THE LIABILITY OF A LOCAL AUTHORITY IN NEW ZEALAND FOR DRAINAGE DAMAGE

WILSHER v. CORBAN, [1955] N.Z.L.R. 478.

When concluding his judgment in the recent case before the Supreme Court at Auckland of Wilsher v. Corban, [1955] N.Z.L.R. 478, which revolved around the respective rights and duties of adjoining land owners on a hillside for drainage waters, the trial judge - North J. - (at 491) raised the question of the liability of the local authority for damage caused by its drainage works, though he found it unnecessary on the facts to express any opinion. Not all the cases the learned Judge quoted as being relevant to the determination of the question he posed are, it is submitted, so relevant, but there is no doubt that the question itself is very interesting and important. It is also rather complicated, largely because of the number of cases throughout the Commonwealth on the same question, but also because in each case there are three different aspects which are sometimes confused, and recent statutory provisions have tended further to confuse those issues.

Since the institution of Local Authorities in England and then in New Zealand, many are the cases where persons have attempted to attack these creatures of statute in respect of the damage caused by their drainage works, and it is possible to discern in these attacks three different aspects, each separate and distinct, though at times tending to become somewhat blurred;

(a) that the Local Authority has failed to do something it has been empowered to do, the doing of which would have prevented the damage or injury resulting;

(b) that the Local Authority has done something it was empowered to do, thereby causing damage;

(c) that it has done something which was not authorized by its empowering statutes, thereby causing damage.

As to the first line of attack, it seems that on two different grounds a local authority may escape liability for damage resulting from its failure to do something which it is authorized to do: first, inasmuch as its inaction was inaction in its capacity as a highway authority, and secondly, inasmuch as its powers are usually merely authorizing powers and not obligatory duties imposed by statute.

The principle developed in England before the institution of corporate local bodies was that no one could be held civilly liable for failure to repair roads (and any essential ingredients of the road) because the whole community was liable for repairs and accordingly no individual could be singled out as responsible; nor was there any procedural means whereby the community could be sued collectively. This immunity continued even after corporate bodies were set up which could be sued, because the Courts held as a matter of interpretation that the constituting statutes intended, unless it was specifically stated otherwise, to impose no greater liability on the corporation than was imposed upon the community at common law. This immunity stemming from Russell v. The Men of Devon (1788), 2 T.R. 667; 100 E.R. 359 was adopted affirmatively by the Privy Council in the 1890's when Municipality of Pictou v. Geldert, [1893] A.C. 524 and Municipal Council of Sydney v. Bourke, [1895] A.C. 433 interpreted and affirmed an earlier decision of Borough of Bathurst v. Macpherson (1879), 4 App. Cas. 256. After the uncertainty as to the true interpretation of Macpherson's case had been thus dispelled, the Courts in New Zealand have repeatedly applied the common law principle of the non-liability of highway authorities for nonfeasance. Examples in the Supreme Court are The Taieri County Council v. Hall (1883), 1 N.Z.L.R. 360 and Gascoyne v. Wellington City Corporation, [1942] N.Z.L.R. 562; in the Court of Appeal, Fortescue v. Te Awamatu Borough, [1920] N.Z.L.R. 281; and in the Full Court Stoddart v. Ashburton County, [1926] N.Z.L.R. 399.

The second and more general ground of defence to the attack against the local authority for not doing what it has power to do is that the instituting statute gives it mere authority and power to do certain things but

imposes on it no obligation to do them: a local authority is given all the powers and authorities necessary to make decisions and perform actions, but it is as a rule not usually placed by the statute under any duty, other than a moral one, to make use of its powers for the benefit of the members of the community which it represents. Thus, unless the statute specifically provides otherwise - and the phraseology must be very clear (see for example Pearce v. The Manawatu Land Drainage Board (1912), 31 N.Z.L.R. 985) - the local authority, in its general capacity, is not as a rule liable for failure to do anything it is merely empowered to do.

This is the state of the law in England as expounded by the House of Lords in Cowley v. The Newmarket Local Board, [1892] A.C. 345, and all Courts in New Zealand have followed a similar line. Even before the House of Lords had approved this principle, the Privy Council had given effect to it in Sanitary Commissioners of Gibraltar v. Orfila (1890), 15 A.C. 400; and then also after Cowley's case, in Geldert's case (supra). Since that date, local Courts in New Zealand have shown no indication of retreating from this position and the principle has been applied by the Court of Appeal in Fortescue v. Te Awamutu Borough (supra), by the Full Court in Stoddart v. Ashburton County (supra) and by the Supreme Court in Featherston Road District v. Tate (1898), 17 N.Z.L.R. 349.

