Tort Liability Clarified: *Northern Territory of Australia* v *Mengel*

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The decision in *Northern Territory of Australia* v *Mengel*

On 19 April 1995 the High Court delivered judgment in *Northern Territory of Australia* v *Mengel*,[1] an appeal from the Northern Territory Court of Appeal.[2] The Northern Territory's appeal was upheld by all seven justices. The Court considered what remedy, if any, was available to an innocent plaintiff who suffered damage as a result of the unlawful conduct of a public officer, which conduct was neither (relevantly) negligent nor intended to cause harm. The fact that the conduct itself was unlawful, and had as its inevitable consequence the causing of harm to the plaintiffs, had been found sufficient to render the Northern Territory liable both at first instance and on appeal to the Court of Appeal mainly by the application of the principle in *Beaudesert Shire Council* v *Smith*.[3]

The High Court overruled *Beaudesert*; suggested (without deciding finally) that it (had) only applied to situations where the 'unlawful conduct' was conduct 'forbidden by law'; examined the 'action on the case'; further defined the tort of misfeasance in public office; and considered the duty of care owed by a public officer to ascertain his or her powers before purporting to exercise them.

The principle in *Beaudesert* overruled

All members of the Court agreed that, subject to one exception, *Beaudesert* should be overruled.[4] In overruling *Beaudesert*, the Court first considered perceived problems with respect to various elements of the test and then considered the general issue of its place in the law of tort.

(a) Elements of the test

The cause of action in *Beaudesert* was described as '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'.[5] The most controversial element of the test is the requirement that the act be 'unlawful'. This may continue to be an important concept as the emerging tort of interference with economic interests ('the economic torts') also depends upon the act being 'unlawful'.

The majority judgment of the Court suggested strongly that the unlawful acts contemplated in *Beaudesert* were confined to those forbidden by law.[6] However, having

1 (1995) 129 ALR 1.
2 (1994) 95 NTR 8. See G Hiley, 'Crown Liability for Unlawful Conduct: *Northern Territory* v *Mengel*' (1994) 18 *University of Queensland Law Journal* 125.
3 (1966) 120 CLR 145, 156.
4 (1995) 129 ALR 1, 16 per Mason CJ, Toohey, Gaudron and McHugh JJ; 25 per Brennan J; 36 per Deane J.
5 *Id* 10 per Mason CJ, Toohey, Gaudron and McHugh JJ (hereafter, the 'majority judgment').
6 *Ibid*

suggested that 'unlawful' meant forbidden by law, the majority judgment went on to consider another alternative, namely, an unauthorised act in the sense of an act that is ultra vires and void.[7] Their Honours did not draw any final conclusion and went on to consider the primary argument that *Beaudesert* was wrongly decided.

Deane J would have given the phrase 'unlawful act' a sufficiently wide meaning to encompass a 'tortious infringement or contravention of the rights of another'.[8] Presumably such conduct would not itself need to be a tort directed at the plaintiff as a separate remedy would then be unnecessary. It is not clear what conduct less than a tort would meet the test. His Honour considered that 'directions' to the plaintiffs by various departmental officers were not '*without more*, unlawful in the sense of being contrary to law'.[9]

The facts were that first a local stock inspector, then his regional superior and district superior in their official capacities, gave instructions to the plaintiffs. The instructions were reinforced by the principal statutory officer who ultimately had a facsimile delivered 'quarantining' the plaintiffs' two stations. That quarantining was as a result of a mistaken view of the law. The plaintiffs even met with the Minister to try to resolve the problems they were experiencing but without result. Deane J regarded these instructions as being mere statements of fact, or as instructions that were simply unauthorised and invalid.

In the Northern Territory Court of Appeal, Priestley J had concluded that the unlawful acts of the defendants assumed a character of a tortious infringement of the rights of the plaintiffs when they were combined with pressure exerted by the government officials, backed by the authority of their official position and coupled with an implied threat of penal consequences if the plaintiffs disobeyed. Deane J disagreed not with that proposition but with the facts found below to support it. All his Honour was prepared to find from the evidence was that the defendants had threatened to take whatever steps could lawfully be taken to prevent contravention of their directions.

