RECENT CASES

GOLDMAN v. HARGRAVE

Liability for things naturally on land.

The decisions of the High Court[1] and the Privy Council[2] in the Western Australian case of *Goldman v. Hargrave* are a welcome clarification of the law governing the liability of an occupier for hazards arising naturally on his land.

Though until this time liability for conditions created by trespassers had been settled in *Sedleigh-Denfield v. O'Callaghan,*[3] the application of this principle to a natural condition of land was uncertain. In *Sedleigh-Denfield* a trespasser had laid a pipeline in a ditch on the defendant's property and installed a faulty grating on it which rapidly became blocked with leaves. The defendant was aware of the drain's condition and had allowed it to remain defective, and as a result the plaintiff's property was flooded. The defendant was held liable for the damage to the plaintiff's land, and the principle was enunciated that an occupier is liable if, with knowledge or presumed knowledge of the existence of a nuisance, he "continues" it or adopts it to his own use.

However decisions such as *Sparke v. Osborne,*[4] where the defendant was found not liable for the spread of prickly pear onto his neighbour's land since it arose naturally on the defendant's land, and *Havelberg v. Brown,*[5] where the defendant was not liable for the spread of a fire of unknown origin into his neighbour's wheatfields, seemed to preclude the operation of a similar rule in liability for natural hazards. Way C.J. in *Havelberg* argued powerfully against responsibility:

> It is one example among many of imperfect obligations, of a moral as opposed to a legal duty, and one can see how difficult it would be to frame a law making an occupier liable for a

1 (1963) 110 C.L.R. 40.
2 [1966] A.C. 989.
3 [1940] A.C. 880.
4 (1908) 7 C.L.R. 31.
5 [1905] S.A.L.R. 1.

> fire arising upon his premises annexing to him legal responsibilities, when he was in no way connected with the act. Should such a legal duty apply in all cases, irrespective of age or sex? Should it be made applicable in spite of the absence or illness of the owner, or in the case of a fire out of sight or without his knowledge? Is it to apply to a man who is weak or unskilful? The slightest reflection must show anyone how difficult it would be to frame a law that would be applicable to all cases. . . .[6]

The traditional common law rules, based upon the needs of a principally rural society in which means of communication and inspection were difficult, regarded the requirement that the occupier prevent his land from becoming a danger to his neighbours in its natural condition as a burden quite disproportionate to the harm likely to be caused. The resulting inclination to absolve the occupier from liability for the natural condition of his land, coupled with the law's unwillingness to impose affirmative duties on a person without some positive act or voluntary undertaking on his part, limited the occupier's liability in these circumstances to those persons in whom he had some beneficial interest—his invitees, licensees, etc.

This led to results such as that in *Reed v. Smith*[7] where an occupier of land on which several badly decayed trees were standing was held not liable for the damage caused to a neighbour's property when one of them fell; it was said that he could insist on the continued presence of these trees on his land no matter how dangerous their condition was. The rule was sharply criticized; and dicta in several cases, such as that of Rowlatt J. in *Noble v. Harrison,*[8] suggested that there was no distinction in principle between a "nuisance" caused by human act and by natural causes or act of God. Until *Goldman v. Hargrave,* therefore, the law was in a state of uncertainty.

The case arose from a stroke of lightning which, on February 25th 1961, struck a tall gum tree on the defendant's property, and set it alight in a fork about 84 feet from the ground. The defendant arranged to have the tree felled the next day, but instead of extinguishing it with water, as it was later found he could have done, he left the tree to burn itself out. On March 1st the wind freshened, the fire revived and spread out onto the plaintiff's property doing considerable damage.

At first instance in the Supreme Court of Western Australia the plaintiffs relied on the the common law as modified by the Fires

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6 Id. at 11.
7 (1914) 17 D.L.R. 92.
8 [1926] All E.R. 284.

Prevention (Metropolis) Act 1774, on *Rylands v. Fletcher*,[9] on breach of statutory duty under the Bushfires Act 1954-58 (W.A.) and on negligence. Jackson J. found for the defendant. The Western Australian statute did not give rise to a civil right of action by the plaintiffs. Nor was he liable in nuisance or *Rylands v. Fletcher* because the fire had been caused by lightning and on the facts Goldman could not be said to have adopted the fire, nor had he *continued* the fire in the sense of having failed to extinguish it. He distinguished the case from *Sedleigh-Denfield v. O'Callaghan,* because in these circumstances the defendant's inactivity did not amount to a user of land. And although he found that Goldman could have extinguished the fire the next day, he found he was under no duty of care to his neighbours to do so.

This decision was reversed on appeal to the High Court: Taylor and Owen JJ. finding the defendant liable in both negligence and nuisance, and Windeyer J. in negligence alone. From this Goldman appealed to the Privy Council.