In concluding the discussion on this aspect of the liability of a local authority, it remains only to say a little more on the interpretation of the word "misfeasance", which has been rather restricted in its meaning and application in New Zealand by reason of the adoption of certain definitions enunciated in English cases. The Full Court in Stoddart v. Ashburton County (supra) adopted the dictum of Lush J. in McClelland v. Manchester Corporation, [1912] 1 K.B. 118, 127:

> Once establish that the local authority did something to the road, and the case is removed from the category of non-feasance. If the work was imperfect and incomplete it becomes a case of misfeasance and not non-feasance, although damage was caused by

an omission to do something that ought to have been done. The omission to take precautions to do something that ought to have been done to finish the work is precisely the same thing in its legal consequence as the commission of something that ought not to have been done, and there is no similarity in point of law between such a case and a case where the local authority have chosen to do nothing at all.

Ostler J. in Hokianga County v. Parlane Brothers, [1940] N.Z.L.R. 315, 322, adopted the same reasoning and quoted with approval a statement by MacKinnon L.J. in Newsome v. Darton Urban District Council, [1938] 3 All E.R. 93, 97, to similar effect.

The second line of attack against the local authority is that the authority has done something it was authorized to do, as a result of which damage has been caused, and that it is liable as an ordinary person is liable and on the same principles of law. This line of attack has to counter the defence that inasmuch as Parliament has authorized the exercise of certain powers, it has also by implication condoned damage resulting therefrom and has immunized the authority to which it has given such powers against liability at common law therefor.

In England, as long ago as 1885 in the case of Truman v. London, Brighton, and South Coast Railway Company (1885), 29 Ch.D. 89 a distinction was drawn between a "necessary" nuisance - as in that case the vibration of a railway track - inherent in the proper exercise of statutory powers, and nuisance not necessarily incidental to the exercise of those powers, and this distinction was later upheld by the Court of Appeal in Shelfer v. City of London Electric Lighting Company, [1895] 1 Ch. 287 and by the House of Lords in Geddis v. Proprietors of Bann Reservoir (1878), 3 A.C. 430, Metropolitan Asylum District v. Hill (1881), 6 A.C. 193, and more recently in Manchester Corporation v. Farnworth, [1930] A.C. 171.

(2) The same principle has been applied in New Zealand by the Court of Appeal in Irvine and Co. Ltd. v. Dunedin City Corporation, [1939] N.Z.L.R. 741. Three of the judges

started from the standpoint outlined above, as stated in the words of Viscount Dunedin when delivering the judgment of the House of Lords in Farnworth's case (supra, at 183):

> When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing of that thing if the nuisance is the inevitable result of the making or doing so authorized . . . the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense.

The learned Chief Justice also cited with approval statements of the same principle by Griffith C.J. in Fullarton v. North Melbourne Electric Tramway and Lighting Co. Ltd. (1916), 21 C.L.R. 181, 188, and Prendergast C.J. in Bank of New Zealand v. Blenheim Borough (1885), 4 N.Z.L.R. (S.C.) 10.

Thus Myers C.J. and Smith , Johnston and Fair JJ. (Ostler J. dissenting) held that a statute, unless it specifically provided otherwise, immunized the local authority against claims for damage necessarily resulting from the proper exercise of its powers, and if it should act negligently or in any way cause damage that was not "reasonably inevitable" then it was not protected by the Parliamentary authority. Its powers thus extend further than its statutory protection: "Where the works may be carried out either without committing a nuisance, or so as to cause one, they must be carried out without causing a nuisance" (per Fair J. at 792).

Some confusion had in the past been caused by the practice of inserting in constituting statutes clauses similar to sections 171 and 173 of The Municipal Corporations Act 1933 - now sections 166 and 168 of the 1954 Act. The first of these known as the "compensation clause" reads as follows:

> Every person having any estate or interest in any lands taken under the authority of this Act for any public work, or injuriously affected thereby, or suffering any damage from the exercise of any of the powers hereby given, shall be entitled to full compensation for the same from the Corporation. That compensation may be claimed and shall be determined in the manner provided by the Public Works Act 1928.

The latter, known as the "nuisance clause" provides:

> Nothing in this Act shall entitle the Council to create a nuisance, or shall deprive any person of any right or remedy he would otherwise have against the Corporation or any other person in respect of any such nuisance.

