CASE NOTES

BEAUDESERT SHIRE COUNCIL v. SMITH AND OTHERS[1]

Tort—Action on the case—Loss caused as the inevitable consequence of an unlawful intentional and positive act.

In 1944 a licence under the Water Acts 1926 (Qld), as amended, was issued to P. R. Smith by the Commissioner of Irrigation and Water Supply, authorizing him to install a pumping plant on part of his property fronting the Albert River for the purpose of irrigating twenty acres of property. Smith installed the plant and until 1957 pumped water from a permanent natural pool in the river. In that year the Beaudesert Shire Council took 12,000 yards of gravel from the bed of the river near his farm, thereby destroying the pool and so altering the flow of the river that Smith could no longer obtain the water which his licence entitled him to take. An action was brought by Smith and eventually taken over by his executors who were awarded £5,000 damages by Hanger J.[2] for the damage to the crops and for the cost of moving the pump to a less advantageous position. This decision was affirmed by the High Court in a unanimous judgment, although the award of damages was reduced to £1,000.[3]

The Court considered that the Council was not justified in taking the gravel and had, in fact, committed a trespass against the Crown. The Water Acts[4] and the Gravel, Sand, and Materials Regulations[5] made under them have the effect of vesting the bed, banks and right of flow of rivers in the Crown, and prohibit anyone except the holder of certain certificates from taking water (for irrigation) or gravel. The Court rejected the Council's argument that it was protected by a certificate issued to the Commissioner of Main Roads because, while the Council may have been acting for the Commissioner, it did not have a certificate issued by him as prescribed by the regulations.[6] A further contention based on section 27 Main Roads Act was rejected very summarily.[7]

Having found that the Council was not justified in taking the gravel the Court had to consider the separate question of whether such unlawful conduct gave rise to an action by Smith for the consequential damage that he suffered. They construed the Water Acts as giving Smith no right to have the pool from which he pumped preserved or to have the flow of water maintained to the pump.[8] The Water Acts had severely restricted the common law rights of a riparian owner and apart from sections 7 and 9, which were considered to be immaterial, the only rights were those conferred on licensees by sections 11 and 14.[9] These gave rights of quiet enjoyment and sole and exclusive use of the plant installed

1 (1966-67) 40 A.L.J.R. 211. (Taylor, Menzies, and Owen JJ.)
2 Not Wanstall J. as appears in the report at page 212. *Vide* Dworkin and Harari, 'The Beaudesert Decision—Raising the Ghost of the Action upon the Case', (1966-67) 40 *Australian Law Journal* 296 and 347.
3 (1966) 40 A.L.J.R. 211, 215.
4 *Ibid.* 213. 5 *Ibid.* 212. 6 *Loc. cit.*
7 *Loc. cit.* 8 *Ibid.* 213.
9 For the text of these sections, *ibid.* 213.

as well as rights to use and dispose of the water obtained, but such rights did not extend beyond the pump to the river.[10] Thus, having held that they could not find liability on the basis of infringement of the rights of a riparian owner or in negligence, nuisance or breach of statutory duty,[11] the Court was led to conclude that

> if what the [Council] did was actionable . . . liability must depend upon the broad principle that the council intentionally did some positive act forbidden by law which inevitably caused damage to Smith by preventing the continuing exercise of his rights as licensee.[12]

After consideration of several cases,[13] which had been collected by Kiralfy in *The Action on the Case,* Their Honours enunciated the 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.[14]

While recognizing that the principle could not cover all cases of loss to one person flowing from a breach of the law by another[15] the Court considered it would have been possible to state a wider[15a] proposition.

It would seem that the Court was confining itself to situations involving three parties so that 'unlawful' would mean an act which is unlawful as against a third party either because it is tortious, criminal or, on recent authority, a breach of contract.[16] 'Intentional' clearly refers to the nature of the act, *i.e.* a voluntary act, and as the principle is confined to 'acts' it would seem that the word 'positive' is redundant even if it was intended to show that omissions were not included.[17]

If this is what the High Court meant the question arises as to whether such a principle is well founded. While development of the action on the case is still possible there are limits within which judicial virtuosity must be confined[18] and it would appear that Their Honours' judgment

[10] *Ibid.* [11] *Ibid.* 213. *Cf.* (1960) 40 A.L.J. at 301.

