
Case Notes

Morrison v Peacock (The Sitka II) (2002) 76 ALJR 1545

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The test case in the Australian High Court of *Morrison v Peacock & An. (M.V. Sitka II)*,¹ on whether the definition of 'damage' under MARPOL includes wear and tear, has settled this issue of the law for Australia and is highly persuasive in other countries that are party to MARPOL. The case arose because, in December 1996, the *Sitka II* was unloading cargo at a jetty on Lord Howe Island, off the east coast of Australia, when an hydraulic hose on the unloading crane ruptured and some oil escaped, of which a mere 5 litres ran into the sea. The turning of the crane as it worked over a long period had caused the hose to become worn and this caused it to rupture. The Master of the *Sitka*, Harold Peacock, and the *Sitka's* owners, Roslyndale Shipping Company Pty Ltd, were both prosecuted in the NSW Land and Environment Court, Sydney, under the NSW legislation² giving effect to MARPOL.

The owners pleaded a defence of 'damage' under that legislation and Regulation 11 of MARPOL. The key phrase in the defence was that the Act did not apply if the oil escaped from the ship 'in consequence of damage, other than intentional damage, to the ship or its equipment ...'³

The question was whether the unexpected rupture of the hose was 'damage' within the meaning of the word as used in the legislation and MARPOL. The court stated a case for the NSW Court of Criminal Appeal which held that wear and tear of the hose could amount to 'damage', so the defence was good.⁴ On appeal to the High Court⁵ it was held that the meaning of 'damage' in the NSW Act should be the same as in MARPOL and that it meant 'where oil escapes through some **sudden change in the condition of the ship that could not be foreseen and avoided**'⁶ and that it meant 'a **sudden change in the condition of the ship or its equipment that was the instantaneous consequence of some event**, whether the event was external or internal to the ship or its equipment'.⁷ (emphasis added). The result was that the expression did not cover the rupture of the hose and the owner and master entered a plea of guilty in the Land and Environment Court.⁸

The decision settles that the defence of 'damage' to the ship or its equipment to liability for an oil spill must involve a sudden change in the ship or its equipment so it excludes gradual changes, such as wear and tear. The High Court holding that the

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¹ (2002) 76 ALJR 1545; [2002] HCA 44.

² *Marine Pollution Act 1987 (NSW)*. All of the States and the Commonwealth have similar legislation, so it was an important test case.

³ This is to be found in s 8(2)(b) of the Act, which is the same wording as in MARPOL Annex 1 Reg. 11(b).

⁴ *Morrison v Peacock* (2000) 50 NSWLR 178.

⁵ *Morrison v Peacock* (2002) 76 ALJR 1545.

⁶ *Ibid*, p.1550 at para [35].

⁷ *Ibid*, p.1550 at 'Answer'.

⁸ It was a condition of the appeal to both higher courts that the prosecutor (the government) pay the costs of the accused. The legal costs incurred over the 5 litres of spilled oil were impressive.

meaning and intent of the 'damage' defence relates to the speed of the event (a 'sudden' change) still leaves many fact situations that may be unclear and linking speed of the event to the requirements of foresight and avoidance makes it a complicated formula. Of course the High Court was deciding on the facts before it, where the key issue was whether the slow deterioration was sufficient or the event had to be sudden.

This case, as far as the author is aware, is the first court decision in the world on this point. It will have to await further development of the law from other decisions and, perhaps, amendments to MARPOL. The Commonwealth and NSW have amendments in hand to their respective Acts to exclude wear and tear from the meaning of 'damage'. Perhaps the IMO will consider a change to the provisions of Regulation 11 to the same effect.

Postscript

Having pleaded guilty as charged in the NSW Land and Environment Court the defendants each made an application under s 10(1) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) ("the Act") that those charges be dismissed without the court proceeding to conviction. It was also submitted that no order be made concerning costs. In dealing with the s 10(1) applications the sentencing judge, Pearlman J, was guided by s 10(3) of the Act and took into account the trivial nature of the offence, the presence of extenuating circumstances and the antecedents of the defendants.

In terms of the trivial nature of the offence Pearlman J noted that the amount of oil discharged was small and that there was no evidence the discharge had caused environmental damage.⁹ Her Honour also found there were extenuating circumstances because there had there was nothing the defendants could have done to avert the rupture of the hose that led to the oil being discharged.¹⁰ The antecedents of the two defendants were also regarded favourably as neither had been previously convicted of a marine pollution offence and were able to tender references testifying to their commitment to the environment.¹¹ In the result, Pearlman J ordered that the charges against the defendants be dismissed pursuant to s 10(1) of the Act with no order being made concerning costs.¹²

⁹ *Morrison v Peacock and Roslyndale Shipping Pty Ltd* [2003] NSWLEC 68 at [15].

¹⁰ *Ibid* at [20] and [27].

¹¹ *Ibid* at [28]-[29].

¹² *Ibid* at [36]-[38].