At first sight, these two sections seem to conflict or else to cover the same ground in providing two remedies for the same damage. The theories that have been advanced to reconcile these two section are adequately discussed by the Court of Appeal in Irvine's case (supra) in which it was held that the sections were mutually exclusive and that they merely confirm and elucidate the common law position. The "nuisance" clause applies where a Corporation is liable at common law for non-necessary damage caused by the exercise of the powers, but, where a Corporation would not have been liable at common law - i.e., where the damage was necessary to the proper execution of its powers - the "compensation" section applies.

Thus it can be seen that the statutory provisions are in complete harmony with the common law. Where a Corporation would have been liable at common law for non-necessary damage it is still liable, but where it was not liable at common law, it may be liable to a claim for compensation under the Municipal Corporations Act and the Public Works Act. This principle was very recently followed in the Supreme Court by Barrowclough C.J. in Vile v. New Plymouth City Corporation, [1954] N.Z.L.R. 1218. The position is rather different with regard to County Councils and Road Boards because of a different attitude adopted to them by the Courts at common law and because of differences in the statutes constituting and empowering those bodies in New Zealand.

It remains now to discuss the third line of attack against the local authority - that it has done something which it has not been authorized to do, thereby causing damage. Being an artificial creation it has only such powers as it has been given, and if it exceeds these or fails in some other way to act in accordance with them, then it acts without authority or statutory protection and if the act is tortious the local authority is liable at common law. There have been very few cases decided in New Zealand in which the actual decision has been dependent solely on the fact that the local body has done something which it has no power to do. There are very many cases earlier this century where the Judges have said that they would hold a local authority liable only if it could be shown that it had acted outside the scope of its powers, but there seems to be no recorded instance of their actually having done so. It seems, however, that by analogy with the principle adopted in Northern Publishing Co. Ltd. v. White, [1940] N.Z.L.R. 75, a local authority would be liable for damage caused by tortious ultra vires actions.

The problem has been raised mainly on the question whether a local body is liable for negligent acts and whether negligence amounts to an excess of powers given it by statute. It might be argued that whilst a local body has authority to do certain things, it has not been given authority to do those things negligently, and that negligent activity is therefore outside the scope of its powers. The Courts, however, have held otherwise. Negligence is not in itself an excess of statutory powers, although, of course, it may be that the local authority will have caused more than "necessary" damage and thus be liable at common law. The Privy Council in 1893 made two authoritative pronouncements on this question. The first was Shire of Colac v. Summerfield, [1893] A.C. 187. It was argued in this case that because the jury had found the appellants negligent they had also found that they had exceeded their powers, but to this argument Lord Watson said (at 191):

> . . . their Lordships think it is very plain that, by his avermentsof negligence, the respondent did

> not intend to charge, and was not understood to charge the appellants with excess of their statutory powers . . . . In the Courts below, the case, from first to last, was conducted upon the footing that what the appellants had done was done in the exercise of the powers conferred upon them by s. 384. So long as they act within their statutory powers, negligence is in any question of compensation, immaterial . . . .

The Judicial Committee, later that same year, in Corporation of Raleigh v. Williams, [1893] A.C. 540, adopted and applied the same principle.

These decisions were discussed in County of Grey v. Frankpitt (1899), 18 N.Z.L.R. 111, where Edwards J. held that although the jury had found the local body negligent yet it had constructed the ditch under and within the authority of its constituting statute. The same judge, two years later, in Borough of Palmerston North v. Fitt (1901), 20 N.Z.L.R. 396, again held that notwithstanding proof of negligence no action would lie at common law unless it could be shown that the local authority had exceeded its statutory powers. This was also the view of the Court of Appeal in Farrelly v. Pahiatua County Council (1903), 22 N.Z.L.R. 683. Stout C.J. in delivering the judgment of the Court said that if a statute authorizes general work then the local authority still acts within the scope of its authorization if it does that work even though negligently.

To summarize, a local authority may be attacked for damage caused by its drainage works along three main lines:

(a) that it has omitted to do that which it has been authorized to do; but such an attack is doomed to failure, if:

  (i) the omission is a mere non-feasance; or

  (ii) no specific duty of performance is imposed by the authorizing Act.

(b) that it has caused damage by doing an intra vires

act; this will give rise to:

(i) a common-law action in respect of "non-necessary" damage; and

(ii) a claim for compensation under the Public Works Act for "necessary" damage.

(c) that it has caused damage by doing an ultra vires act; there is no reason to doubt that an action on this ground would lie although there is no New Zealand decision on this point.

[Note: Reference should also be made to Strange v. Andrews (Supreme Court, Hamilton, September 1956; to be reported). - Ed.]