There are therefore a number of questions remaining open as to the meaning of 'unlawful acts'. If those questions are to be resolved, they will be resolved either in the context of the developing economic torts or the exception to the overruling of the *Beaudesert* principle.

(b) Principle

Having considered the elements of *Beaudesert*, the majority judgment then considered the correctness of the principle. They concluded that the cases upon which *Beaudesert* was based did not support the principle as stated. Since some of those cases had also been relied upon by the United Kingdom courts to develop the tort of intimidation (and subsequently the economic torts) they plainly supported some principle. The majority judgment stated that their conclusion that the *Beaudesert* principle should be overruled was subject to the qualification that 'there may be cases in which there is liability for harm caused by unlawful acts directed against a plaintiff or the lawful activities in which he or she is engaged'.[10]

The expression 'directed against a plaintiff or the lawful activities in which he or she is engaged' is the additional mental element that creates a cause of action where a defendant acts unlawfully. The boundaries of that mental element are unclear. Certainly it requires less than an intention to harm. It is a description extracted from a range of allegations and findings in the cases founding the *Beaudesert* principle including:

- acts 'to discredit and deprive the plaintiff';
- 'contriving and maliciously intending to hinder and deter the plaintiffs from trading';

7 *Id* 11.
8 *Id* 31.
9 *Ibid*
10 *Id* 17.

- disturbing fairgoers by which a plaintiff lost his toll; and
- a violent or malicious act done to a man's occupation.

Their Honours also described the emerging economic tort as one requiring an unlawful act 'directed at the person injured, although not necessarily done for the purpose of injuring his or her interests'.[11]

On the facts in *Mengel*, the defendants had no intention or desire to injure the plaintiffs but they knew full well that their acts would cause the harm experienced. The High Court did not attempt to analyse whether such conduct was 'directed against' the plaintiffs in the relevant sense. Their Honours concluded that the *Beaudesert* principle was stated too widely to be supported by the cases upon which it was based. It must be assumed that the narrower principle that could be supported did not apply to the plaintiffs in this case.

(c) The economic torts

The majority judgment then considered how the elements of a *Beaudesert* action compared with the developing economic torts. This is the first time the High Court had considered this area. The majority judgment noted that the economic torts had largely proceeded on the basis that liability depends upon the intentional infliction of harm.[12] Their Honours observed, however, that 'more recent developments in the United Kingdom suggest the emergence in that country of a tort of interference with trade or business interest by an unlawful act directed at the person injured, although not necessarily done for the purpose of injuring his or her interests'.[13] They stated that the necessary intention to harm exists where 'a person knowingly interferes with the enjoyment by another of a positive legal right, whether such knowledge is actual or constructive'.[14] If this is a sufficient definition of the element that the unlawful act must be 'directed against' the plaintiff, it appears to support a wide interpretation of that element. It appears to require only knowledge that a right is being interfered with and not an intention, whether predominant or not, to interfere.

(d) Other causes of action

Having compared *Beaudesert* to the economic torts, the majority judgment went on to compare it also with actions in negligence and the action for breach of statutory duty. They concluded that:

(i) the lack of authoritative support for the principle stated in *Beaudesert*;
(ii) the difficulties associated with the elements of unlawful act and inevitable consequence;
(iii) the difficulty of reconciling *Beaudesert* with negligence and breach of statutory duty; and
(iv) the general trend of legal development,

compelled the conclusion that *Beaudesert* should no longer be followed.[15]

The majority judgment observed that putting the action of breach of statutory duty aside:

> [T]he recent trend of legal development, here and in other common law countries, has been to the effect that liability in tort depends on either the intentional or the negligent infliction of harm.[16]

This is a statement dealing expressly with areas in which tort is developing, and does not necessarily refer to established principles. The majority judgment put forward another