[12] (1966) 40 A.L.J.R. 211, 213.

[13] *Earl of Shrewsbury's case* (1610) 9 Co. Rep. 466; 77 E.R. 798; *Garret v. Taylor* (1620) Cro. Jac. 567; 79 E.R. 485; *Tarleton v. McGawley* (1794) Peake N.P. 270; 170 E.R. 153; *Keighley's case* (1607) 10 Co. Rep. 139b; *Whaley v. Laing* (1857) 2 H. & N. 476; 157 E.R. 196; *Carrington v. Taylor* (1809) 11 East 571; 103 E.R. 1126; *Keeble v. Hicheringill* (1809) 11 East 574; 103 E.R. 1127; *Mogul Steamship Co. v. McGregor Gow & Co.* (1889) 23 Q.B.D. 598 (C.A.); [1892] A.C. 25 (H.L.).

[14] (1966) 40 A.L.J.R. 211 215.

[15] Limitations are for example placed on the principle by the doctrines of recovery for breach of statutory duty. [15a] *Sic.*

[16] *Rookes v. Barnard* [1964] A.C. 1129.

[17] On the meaning of the terms compare the discussion by Dworkin and Harari (1966) 40 A.L.J. 347.

[18] 'The whole history of the action on the case, from 13 Edw. 1 c. 24 onwards affirms the principle that where cases fall under the same right and require a like remedy new precedents should be created.' Lord Halsbury L.C. in *Allen v. Flood* [1898] A.C. 1. Note the distinction made by Ashhurst J. in *Pasley v. Freeman* (1789) 3 T.R. at 63 between cases which are new *in principle* and cases which are merely new *in instance. Vide* (1966-67) 40 *Australian Law Journal* 296, 302; Kiralfy, *op. cit.*, especially 10-14, and 32ff; Milsom, (1954) 12 *Cambridge Law Journal* 105; (1965) 81 *Law Quarterly Review* 496.

reached beyond them. It is submitted, with respect, that the High Court proceeded on an inadequate survey of the earlier cases and of fundamental notions of tortious liability.

The authorities cited by the Court have all been considered in recent cases and it is surprising that they were not referred to.[19] Cases should not be read in isolation but rather as groups which demonstrate lines of development. Those cited by the Court would seem to fit more happily into Professor Fleming's category of interference with economic relations, and the House of Lords has recognized this.[20] Thus we have seen the development of the torts of inducing breach of contract, intimidation and conspiracy. Often these torts involve three-party situations, and an element of unlawful conduct, inasmuch as an unlawful act is threatened or induced. The essence of these actions is, however, an intention to injure the plaintiff. The defendant must have knowledge of a civil right and act so as to injure the plaintiff as a result of violating that right.[21] The *Beaudesert* principle proceeds on the footing that such intention is irrelevent and yet the same cases are used to establish both propositions.

Recently an attempt has been made to find a principle underlying those cases. It has been maintained that there is a separate tort of 'causing loss by unlawful means'.[22] 'The cases show that the means used by A to cause loss to C can be unlawful because they involve acts which are unlawful towards B.'[23] However, this is far from saying, as the *Beaudesert* principle does, that they *must* be unlawful. In *J. T. Stratford and Son v. Lindley*,[24] in circumstances where the tort of intimidation was inapplicable, it was recognized that for A to interfere with contractual relations between C and D by instructing B not to man barges owned by D, in breach of his contract with C, was actionable by D who suffered loss. Two members of the House of Lords applied the principle of the residual tort of causing loss by unlawful means but recognized the importance of the intention on the part of A to injure D.[25] The underlying principle found by the House of Lords involves an intention to injure and yet that of the High Court would seem to disregard it.

It may be that the High Court was seeking to apply generally the principle of *Wilkinson v. Downton*.[26] It is actionable 'if a person deliberately does an act calculated to cause physical injury for which there is no lawful justification or excuse and in fact causes injury to that other person'.[27] From that case itself and others it would seem that this

19 *Bowen v. Hall* (1881) 6 Q.B.D. 333 (C.A.) esp. 337ff.; *Allen v. Flood* [1898] A.C. 1 esp. 92-5, 101-2, 133; *Quinn v. Leathem* [1901] A.C. 495 esp. 510; *Sorrel v. Smith* [1925] A.C. 780; *Rookes v. Barnard* [1963] 1 Q.B. 689 (C.A.), [1964] A. C. 1129 (H.L.); *James v. The Commonwealth* (1939) 62 C.L.R. 339 esp. 362-5, 370; *Thomson v. Deakin* [1952] Ch. 646, 693.

