COMPENSATION FOR DEFECTIVE GOVERNMENT ACTION AFTER MENGEL

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The *Beaudesert* case

In order to appreciate fully the impact of the *Mengel* decision, one has to step back thirty years or thereabouts, to revisit the *Beaudesert* decision. In that case the High Court held the Beaudesert Shire Council liable for the economic loss it had caused to Mr Smith when it removed gravel without first obtaining a certificate of authority under the Queensland Water Act. The removal of the gravel had diverted the flow of water from the river bed, thereby rendering Smith's pump useless. Smith himself had a licence to pump water for irrigation purposes from the river to his adjoining property.

Smith faced several difficulties in establishing a right of action. He did not possess any riparian rights in relation to the river; and his licence did not confer on him any right to an undiminished flow of water to his pump. Counsel for Smith had not raised the issue of negligence at the trial and the High Court considered that the Council had not committed actionable nuisance. And the statutory regulations were interpreted as not having been intended to confer a private remedy on someone injured by their infraction, so that Smith had no claim for breach of statutory duty. Not daunted, the High Court developed a new cause of action whereby:

> 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 act of another is entitled to recover damages from that other.

Given the potential scope of the *Beaudesert* ruling, when it was applied by the Northern Territory Court of Appeal in *Mengel*, it is fair to say that alarm bells were sounded in government circles.

Although *Beaudesert* had been considered on a number of occasions, the *Mengel* decision was the first time that it had actually been applied, but the way in which it was applied, if anything, demonstrated just how much scope there was for holding public officers liable for defective acts or decisions.

Mengel - the facts

The Mengels, who owned two cattle stations in the Northern Territory, sought to sell 4,400 head of cattle at the end of the 1988 season. Both the Mengels and two inspectors from the Northern Territory Department of Primary Industry and Fisheries mistakenly believed that the cattle had first to be tested for brucellosis, but in fact there was no approved programme for the eradication of

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brucellosis applicable to the Mengels' property, so that there was no statutory or other authority for the actions of the inspectors.

When some of the initial tests proved positive, the inspectors informed the Mengels that there were restrictions on the movement of the cattle and, by the time they were finally declared free of the disease, the Mengels had missed the sales and incurred financial loss.

Issues before the High Court

Although various causes of action, including negligence, had been relied on before the Northern Territory Supreme Court, Asche J found in the Mengels' favour only on the basis of the *Beaudesert* principle.

Liability on this ground was confirmed by the Court of Appeal which, in addition, found that the action should succeed on a cause of action based on the decision in *James v Commonwealth* and also 'under the constitutional principle of the rule of law'.

These three issues, plus arguments by the Mengels based on misfeasance in public office, were considered by the High Court.

The High Court on *Beaudesert*

The Court was unanimous in its decision that the *Beaudesert* principle be overruled. It would be erroneous, however, to suggest that in so doing, the Court was motivated primarily by the desire to let public officials off the liability hook. And, in so far as they have done so, this is to be regarded as an incidental consequence only.

The decision to overrule *Beaudesert* should rather be viewed as another manifestation of the trend within the High Court in recent years to make liability in tort dependent upon either negligence or an intention to inflict harm on the plaintiff. This trend was expressly recognised by the Court in the joint majority judgment. The decision in *Burnie Port Authority v General Jones Pty Ltd* was cited by the Court as the previous most recent example of this trend. In that case it was held that, subject to one exception, the special rule in *Rylands v Fletcher*, which had stood for well over a hundred years, and which had imposed strict liability for the escape of dangerous substances involved in the non-natural use of land, had been absorbed into the general law of negligence.

Another example of this trend is the decision in *Australian Safeway Stores v Zaluzna* in which the High Court held that it could no longer justify the continued recognition of the 'special duty of care owed by occupiers' of property, and that the time had come to simplify the law in this area. The decision to integrate the law of occupiers liability into the mainstream law of negligence was not sudden but the culmination of a move towards reform begun thirty-five years previously.