11 *Id* 15.
12 *Id* 14.
13 *Id* 15.
14 *Ibid*
15 *Id* 16.
16 *Id* 14.

general proposition in relation to each cause of action considered, namely, that if there was a duty of care to avoid the harm suffered an additional cause of action would serve no useful purpose and if there was no duty of care, it was anomalous to impose liability for unintended harm.[17] In relation to intimidation they said:

> So far as individual government employees are concerned, it would extend personal liability beyond misfeasance in public office or, even, negligence and, in effect, impose liability for an error of judgment. That result is supported by neither policy nor principle.[18]

Neither of these two statements of general principle appears to take into account the law of trespass. The High Court has recently confirmed that there may be liability where there is no duty of care and no intended harm. This was in the trespass to land cases of *Halliday* v *Nevill*[19] and *Plenty* v *Dillon*.[20] In the latter case, Gaudron and McHugh JJ noted that the first and second respondents (police officers) were acting honestly in the supposed execution of their duty but that nevertheless they committed a trespass. Their Honours went on to say:

> If the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official.[21]

The law of trespass protects the rights of individuals against harm which is neither negligent nor intended.

There are two distinctions between the plaintiffs in *Mengel* and those in *Plenty* and *Halliday*. One is the nature of the interest protected and the other is the conduct that interfered with the interest. The interests protected in the trespass cases were the plaintiff's right to privacy[22] and his right not to be unlawfully invaded.[23] The plaintiffs' rights in *Mengel* were their property rights in their chattels (cattle) and their economic rights flowing from trading in their chattels.

The second distinction is that in the trespass cases the interference with those rights was direct — the police officers entered the plaintiff's land. In the *Mengel* case, the interference was indirect. The defendants did not themselves interfere with the chattels but (unlawfully) directed the plaintiffs to deal with the chattels to their detriment.

Do these distinctions suggest a satisfactory reason in policy for the difference in availability of remedies?

Brennan J (as he then was) in his separate judgment discussed the dual requirements of tort that:

> The conduct must infringe an interest which the common law protects and the conduct must be of a character which the common law treats as wrongful.[24]

He referred to a number of rights protected by law (eg privacy, reputation, and physical damage) but categorised Mengel's 'legal right or interest' as pure economic loss. This is the damage that may flow from interference with the right rather than the right itself. None of the justices in the High Court referred to the plaintiffs' property rights. Only Brennan J discussed trespass. He noted that: 'Had there been any act of trespass . . . the inspectors may well have been liable . . .'[25]

17 *Id* 16 with respect to *Beaudesert*; 19 with respect to misfeasance; and 22 with respect to 'intimidation'.
18 *Id* 22.
19 (1984) 155 CLR 1.
20 (1991) 171 CLR 635.
21 *Id* 655.
22 *Halliday* v *Nevill* (1984) 155 CLR 1, 9 per Brennan J.
23 *Plenty* v *Dillon* (1991) 171 CLR 635, 647 and 655 per Gaudron and McHugh JJ.
24 (1995) 129 ALR 1, 24.
25 *Id* 29.

Misfeasance in public office

The judgments contain a useful analysis of this tort and its development. *Mengel* argued that although most of the decisions on this tort require that the public officer acted with malice, or with actual knowledge of the fact that he was acting without authority, it should suffice if the officer had constructive knowledge — that is, if he ought to have known that he was acting unlawfully. The Court rejected such an extension but recognised that a third alternative, namely reckless indifference, may suffice.

