Obituary for *Beaudesert Shire Council v. Smith*

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1. Introduction

In 1966, the High Court of Australia formulated a cause of action for pure economic loss based on the Action on the Case. *Beaudesert Shire Council v. Smith*[1] concerned the rights of the owner of a licence, Smith (whose executors were the plaintiffs), to irrigate his crops by means of a pump which drew water from the river abutting his land. After some 13 years, the flow of the river was destroyed when the defendant council removed gravel from the river without first obtaining the permit required by the relevant regulations. The licence contained no assurance that the flow of water would be preserved, but only that Smith was entitled to draw what water was in the river from time to time.

After examining a number of cases from earlier centuries, the three justices stated that there was 'a solid body of authority' justifying a principle that 'independently of trespass, negligence or nuisance, but by an action for damages upon the case, a person who suffers harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another, is entitled to recover damages from that other.'[2]

The pre-conditions to establishing the cause of action were, therefore:

(a) that the defendant's act was intentional, positive and unlawful; and

(b) that the plaintiff's loss was the inevitable consequence of that act.

While cautioning that it was not possible 'to adopt a principle wide enough to afford protection in all circumstances of loss to one person flowing from a breach of the law by another', the court was willing to extend considerably the scope of the then recognised 'intentional' torts and to suggest a possible basis for a more general tort principle. It was seen as offering to persons adversely affected

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1 (1969) 120 CLR 145.

2 Id at 156.

by administrative action in contravention of the relevant statute, a means of recovering damages when the statute itself provided no private remedy, action for Breach of Public Duty was not available[3] and Negligence could not be established.

In spite of the court's suggestion that an even wider proposition may have been justified, the decision attracted criticism from academics in journals[4] and textbooks.[5] In 1982, Lord Diplock stated in the House of Lords that the principle 'formed no part of the law of England'[6] and in the same year, three judges of the High Court of Australia also foreshadowed[7] that the precedent should be re-assessed if it were to come before the court in the future. It was subsequently rejected in New Zealand[8] and appears never to have been applied in any case in which it has been pleaded. Only one academic writer appears to have publicly defended the principle.[9]

2. The Intentional and Positive Act

The requirement that the act must be intentional and positive was said to be satisfied if an act, as distinct from an omission, was deliberate, rather than inadvertent. It was not necessary that the defendant intended to harm the plaintiff. This expanded the existing bases of liability imposed. Apart from cases of negligence (and *Rylands v. Fletcher*[10] which has since become the prodigal son of negligence[11]), liability for tort required at least 'ordinary malice', that is, that the defendant acted in a way which was intended, or was at least 'calculated in the ordinary course', to cause harm. In cases of Interference with Contractual Relations, for

3 See the judgment of Dixon J in *O'Connor v. S P Bray Ltd* (1937) 56 CLR 464 on the question of actionability by individuals.

4 Dworkin, G. & Harari, A., 'The Beaudesert Decision—Raising the Ghost of an Action upon the Case' (1967) 40 *ALJ* 296 and 347; Dworkin, G., 'Intentionally Causing Economic Loss' (1974) *Monash LR* 4; Heydon, J. D., 'The Future of Economic Torts', (1975) 12 *UWALR* 1 at 16-17; Standish, M.J., Case note, (1967) 6 *MULR* 225.

5 For example, Fleming, J. G. 1992, *The Law of Torts*, 8th edn, Law Book Co. Ltd, Sydney, 702-3 and, notably, Balkin, R.P. & Davis, J.L.R. 1991, *Law of Torts*, Butterworths, Sydney, 682-7 who suggest the proposition was given *per incuriam*..

6 *Lonrho Ltd v. Shell Petroleum Co Ltd* (No. 2) [1982] AC 173.

7 In *Elston v. Dore* (1982) 149 CLR 480 at 492.

8 *Takaro Properties Ltd v. Rowling* [1978] 2 NZLR 314 at 339.

9 Sadler, R.J. , 'Whither *Beaudesert Shire Council v. Smith* ?' (1984) 58 *ALJ* 38.

10 (1866) L R 1 Ex 265; (1868) L R 3 HL 330.