Lack of intention

In the *Beaudesert* context, the intentional element of the tort, which is satisfied merely by the doing of an intentional act, but which does not depend on an intention to harm the plaintiff, is clearly inconsistent with the judicial trend. In this regard the Court accepted that the *Beaudesert* principle was out of step with the development of other so-called 'economic' torts, such as the tort of intentional interference with contractual relations (although the constructive knowledge of the terms of a contract is sufficient, so that a person will be liable if he or she recklessly disregards the means of ascertaining the meaning of the contractual terms).

In the same way, the torts of intimidation and conspiracy also require an intention to cause economic harm. And the emerging

tort of interference with trade and business interests also requires that the unlawful act be directed at the person injured, although not necessarily done in order to injure the interests of the plaintiff.

Inevitable consequences

Another difficulty with the *Beaudesert* principle is that liability thereunder is imposed for all inevitable consequences of the unlawful act, whether or not foreseeable. Foreseeability of harm is, of course, one of the fundamental elements of the action in negligence. While it may be arguable that most foreseeable harm will also be inevitable or, put another way, bound to happen, this is not always the case. And simply because the loss turns out in a particular case to be an inevitable consequence does not necessarily mean that it was foreseeable at the time of doing the act that led ultimately to that loss. *Beaudesert* is a case in point. There is nothing in the facts as reported to indicate that the Shire Council could or should have foreseen that removal of the gravel would alter the flow of the river or cause damage to those licensed to pump water from it.

Indeed, there is nothing in the facts of *Beaudesert* to indicate that the Council even knew or should have known of the existence of the defendant and his licence to pump water. The *Beaudesert* principle consequently has the potential to impose unlimited liability for harm which has not been foreseen, in circumstances where no duty of care was necessarily owing, and where the act in question was not negligent nor calculated to harm the plaintiff.

Unlawful acts

The Court in *Beaudesert* in formulating the grounds for liability, had required that the act complained of should be unlawful. In that case the Council's action in removing the gravel was unlawful in the sense of being against the law. The gravel was removed in the face of a statutory prohibition on the taking of gravel except with a permit, which the Council did not have.

The nature of the acts in the *Mengel* case were somewhat different. In so far as the acts of the inspectors consisted of informing the Mengels that their cattle were subject to quarantine restrictions and could not be moved from the stations, these acts were in no sense against the law - at most they were unauthorised and lacked legal efficacy. There was no statutory programme relating to the cattle or the Mengels' properties.

After examining the *Beaudesert* case more closely, the High Court had no hesitation in holding that these acts were not 'unlawful' in the sense required by *Beaudesert*. According to the majority judgment, this meant that the acts had to be forbidden by law. Deane J in his separate judgment agreed that the word 'unlawful' had been used by Taylor, Menzies and Owen JJ in the critical passage in *Beaudesert* in the sense of 'contrary to the law' as distinct from either invalid or unauthorised.

But, as Justice Deane went on to say, this finding only goes part of the way towards resolution of the ambiguity arising from the use of the word 'unlawful' in *Beaudesert*. There are several possible interpretations of the word. It can refer to acts which are forbidden either by the criminal law or by some specific and direct statutory prohibition. But what if it were argued that the act was intimidatory or had induced a breach of contract or was simply a breach of a contractual term?

Given the Court's findings on unlawfulness, one course of action open to it would have been to distinguish the facts of *Mengel* from those of *Beaudesert*. In deciding to overrule *Beaudesert* altogether the High Court was sending a distinct signal that this cause of action was no longer appropriate (if it ever had

been) in a modern torts context. It is a seminal decision in so far as it means that public officials are no longer at risk of being singled out for liability for defective acts which, although unauthorised, are not negligent nor carried out in bad faith nor intended to cause harm to the plaintiff.

Misfeasance in public office

It was also argued by counsel for the Mengels that the Northern Territory inspectors were liable for misfeasance in public office. This argument was rejected on the facts but the existence of the tort itself was left firmly intact.

The tort of misfeasance in public office is sometimes regarded as the counterpart to the tort imposing liability on private individuals for the intentional infliction of harm. Liability under this tort arises where a public official abuses his or her public office.