The rejection of a constructive knowledge element seems to be based upon the assumption that constructive knowledge more appropriately belongs to a negligence action (ie an action based upon a duty of care to ascertain the extent of one's powers — see below) whereas the tort of misfeasance in public office 'is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer concerned knowingly acts in excess of his or her power'.[26]

Although most of the earlier cases required actual malice towards the plaintiff, the courts have recognised that liability can be established where the public officer commits an act that he or she knows is beyond power and which involves a foreseeable risk of harm.[27] The majority judgment expressed the view that policy and principle both suggest that liability should be confined in the same way as in those torts that impose liability on private individuals for the intentional infliction of harm.[28] However, they included in that category, acts that are done with reckless indifference to the harm that is likely to ensue.[29] The majority judgment concluded by saying that 'misfeasance in public office is not confined to actual knowledge but extends to the situation in which a public officer recklessly disregards the means of ascertaining the extent of his or her power'.[30]

Brennan J also approached this aspect by requiring a state of mind that is inconsistent with an honest attempt by a public officer to perform the functions of his or her office. To the mental elements of malice and knowledge his Honour adds 'reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce'.[31] He said:

> Misfeasance in public office consists of a purported exercise of some power or authority by a public officer otherwise than in an honest attempt to perform the functions of his or her office whereby loss is caused to a plaintiff. Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete.[32]

Brennan J also distinguished this tort from the negligence torts by observing that 'the tort of misfeasance in public office is not concerned with the imposition of duties of care. It is concerned with conduct which is properly to be characterised as an abuse of office and with the results of that conduct. Causation of damage is relevant; forseeability of damage is not'.[33]

Deane J reached a similar conclusion but in a slightly different way. His Honour uses the word 'malice' as covering all three of the mental elements to which the other judges refer — namely, acts done with actual intention to cause the injury, acts done with knowledge of invalidity or lack of power and with knowledge that they would be likely

26 *Id* 17 per the majority judgment.
27 *Id* 19.
28 *Id* 18.
29 *Id* 19.
30 *Id* 19.
31 *Id* 26.
32 *Id* 27.
33 *Id* 27.

to cause such injury, and thirdly, acts done 'with reckless indifference or deliberate blindness to that invalidity or lack of power and that likely injury'.[34]

Duty of care to ascertain powers

Adverting to possible remedies in negligence, all members of the Court (with the exception of Brennan J) observed that there may be a duty of care upon a public officer to ascertain the extent of his or her powers before he or she exercises them. It was stated in the majority judgment that:

> Governments and public officers are liable for their negligent acts in accordance with the same general principles that apply to private individuals and, thus, there may be circumstances, perhaps very many circumstances, where there is a duty of care on governments to avoid foreseeable harm by taking steps to ensure that their officers and employees know and observe the limits of their power. And if the circumstances give rise to a duty of care of that kind, they will usually also give rise to a duty on the part of the officer or employee concerned to ascertain the limits of his or her power.[35]

In *Mengel* their Honours decided that the critical information in this context was not the terms of the relevant (empowering) legislation but whether a certain fact existed, namely, whether there was an approved program current in September 1988.[36] The trial judge had found there to be no breach of any relevant duty to act with reasonable care.

The duty of care suggested by the majority judgment may provide some remedy for damage caused indirectly by unauthorised conduct. But it seems anomalous that the existence of a remedy for such conduct (indirectly causing damage) depends upon there being a duty not to exceed authority, whereas in cases of direct damage (eg trespass) no such duty needs to be identified.

Brennan J considered negligence in the context of discussing the tort of misfeasance. His Honour disagreed strongly with the suggestion that a public official could be liable in negligence for failing to know and observe the limits of power. He stated:

> If liability were imposed upon public officers who, though honestly assuming the availability of powers to perform their functions, were found to fall short of curial standards of reasonable care in ascertaining the existence of those powers, there would be a chilling effect on the performance of their functions by public officers.[37]

His Honour drew a distinction between the standards required in ascertaining the existence of power and those applicable in exercising an available power. He concluded that:

> Error by a public officer in the ascertainment of available power may found a misfeasance action, if at all, only if the public officer knew there was no power or was recklessly indifferent as to the existence of the power to engage in the conduct which caused the plaintiff's loss.[38]

Earlier his Honour had stated:

> Thus liability may be imposed on a public officer under the ordinary principles of negligence where, by reason of negligence in the officer's attempted *exercise* of a power, statutory immunity that would otherwise protect the officer is lost.[39]

Under this analysis, an honest though foolish official is protected at the point of ascertaining whether power is available but not at the point of attempting to exercise an

34 *Id* 37.
35 *Id* 23.
36 *Id* 20.
37 *Id* 27.
38 *Id* 28.
39 *Id* 27.

existing power. (Neither officer is protected of course if his or her conduct happens to amount to a trespass.)