The Privy Council rejected, as the High Court had, the argument for strict liability, 'because the respondent did not bring the fire upon his land, nor did he keep it there for any purpose of his own. It came there from the skies,'[10] and found the issue to be whether the occupier was guilty of negligence. 'The present case is one where liability, if it exists, rests on negligence and nothing else, therefore whether it falls within or overlaps the boundaries of nuisance is a question of classification which need not here be resolved.'[11] The appellant's defence under section 86 of the Fires Prevention Act was excluded, since the court's finding of negligence meant that the fire which caused the damage had not started "accidentally" within the meaning of the Act, (approving *Musgrove v. Pandelis*[12]).

It was argued before the Privy Council that, as the rule of non-liability for natural conditions was based on there being no *user* of land on which to found liability in nuisance, therefore *Sedleigh-Denfield v. O'Callaghan* could be distinguished from the present case. In that case a human agency had brought about the hazard, and thus the occupier was *using* his land to the detriment of his neighbour, whereas mere nonfeasance in the face of a natural hazard could not be said to make the occupier liable. The argument was dismissed.

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9 [1861-73] All E.R. 284.
10 (1963) 110 C.L.R. 40, 59, per Windeyer J.
11 [1966] A.C. 989, 992, per Lord Wilberforce.
12 [1918-19] All E.R. 589.

'The fallacy of this argument is that the basis of the occupier's liability lies not in the use of his land . . . but in the neglect of action in the face of something which may damage his neighbour.'[13] As Lord Wilberforce pointed out, it is often impossible in practice to say whether a fire was started by human or natural forces.

Clearly the Privy Council is imposing liability for pure non-feasance. The defendant need not come within the usual categories of nuisance by using his land in any way: instead his liability lies in negligence. Though Lord Wilberforce spoke of the appellant's omission to extinguish the fire as bringing out a 'fresh risk', liability would have followed if the defendant had done nothing at all, depending purely on whether he had discharged his duty to his "neighbour", that is to 'those persons who are so closely and directly affected by his act that he ought reasonably to have them in contemplation as being so affected when he is directing his mind to the acts or omissions which are called in question'.[14]

The Board's decision is based on *Sedleigh-Denfield* and the two statements of the law approved therein, Lord Scrutton's dissenting judgment in *Job Edwards Ltd. v. Birmingham Navigations,*[15] and Salmond's Law of Torts,[16] and also to a lesser extent on Rowlatt J. in *Noble v. Harrison* and two N.Z. cases, *Boatswain v. Crawford*[17] and *Landon v. Rutherford.*[18]

WHAT IS A HAZARD?

A possible explanation of many of the "natural conditions" cases in which non-liability has been found is that there was in fact no nuisance to warrant the court's interference: for instance in *Giles v. Walker,*[19] where the occupier was held not liable for the spread of thistledown from his land, or *Salmon v. Delaware,*[20] where the court found no duty on an occupier to prevent leaves from blowing onto a neighbouring railway line. Professor Goodhart[21] suggested that had the positions been reversed and the leaves drifting onto a neighbour's land been poisonous and likely to injure livestock, a duty might well

13 [1966] A.C. 989, 995.
14 Donoghue v. Stevenson, [1932] A.C. 562, 582, per Lord Atkin.
15 [1924] 1 K.B. 341.
16 5th ed., 258-265.
17 [1943] N.Z.L.R. 109.
18 [1951] N.Z.L.R. 975.
19 [1886-90] All E.R. 501.
20 (1875) 38 N.J.L. 5.
21 Goodhart, *Liability for Things Naturally on Land,* 4 C.L.J. 13.

have been found. So the gravity of the harm threatened will certainly be a factor in a court's finding the duty of care to exist; while a mere annoyance such as the spread of thistledown or other weeds would probably not give rise to a duty, the spread of a potential disaster such as a fire in dry country in midsummer would certainly do so.

Closely allied with this point is the relevance of the possibility of the plaintiff's self-help. In the face of a natural disaster such as fire or flood the magnitude of the danger and the limited time to prepare defences militates against that possibility, whereas where the danger is the spreading of weeds and vermin[22] the opportunity is more ready, and more commonly practised. Courts may well be disinclined to hold a defendant liable for damage caused by natural conditions where the defendant could have protected himself: e.g. where the plaintiff neglected to poison his land and was overrun with rabbits from his neighbour's property.

The source of the natural condition which is becoming a "nuisance" is important: e.g. if rabbits are deliberately or negligently attracted or encouraged onto the defendant's land, *Pratt v. Young*[23] is authority for the fact that this is an actionable *nuisance,* though quite probably if the same situation were to arise by the ordinary course of nature the courts would refuse to find the defendant liable.[24] This however, would not be based on the court's being able to find an active misfeasance on which to base the liability, because *Goldman v. Hargrave* makes it clear that use of the land is no longer a necessary element for liability.