20 Fleming, *The Law of Torts* (3rd Ed.) 647ff., esp. 651-671, and the articles there cited.

21 On the question of malice and acts lawful in themselves, *vide Hollywood Silver Fox Farm v. Emmett* [1936] 1 All E.R. 825; *Bradford Corporation v. Pickles* [1895] A.C. 587; *Allen v. Flood* 1898 A.C. 1; Fleming, *op. cit.* 373-5; Williams, (1939-41) 7 *Cambridge Law Journal* 111 esp. 127-8.

22 Hoffman, (1965) 81 *Law Quarterly Review* 116, esp. 121.

23 *Ibid.* 119.

24 [1965] A.C. 269 (Court of Appeal 276-307; House of Lords 320-343).

25 *Per* Lord Reid, 324-5, and *per* Viscount Radcliffe, 328-9.

26 [1897] 2 Q.B. 57. 27 *Ibid.* 59.

is a tort of intentional injury.[28] The reason for it being considered a separate tort is that it seems to be a misuse of terms to categorize as negligence conduct which is intended to damage him and which does in fact damage them, even although such damage is merely consequential.[29] And because it is consequential trespass will not lie. An interesting discussion of the cases can be found in the judgment of Herring C.J. in *Hutchins v. Maughan*,[30] and it appears that the principle extends to injuries to animals. The widest formulation of this principle is to be found in *Mogul Steamship Co. v. McGregor Gow and Co.* where Bowen L.J. said:

> Intentionally to do that which is calculated in the ordinary course of events to damage, and which does in fact damage another in that person's property or trade is actionable if done without just cause or excuse.[31]

The difficulty, of course, is in defining what is just cause or excuse, for clearly some liberty is allowed intentionally to injure another's interests. Lord Herschell noted the breadth of this proposition in *Allen v. Flood* and commented that

> if it means that a man is bound in law to justify or excuse every wilful act which may damage another in his property or trade, then I say, with all respect, the proposition is far too wide; everything depends on the nature of the act, and whether it is wrongful or not.[32]

This seems to be an accurate appraisal of the English attitude which prefers to place the burden of negativing lawful justification on the plaintiff by the device of forcing him to bring his action within a recognized principle of tortious liability. Lord Herschell clearly meant 'wrongful' to indicate this proposition, *i.e.* the act must be tortious.

This discussion of the principle underlying *Wilkinson v. Downton* shows that the High Court may have been searching for such a principle and either, misused the word 'intentional', or read too much into the *dicta* which appear to pose an objective test of intention in this field by

[28] *Bunyan v. Jordan* (1937) 57 C.L.R. 1.

[29] On the differentiation of trespass and case, *vide* the article by Heffey and Glasbeek (1966) 5 *M.U.L.R.* 158. Also Milsom (1954) 12 *Cambridge Law Journal* and Goodhard and Winfield (1933) 49 *Law Quarterly Review* 359.

[30] [1947] V.L.R. 131 and the cases there cited.

[31] (1889) 23 Q.B.D. 598, 613.

[32] [1898] A.C. 1, 139; *Cf. Rogers v. Rajendro Dutt* (1860) 13 Moore P.C. 209, 15 E.R. 78; and note the *dictum* in the *Mogul case* which was approved by Lord Halsbury in *Allen v. Flood* and by Lord Shand in *Quinn v. Leathem*: 'Intimidation, obstruction and molestation are forbidden, so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence: *Tarleton v. McGawley*; the obstruction of actors on the stage by preconcerted hissing: *Clifford v. Brandon*; *Gregory v. Brunswick*; the disturbance of wild fowl in decoys by the firing of guns: *Carrington v. Taylor* and *Keeble v. Hickeringill*, the impeding or threatening servants or workmen: *Garrot v. Taylor*; the inducing persons under personal contracts to break their contracts: *Bowen v. Hall*; *Lumley v. Bye*—are all instances of such forbidden acts.' It will be seen that this is closely connected with the torts concerned with interference with economic relations.

imputing an intention to the defendant. It would appear that those *dicta* either confuse the tort with negligence, or make too much of the presumption that a man intends the natural and probable consequences of his act. As Lord Denning has pointed out this is merely an inference of fact which may or may not be drawn.[33] If the Court were striving after such a proposition, which is debatable, it is submitted that it could not have been applied in this case as on no analysis of the facts could intention be imputed; although for purposes of orderly classification the principle underlying *Wilkinson v. Downton* should be extended outside the field of physical injury.