In situations where an official's power consists of numerous separate statutory powers, a distinction between an error in the existence of power and the attempted exercise of power may be difficult to make. In the *Mengel* case itself, the Chief Inspector of Stock had not realised that his source of power should have been a gazettal notice which he had authorised. He thought, wrongly, that he was exercising an unrelated statutory power that itself was not applicable to the circumstances. Other officials followed internal administrative guidelines without any consideration of whether there was statutory power.

Deane J suggested that the Court of Appeal might be invited to reconsider a claim based upon a breach of a duty of care owed by the public officers in failing to appreciate that their actions were unauthorised. However, he referred to 'some obvious difficulties, such as causation of damages'.[40] He had earlier made the point that had the defendants ascertained that they did not have the necessary power to do what they wished, such lack of authority could have been rectified by the exercise of powers that the defendants did have.[41] The same action could have been taken (lawfully) and the same damage caused, without any liability.[42]

Establishing causation may be difficult in most cases where the tortious conduct complained of is little more than a defendant acting beyond his power in circumstances where had he been aware of his lack of power at the time, he could have brought about exactly the same result but in a lawful way.

Damages in administrative law cases?

Perhaps it is for this sort of reason that it is somewhat unusual for a plaintiff to successfully claim damages in circumstances where he or she has sustained (economic) loss as a result of administrative action later held to be invalid or ultra vires. The usual remedy is (only) to have the decision quashed or otherwise declared invalid. A good example of the inability to claim damages for losses directly sustained by reason of invalid administrative action is the subject of the judgments in *Takaro Properties Ltd* v *Rowling*[43] and *Rowling* v *Takaro Properties Ltd*.[44]

Brennan J hints however that where an officer's administrative act is invalid on account of his or her failure to accord a plaintiff procedural fairness, this may in some circumstances form the basis of a misfeasance in public office claim.[45] The circumstances must of course have been such as to satisfy the necessary mental element. Can the foundations for a damages claim based on misfeasance in public office be laid by protesting to the public officer (or for that matter, any 'administrator') at the outset that he or she does not hold the requisite power, thereby creating a situation that by proceeding the administrator would be acting with knowledge of his or her lack of power or with reckless indifference?[46]

Action on the case

Although it had provided the foundation for most of the modern day torts, the High Court dismissed the action on the case as such as having any contemporary use, particularly in

40 *Id* 39.
41 *Id* 30.
42 *Id* 36.
43 [1986] 1 NZLR 22.
44 [1988] AC 473.
45 (1995) 129 CLR 1, 27.
46 Cf *Little* v *Law Institute of Victoria (No.3)* [1990] VR 257.

light of the modern developments in the law of negligence. Absent intentional harm, the Court saw no reason for extending personal liability beyond misfeasance in public office or negligence. To do so would 'in effect, impose liability for an error of judgment'.[47]

Where to now?

The High Court has declined to identify a remedy for cases where a defendant, without any right or authority, causes damage to a plaintiff which damage is the inevitable consequence of the defendant's intentional conduct but where the damage is indirectly caused. (Compare this with a trespass action, where the only difference is that the damage was directly caused.)

Accordingly, a plaintiff, if unable to prove direct and intended damage, or breach of a (causally) relevant duty of care, will probably fail to recover unless he or she can bring himself or herself within one of the exceptions. Such exceptions would include 'the emerging tort' of unlawful interference with trade or business interests, or some other developing remedy such as restitution.

47 (1995) 129 ALR 1, 22.