The notions of public officer and public office are expansive and are not limited to salaried government employees nor to an abuse of office by exercise of statutory power. It can also, for example, include the exercise of common law powers. In *Henly v The Mayor of Lyme* the allegation was of a failure by a corporation to repair a sea wall, the maintenance of which was a condition of the grant to the corporation. There was no statutory power involved. The court, by way of example, noted that church officers may be regarded as public officers so that a member of the clergy who neglected to register a person brought to be baptised, in consequence of which the person loses an estate, could be liable to the action for this tort. In an era of increasing government privatisation of public services which used to be the preserve of government departments and agencies, there seems to be no reason in principle to exclude such persons from the ranks of public officers.

The tort is limited to the invalid exercise of power, either because there is no power to be exercised or because the exercise of the power has miscarried by reason of some matter which warrants judicial review and a setting aside of the administrative action. However, valid exercises of power which cause loss do not give rise to liability for misfeance. As was explained by Brennan J, in this case the conduct of the public officer does not infringe an interest which the common law protects.

The element of abuse is central to the cause of action. This relates to the state of mind of the officer and means that the officer must have acted either maliciously, that is, with an intention of causing injury to the defendant, or with actual knowledge that there is no power to engage in the conduct complained of. Brennan J was also prepared to accept that the tort could be committed where the officer acted with 'reckless indifference as to the availability of power to support the impugned conduct'. In this regard he went a little further than the majority judgment in which it was held that 'there is much to be said for the view that, just as with the tort of inducing breach of contract, misfeasance in public office ... extends to the situation in which a public officer recklessly disregards the means of ascertaining the extent of his or her power'.

But neither Brennan J nor the other justices were prepared to accept the argument put forward by counsel for the Mengels that liability would be incurred when the officer concerned ought to have known that he or she lacked power. That is to say, it will not suffice to prove constructive knowledge of the lack of power. The tort of misfeasance in public office is not concerned with negligent conduct. It follows from this that foreseeability of injury to the plaintiff is also not relevant. Something more is required.

Justice Brennan summed up the policy issue as follows:

> A public officer is appointed to his or her office in order to perform functions in the public interest. 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.

The *James* principle

As mentioned earlier, the Court of Appeal in Mengel had also found for the Mengels on the basis of the principle in *James v Commonwealth*, and this issue was subsequently argued before the High Court.

The *James* principle is based on a statement in *Salmond's Law of Torts* that:

> Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence against him by the defendant with that intention.

In the *James* case, the basis of the claim was that the Commonwealth or its officers had compelled the plaintiff to discontinue his trade by unlawful threats that his goods would be seized. Dixon J ultimately found against the plaintiff on the basis that, on the facts he had not been influenced by the fear of seizure and it had not been the supposed threat that had operated to restrain his trading.

This statement of principle, as formulated by Salmond and as applied by Dixon J, is not confined to threats made by public officials. But in the *Mengel* case, in the Court of Appeal, Priestley J in effect reformulated the rule specifically to apply to public officers. In his view the plaintiff would have an action for damage suffered where:

> In face of an express or implied threat by governmental authority of unlawful prosecution of the plaintiff, the plaintiff felt compelled to refrain, and has refrained, to the plaintiff's loss, from dealing with the plaintiff's goods.

While the *James* principle was endorsed by the High Court in *Mengel*, its reformulation and application by Priestley J was not endorsed. The Priestley reformulation was criticised, in particular, on two grounds. The first was that it involved no intentional element and, to that extent, was clearly contrary to the principle adopted by Dixon J in the *James* case. That is to say, while the Dixon formulation required the existence of an intention to compel a person to do an act whereby loss would accrue to that person, the Priestley formulation is silent on the issue of intention and would allow a person to recover damages where loss had been suffered irrespective of whether the public officer intended to cause the loss.

The High Court also had misgivings about the idea expressed by Priestley J that a government officer might incur liability by virtue of an express or implied threat of 'unlawful prosecution', at least where that extends beyond malicious prosecution or abuse of process. As Deane J held, the threat of prosecution is not, without more, a threat of an illegal act even if the prosecution would be doomed to fail. There is nothing illegal about a prosecution which is brought bona fide but which fails, and in the absence of malice or of some ulterior or improper motive, a threat to institute a prosecution is not a threat of an 'illegal act' for the purposes of applying the principle in *James v Commonwealth*. In this regard, Dixon J in *James* had made the point that a public officer would not be liable if, under a bona fide mistake as to the state of the law, that officer proposes to proceed by judicial process. As he said, 'to treat a proposal or threat to institute proceedings as a wrongful procurement of a breach of duty

is to ignore the fact that, assuming bona fides, the law always countenances resort to the courts, whether by criminal or civil process, as the proper means of determining any assertion of right'.

