there was any reason to suspect that the equipment was still faulty. Nor did he instruct them to check the reliability of the electronic equipment while the operation was being carried out. In my opinion, in failing to give these instructions, he was guilty of "actual fault".

## III. NOVUS ACTUS INTERVENIENS

Another interesting issue which the courts had to consider was whether or not Westham was responsible for the cost of the clean-up operation which was made necessary by the fracture of the pipe as a result of a decision made by Australian Oil Refining (AOR) to flush the broken pipeline. During that operation several hundred tonnes of fuel escaped into the waters of Botany Bay. As a result, Westham asserted that AOR was guilty of negligence and that such negligence amounted to a "novus actus interveniens". This argument did not find favour with either Yeldham J or the Court of Appeal. Expert evidence was called in support of that proposition, which was countered by experts on behalf of Australian Oil Refining. McHugh JA said that Australian Oil Refining's conduct was —

not to be judged by what lawyers and experts sitting in the relaxed atmosphere of the court room and with the benefit of hindsight, think was the preferable course. Their conduct can only be characterised as negligent if reasonable persons in their position would have refused to take the course which they did.