11 See *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 530.

example, this required at least that the defendant, knowing of the existence of a contract between the plaintiff and a third party, deliberately acted to interfere with the contract and either intended that, or was at least reckless as to whether, the plaintiff's contractual rights would be breached.[12] The new formula required no malice of this kind but only an unlawful act committed deliberately and inevitably causing the plaintiff's loss.

3. Unlawfulness

In *Beaudesert*, the act of removing gravel without a licence was prohibited by statutory regulation and constituted a trespass against the Crown. Subsequent decisions, including those of the High Court itself, have limited the scope of the principle by restricting the type of acts categorised as 'unlawful' to those 'contrary to law'. In most cases, the relevant acts were found not to be 'contrary to law' although they were unauthorised. Hence, resolutions passed *ultra vires* by a local government council were said to be invalid rather than unlawful.[13] An act done in breach of a statutory duty was held not to be contrary to law.[14] Likewise, failure to exercise a statutory duty did not constitute 'a positive unlawful act'.[15] Cancelling a taxi licence without authority was not an unlawful act as it did not breach a specific law.[16] Neither was carrying on a trade without a permit required by statute an act 'forbidden by law'.[17] Even circulating to schools, in good faith, a misleading memorandum about copyright was held not to have been 'contrary to law' for the purposes of the tort even if it were *ultra vires* the Director-General or could result in infringements of copyright.[18]

12 *Emerald Construction Co. Ltd v. Lowthian & Ors* [1966] 1 WLR 691.
13 *Dunlop v. Woollahra Municipal Council* (1980) 33 ALR 621 (PC).
14 *Kitano v. The Commonwealth* (1973) 129 CLR 151.
15 *Hospitals Contribution Fund of Australia v. Hunt* (1982) 44 ALR 365.
16 *Turner v. Fisher* (1986) Aust Torts Reports 80-020.
17 *Grand Central Car Park v. Tivoli Freeholders* [1969] VR 62.
18 *Copyright Agency Ltd v. Haines* [1982] 1 NSWLR 182.

4. Loss the 'Inevitable Consequence' of the Unlawful Act

In *Beaudesert*, the plaintiff's loss, caused by being unable to irrigate his crops, was found to have been the 'inevitable consequence' of the council's act in removing the gravel. This pre-condition has been strictly interpreted in later decisions such as that of the High Court in *Kitano v. Commonwealth of Australia.*[19] There the principal owner of a yacht alleged that the issue of a clearance certificate in contravention of s. 122 of the *Customs Act 1906-1968 (Cwlth)* enabled some part-owners of the yacht to leave Darwin without him. While conceding that the plaintiff's loss was *a* consequence of the issue of the certificate, it held that it was not an *inevitable* consequence. The court found that the main cause of the plaintiff's loss was the act of his co-owners in deciding to sail without him and, in fact, doing so.

Critics have pointed to the difficulty of reconciling the absence of any requirement for intention to injure with the requirement that the loss follow inevitably from the act. It has been suggested that if the loss would follow inevitably, then the defendant ought to have foreseen that consequence and should be deemed to have intended it. In such a case, a defendant's act could be said to have been 'calculated to injure' the plaintiff. Such an approach would have brought the tort in line with other 'intentional' torts such as Interference with Contractual Relations.[20]

5. *Northern Territory of Australia v. Mengel* (1995) 129 ALR 1

In 1995, the High Court was given another opportunity to review its decision in *Beaudesert.* The case of *Northern Territory of Australia v. Mengel* was an appeal from the decision of the Full Court of the Supreme Court of the Northern Territory[21] which had affirmed the decision of the primary judge[22] who had found for the plaintiff. All seven judges sat on the appeal and it is interesting to note that an academic who had been critical of the *Beaudesert* decision assisted as counsel.[23]

The case arose out of a decision by officers of the Department of Primary Industry and Fisheries, in the course of a national

19 (1973-4) 129 CLR 151.
20 eg. *Emerald Construction Co Ltd. v. Lowthian* [1966] 1 All ER 1013.
21 (1994) 95 NTR 8.
22 (1994) Aust Torts Reps 81-267.
23 Rosalie Balkin, one of the authors of Balkin, R.P. & Davis, J.L.R. 1991, *Law of Torts*, Butterworths, Sydney.