As the occupier's duty is based on negligence, a possibility of a defence of contributory negligence arises, for instance where the spread of a small fire is accelerated by long grass and dead vegetation on the plaintiff's land. Apportionment is possible in Western Australia if the claim is based upon negligence rather than nuisance: *Prztak v. Metro. Trans.*[25] However before the defence can be successfully pleaded it must be proved that the plaintiff's use of his land which foreseeably increases his exposure to risk of harm must be such as to make him abnormally sensitive: *Robinson v. Kilvert.*[26] Similarly it would probably be no defence that the plaintiff had failed to take steps to minimize or avert the danger caused by the defendant's neg-

22 See, e.g., Stearn v. Prentice Bros., [1919] 1 K.B. 394.
23 (1952) 69 W.N. (N.S.W.) 214.
24 See, e.g., Farrer v. Nelson, (1885) 15 Q.B.D. 258.
25 [1961] W.A.R. 2.
26 (1889) 41 Ch. D. 88.

ligence, at least where such warding-off would be burdensome or expensive.

EXTENT OF OCCUPIER'S DUTY

The occupier is one of the largest classes on which duties of affirmative care, based on the advantages he gains from his possession of land, are cast. There is not such a great step from this to the enforcement of what courts have hitherto inclined to regard as a purely moral obligation. This is not inapt, for not only does the occupier gain some economic, social, even psychological benefit from his position, but he is also best suited to control the condition of his own land and thus should bear the responsibility for it.

This presents little difficulty where, as in *Goldman v. Hargrave,* the hazard could be remedied with little expense or inconvenience. But in a case such as *Pontardarwe R.D.C. v. Moore-Gwyn,*[27] where the defendant's land was agriculturally useless, and it would have cost about £400 to prevent weathered rocks from falling onto the plaintiff's land, the question becomes more difficult.

The Privy Council had in mind the possible injustice to an occupier who is under a duty of affirmative care to remove a hazard on his land for which he is in no way responsible, when it formulated the standard of care as that which is reasonable having regard to the occupier's individual circumstances:

> . . . what is reasonable to one man may be very unreasonable and indeed ruinous to another. . . . One must say in general terms based on knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. . . . Thus less must be expected of the infirm than of the able-bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them.[28]

Generally, for practical reasons the standard of care in negligence is that of the 'man of ordinary prudence.' But Lord Wilberforce's subjective standard is obviously a reasonable limitation where an occupier is placed in a hazardous situation not of his own making—just as in contributory negligence cases where the plaintiff's personal characteristics and circumstances are considered. This sort of subjective standard of care would, as both the High Court and the Privy

27 [1929] 1 Ch. 656.
28 [1966] A.C. 989, 996.

Council pointed out, (though the High Court somewhat more vigorously), affect the findings in some of the earlier cases:

> If some of the situations such as those in *Giles v. Walker* (Thistledown) and *Sparkes v. Osborne* (prickly pear) were to recur today, it is probable that they would not be decided without a balanced consideration of what could be expected of the particular occupier as compared with the consequences of inaction.[29]

CONCLUSION

Both Goodhart[30] and Noel[31] note and approve the general trend of courts from the traditional immunities of the landowners to a broader general duty of care in occupiers to prevent their land from becoming a source of danger to others. It is submitted that *Goldman v. Hargrave* is not breaking new ground in finding liability for the natural condition of land—though in basing the decision on negligence rather than the traditional forms of nuisance it may appear so. Rather, the decision gave the coup de grace to an ailing natural condition rule, in favour of that closer concern for one's neighbour who, in an increasingly complex and closely-populated society, is necessarily more than ever to be affected by one's acts or omissions.

M. E. STOCKWELL*

R. v. SLEEP

The Code defence of provocation is available in offences where assault is not necessarily an element of the offence charged.

The decision of Hart J. in *Sleep*[1] to direct the jury that provocation could be a defence to manslaughter is illustrative of the difficulties which beset the interpretation of codes.

In ruling that the jury should consider that defences under sections 246 and 247 (provocation) and 248[2] were open to the accused, his Honour had to overcome an extremely imposing difficulty. Section 245 defines provocation for the purposes of section 246, and it pre-

29 Ibid.

30 Op. cit., n. 21, above.

31 Noel, *Nuisance from Land in its Natural Condition*, 56 HARV. L. REV. 772.

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1 [1966] Qd. R. 47.

2 The reference are not to the Queensland sections of the Code but to the Western Australian equivalents.