It is therefore doubtful whether the cases cited by the Court do establish the proposition enunciated. Their Honours' interpretation may have extended certain other cases beyond the limits that they can be without conflicting with other principles.[34] An interesting example, adverted to by Dworkin and Harari, where the *Beaudesert* principle would allow actions where they have steadfastly been denied before, is in the field of negligence.[35] It would lead to the amazing conclusion that if A were liable in negligence to B it would only be for damage that was reasonably forseeable, whereas if C were damaged as a consequence of that unlawful act of negligence towards B, A would be liable for all the inevitable consequences even though no duty of care may have been owed to C. It would seem that such a result is totally out of line with modern considerations of fault liability, and may in fact be reintroducing *Polemis* into the law of negligence.[36]

This apparent conflict with the recognized principles of negligence has a parallel in the law of contract. If A contracts with B for the benefit of C who provides no consideration, the common law will not permit C to sue A for breach of the obligation. If the *Beaudesert* principle were applied an anomalous position would result: if A's obligation were *positive*, in that he contracted to perform an act, and he broke his contract, C would still be unable to sue him because A would have caused him loss by an omission; if, on the other hand, A's obligation were *negative*, in that he contracted not to do something in relation to C, the latter would have an action for loss inevitably caused by an unlawful positive act in breach of contract. If the principle is to hold good, it would seem therefore that it cannot apply to contracts, and yet it might be argued that the reasoning in *Rookes v. Barnard* indicates that there should be no such exception.

Further criticisms of this case may be found in the article by Dworkin

[33] *Hosegood v. Hosegood* (1950) 66 (pt 1) T.L.R. 735, 738 (Denning L.J.) *Cf.* Fleming *op. cit.*, 54.

[34] Further criticisms of the cases can be found in the article by Dworkin and Harari (1966-67) 40 *Australian Law Journal* 296, 305. It is interesting to note that the cases which do not fall within such principles as intimidation can be argued to be cases of nuisance, *e.g. Whaley v. Laing*, and *Keeble v. Hickeringill*. On the latter case, note the criticisms of Lord Watson in *Allen v. Flood*, (1898) A.C. 1, 101-2, and the treatment in *Hollywood Silver Fox Farm v. Emmett* [1936] 1 All E.R. 825. In both cases it is treated as a case of nuisance.

[35] (1966-67) 40 *Australian Law Journal* 347, 349.

[36] *Overseas Tankship (U.K.) Ltd v. Morts Dock and Engineering Co. Ltd* [1961] A.C. 388; *Overseas Tankship (U.K.) Ltd v. The Miller Steamship Co. Pty* [1966] 3 W.L.R. 498; *In re Polemis* [1921] 3 K.B. 560.

and Harari.[37] The conclusion would seem to be that no such principle as the High Court stated exists in our law, so that Smith should in all probability not have recovered.[38] Although such a result may be deplored some of the blame may be laid on the Water Acts.[39]

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[37] (1966-67) 40 *Australian Law Journal* 296 and 347. One may question their criticism of the Court's approach to the whole case (p. 298). They submit that the Court first asked whether Smith had any right to the preservation of the pool or of a flow of water to the pump, and, having concluded that he had no such right, proceeded to determine whether the Council had committed an actionable wrong by depriving him of it. This is exactly what the Court did not do. Because it could not find any right to the water itself it was forced to enunciate the principle that it did. The right that is recognised by establishing this duty is independent of water rights and depends simply on an unlawful act which causes consequential damage.

[38] A parallel case in which relief was refused was *Best v. Samuel Fox and Co. Ltd* [1950] 2 All E.R. 798, on appeal [1951] 2 All E.R. 116. *Cf.* Fleming, *op. cit.*, 622-625 esp. 624.

[39] Dworkin and Harari discuss the common law position in relation to water rights and also submit that the Court failed to consider adequately the effect of the Water Acts on those rights. (1966-67) 40 *Australian Law Journal* 298-99.