Brucellosis Eradication Programme, to place movement restrictions on cattle owned by the respondents following testing for brucellosis. The restrictions prevented the respondents from transporting the cattle to southern markets for sale during a time of severe drought.

The Full Court of the Supreme Court of the Northern Territory found that, by exercising their discretion under the statute, changing the disease status of the respondents' properties and placing movement restrictions on the herds, the appellant intentionally performed a positive act. Although the officers acted in good faith, it was accepted that their act was not authorised by the statute. Although the act was not unlawful for the purposes of *Beaudesert* merely because it was 'unauthorised', it was held to have been unlawful in that the appellants had commanded the respondents to do something detrimental to their economic interests in circumstances which inferred that the respondents would be subject to penalties if they did not comply. Priestley J (in a judgment supported by Angel and Thomas JJ) stated[24] that the lack of authority, together with the pressure exerted on the respondents, was not merely unauthorised but was tortious and 'contrary to law'. The Full Court also found that the loss suffered by the respondents was the 'inevitable consequence' of the officers' actions.

6. The Decision of the High Court

On 19 April 1995, the justices of the High Court of Australia handed down their judgments. The main judgment was given by Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ. Brennan and Deane JJ generally agreed with the majority but gave their reasons independently. Two main issues were addressed: first, whether or not the facts brought the Mengel action within the *Beaudesert* principle and, second, whether or not *Beaudesert* had been wrongly decided in 1966.

The parties were agreed that, at the time the movement restrictions were imposed, no Brucellosis Eradication Programme under the relevant Act was current in respect of the Mengels' properties. It was accepted that the officers had acted in good faith without any intention to cause harm to the Mengels. The questions were, therefore, whether or not the act amounted to an 'unlawful, intentional and positive act', and whether or not the loss that ensued was the 'inevitable consequence' of the act.

24 (1994) 95 NTR 8 at 30.

The majority of the High Court was unable to identify any act which was 'forbidden by law' as required and had difficulty even in identifying an act that was 'unauthorised'. As the judgment[25] states:

> What happened was that the inspectors told the Mengels that there were movement restrictions when, in fact and in law, there were none. That did not involve an act forbidden by law in any relevant sense. Nor did it require authority in a way justifying its description as 'unauthorised'.

They also held that the inspectors' act was not rendered unlawful by what Priestley J, in the Court of Appeal, had described as an 'implied threat of penalty' for non-compliance.

In relation to the requirement that the plaintiffs' loss or damage be the 'inevitable consequence' of the unlawful action, the majority suggested that an inevitable consequence would necessarily be foreseeable at the time when the act was committed. They noted that, in *Beaudesert* itself, there was no indication in the judgment that it had been foreseeable that the removal of the gravel would either alter the flow of the river or cause damage to those licensed to pump water from it. In any event, they found that the Mengels' loss was incurred when they acted on the basis that their cattle were subject to the movement restrictions and, 'even if it is assumed that that was likely to happen in the ordinary course, there is nothing to suggest that it was bound to happen.'[26] Neither pre-condition to applying the *Beaudesert* principle was, therefore, found to have been satisfied.

The Court proceeded to consider whether or not the Court's earlier decision in *Beaudesert* should be overruled. *Beaudesert* met most of the criteria that determine whether or not the High Court should review the correctness of one of its previous decisions.

In traversing the early decisions on which *Beaudesert* was based, the court noted that, in all of them, the defendant's act had been 'deliberate' in the sense of being purposely directed against the plaintiff or at activities in which the plaintiff was lawfully engaged. In requiring only that the act be done deliberately and thereby imposing a stricter liability, *Beaudesert* was anomalous and was probably so from its inception. The recent common law trend has been to impose tort liability only where there is either negligence or intention to injure the plaintiff.[27] The justices cited as

25 (1995) 129 ALR 1 at 11.