The High Court also noted that there was a difference between a threat and the giving of advice. In this regard it upheld the statement of Dixon J that the intimation that the claims of government might be enforced by resort to legal process did not amount to procurement or inducement for the purposes of applying the *James* principle. Nor did the mistaken assertion by government officers that, as a matter of law, certain consequences would or might attend a particular course of action constitute a threat for the purposes of the *James* principle, at least where the assertion was made in good faith.

Accordingly, when applied to the facts in *Mengel*, there could be no liability under the *James* principle.

The constitutional principle of the rule of law

In the Court of Appeal, Angel J had been of the view that 'liability attached to the inspectors and the Northern Territory Government as a consequence of the constitutional principle of the rule of law rather than any private tort'.

It is not entirely clear what His Honour meant by this notion, but it seemed to involve the view that, if harm results, there is liability for any unauthorised acts by government and government officers. Alternatively, where harm results there is liability for unauthorised acts which prevent the individual from doing what he or she would otherwise be free to do where not prevented by a statutory provision.

This principle was rejected by the High Court as not being supported by either authority or by principle. In this regard it was noted that the so-called principle might well be contrary to s64 of the *Judiciary Act 1903* (Cth). Section 64 provides that in matters of federal jurisdiction 'in any suit to which the Commonwealth or a State is a party, the rights of parties shall as nearly as possible be the same ... as in a suit between subject and subject'. All Australian jurisdictions except Western Australia have similar statutory provisions.

It was accepted by the Court that, in line with both s64 and with general principles of liability as developed through the common law, it would not be acceptable to hold public officers liable merely for acting in an unauthorised way, when they were not acting negligently nor in bad faith. The High Court in this regard noted that the formulation of principle espoused by Angel J suffered from the same defects as did Priestley J's formulation of the *Beaudesert* principle.

Breach of statutory duty

The action for breach of statutory duty was not discussed in any detail in the High Court, which is not surprising, given the particular facts of the case. Nevertheless, to the extent that this action was discussed, it was clear that the High Court had difficulty in reconciling the *Beaudesert* principle with the accepted formulation of the tort of breach of statutory duty.

On the one hand, there is an obvious similarity between the cause of action recognised in *Beaudesert* and the action for breach of statutory duty. Both actions dispense with the need to prove negligence or the need to prove an intention to injure the plaintiff and in this sense both may be regarded as torts of strict liability.

But there are also important differences between the two causes of action, the main difference being that, with the action for breach of statutory duty, in the absence of a statutory provision which

confers a right of action on the plaintiff, the plaintiff has no right to sue for any breach by the public officer of that duty. In other words, the action for breach of statutory duty recognises that no right of action accrues to the injured individual simply because a legislative provision has been breached; this right only arises if, in addition, the legislative provision shows an intention to protect the plaintiff by granting the plaintiff a right of action in tort. Often the statutory provision will only confer an alternative remedy, for example, of an administrative nature.

The *Beaudesert* principle goes far beyond this. If upheld, it would impose liability on public officers even in situations where the statute envisaged no private right of action. In so doing, it would introduce standards of liability for public officers much stricter than those imposed on ordinary members of the public and in circumstances where even the special remedies of misfeasance and breach of statutory duty are not applicable. While not on its face expressly confined to liability for defective acts of public officers, in practice the *Beaudesert* principle has been sought to be applied only in cases involving defective government actions. It was argued by counsel representing the various governments that, when negligence was not relied on, liability in these cases should be confined to actions for misfeasance of public office and breach of statutory duty, and that, to allow actions to succeed on the basis of the *Beaudesert* principle would expose public officers to unwarranted and insupportable liability. Fortunately for public officers the High Court agreed.