26 Ibid.

27 Note, however, that actions for Trespass to the person or to land still require only intention to interfere.

another example of this trend the court's recent decision in *Burnie Port Authority v. General Jones Pty Ltd* (1994) 179 CLR 530 in which the strict liability tort based on *Rylands v. Fletcher* was absorbed into the general law of negligence.

The court concluded, not unexpectedly, that its previous decision in *Beaudesert* should be overruled and the principle abrogated. Brennan J, whose judgment focused mainly on the tort of Misfeasance in Public Office, supported the majority's conclusion in relation to *Beaudesert.* It was left to Deane J to write the eulogy. He gave an historical account of the Action on the Case of which *Beaudesert* was a modern example, and suggested that its retention might be justified if the 'unlawfulness' were confined to breach of the criminal law or of a statutory prohibition. After examining these possibilities further, however, he concurred with the majority's comments about the trend in tort liability and came to the conclusion that the decision should be overruled.

7. Significance of the Decision

When one recognises that actions based on *Beaudesert* have almost exclusively arisen out of governmental action, it is difficult not to sympathise with the view of Priestley J, in the Full Court, that where mistaken actions by public officials in pursuance of a desirable public objective cause loss to private individuals, the loss should preferably be met from public funds rather than by the private persons not at fault.[28] Angel J went further and stated that liability in cases such as *Mengel* should be seen to rest, not on private tort principles, but on the place of individual liberty of action within our society under the constitutional principle of the rule of law.[29] Graeme Orr, in an article written prior to the High Court decision, takes a contrary stance and considers that the decision in *Beaudesert* had been the result of a rather jaundiced view of governmental action and was discriminatory.[30]

In other 'intentional torts', it is necessary to show malice to the extent of either actual malice on the part of the defendant or at least recklessness that the unlawful act would result in loss to the plaintiff. In Misfeasance in Public Office, a tort closely related to *Beaudesert*, the defendant must have acted with malice or at least

28 (1994) 95 NTR 8 at 35.
29 (1994) 95 NTR 8 at 12-14.
30 See *'Northern Territory v. Mengal:* the Rule in *Beaudesert Shire Council v. Smith* appealed' (1994) 3 *Torts Law Journal* 219 at 224-5.

with actual knowledge that what he did was 'an abuse of his office',[31] which the Court interpreted as being both knowingly *ultra vires* and involving a foreseeable risk of harm. The High Court confirmed that liability for Misfeasance in Public Office should not be extended to cases in which the public officer 'ought to have known' that the act was beyond power. In view of the other pre-requisite of 'reasonably foreseeable risk of harm' to the plaintiff, those cases would fall to be determined under the law of Negligence.[32]

The decision of the High Court in over-ruling its previous decision in *Beaudesert* has now clarified and simplified the basis on which liability will be imposed on those administering legislation. It represents a further step towards confining tort liability to cases that involve either negligence or an intention to harm the object of the action and answers the suggestion that establishing that damage is the 'inevitable consequence' of an unlawful act might be a satisfactory substitute for establishing an intention to injure.

Because of the policy considerations outlined by Priestley J, and the fact that the statute the subject of the *Mengel* decision did provide compensation for most cattle producers disadvantaged by the campaign, the onus is more heavily on parliament to ensure that the drafting of its statutes does not inadvertently discriminate against some individuals whose commercial interests are adversely affected by governmental action. At the same time, the legal principles should be consistent and readily comprehensible rather than studded with exceptions and anomalies. They need to be realistic in the demands placed on those charged with administering them, so that they are not unduly inhibited in the performance of their duties by fear of legal action. Contemplating an appropriate legislative response to a crisis such as has arisen in Britain in relation to 'mad cow' disease makes it frighteningly clear that the balancing of these demands with economic reality is no easy task.

31 *Farrington v. Thomson & Bridgland* [1959] VR 286 at 293.
32 (1995) 129 ALR 1 at 18-19.