Abrogating the *Beaudesert* Aberration: The High Court on Governmental Liability in *Northern Territory v Mengel*

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Background to the Case

In *Northern Territory v Mengel*,[1] an appeal from a decision of the Northern Territory Court of Appeal,[2] the High Court has taken the opportunity of overruling *Beaudesert Shire Council v Smith*.[3] Long regarded by commentators as an aberration, and rarely used, the principle in *Beaudesert* allowed recovery for loss suffered as the inevitable consequence of any unlawful, intentional and positive act of another, independently of proof of negligence, nuisance or trespass.[4]

This note will summarise the High Court's decision, consider the neat dichotomy employed by the Court to delimit the liability of public officials, and conclude with some general comments on the trend in the High Court's approach to torts.

Mengel's Loss

Mengel and others owned two cattle stations. Mengel suffered direct and consequential financial loss after sale of his stock was delayed by decisions of the Northern Territory Government's stock inspectors. Acting on a suspicion (based on positive reaction in a single blood sample) that Mengel's stock was infected with brucellosis, the inspectors in effect placed movement restrictions on his herds. Mengel's own tests showed that the stock was not infected. The inspectors' decisions were made honestly, but without statutory authority.

Under the statutory scheme or 'campaign' then in place, the inspectors had certain powers and duties designed to limit the spread

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1 (1995) 69 ALJR 527.

2 *Northern Territory v Mengel* (1994) 95 NTR 8.

3 (1966) 120 CLR 145.

4 This author advocated the overruling in '*Northern Territory v Mengel*: The Rule in *Beaudesert Shire Council v Smith* Applied' (1994) 2 *TLJ* 219.

of brucellosis, a disease which has been a scourge of cattle, the industry and the wider economy. The inspectors' cautious decision to restrict the stock's movement was based on a mistaken understanding of the width of the statutory scheme and its application to Mengel's stock. The inspectors did not prove that the Mengel's stock was part of an approved eradication programme, a technical pre-requisite to the imposition of any movement restrictions. Nonetheless, Mengel, whilst seeking (eventually successfully) to prove his stock clear, felt bound to follow the inspectors' orders and advice. In the end, the stock was sold, but had missed the markets. Mengel lost a significant amount of money, both on the sale and consequentially (the sales revenue had been badly needed to finance bank loans during the dry season).

According to the trial judge (Asche CJ) and the Court of Appeal (Priestly, Angel and Thomas JJ), Mengel should be compensated by the Northern Territory Government under, *inter alia*, the *Beaudesert* principle. Mengel's counsel also argued liability under *James v The Commonwealth*,[5] and the Court of Appeal created a third, based on the 'rule of law'. The High Court, however, found against Mengel on all approaches. In doing so, the Court overruled *Beaudesert* and made some useful comments on heads of liability as they pertain to public officials.

The Decision: Try Negligence and Misfeasance, But Not *Beaudesert*

Whilst two judges (Brennan and Deane JJ) gave separate judgments to the joint judgment (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ), the court spoke with an almost unanimous voice. According to the joint judgment, the *Beaudesert* principle lacked 'authoritative support', and created intractable difficulties of interpretation and application: no workable definition could be given to 'unlawful act' or 'inevitable consequence' for the purposes of the tort.[6] Justice Deane spilt some ink delving into the antecedents of *Beaudesert* to show that it was not unprecedented (a matter on which Brennan J was inclined to agree[7]), but both judges nevertheless agreed that *Beaudesert* should be overruled.

Besides the general concern that definite meanings could not be given to some of the elements of the tort, all the judges showed a desire to

5 (1939) 62 CLR 339.

6 (1995) 69 ALJR 527 at 539.

7 Id at 545 per Brennan J, and 551-554 per Deane J.

streamline the working of liability law as it applies to public officials and activities. *Mengel* developed a familiar dichotomy, distinguishing between intentionally and negligently caused harms. *Beaudesert* contained no requirement that the harm itself be intended; simply that the act complained of be intentionally done.

According to *Mengel*, the tort of misfeasance in public office exists to cover intended harms, and hence focuses generally on intention and actual knowledge. Public officials and their employers may be liable where they act (or fail to act) beyond power, and

- are actuated by 'malice' in the sense of intention to injure;
- know that their act is beyond power and ought to know injury will follow;[8] or
- act blindly with reckless disregard of the legality and consequences of their act.

On the other hand, the law of negligence serves to offer recovery for unintended harms. The acts of governments and public officials are subject to the law of negligence under the same general principles that apply to private persons. Chief among these principles are the notions of proximity and foreseeability.[9] The joint judgment suggests that, although pleaded, negligence was not properly or fully argued. The trial judge found that the inspectors had not acted unreasonably and Mengel's counsel did not seek to appeal this finding. The joint judgment hints that, had the trial judge made a definite finding that the Mengel's stock was not subject to an approved eradication programme, a negligence case would have been arguable. The trial judge's actual finding was merely that the Northern Territory had *not proven* that there was such a programme covering the Mengel stock. If Mengel had positively proven at trial that no such programme existed, the inspectors may have been in breach of a duty of care in unreasonably failing to ensure that there was such a programme before acting.[10]

8 The degree of likelihood and the imputability of such knowledge to the official is left uncertain. Deane J at 554 seems to require 'knowledge that it would cause or be likely to cause harm'. Brennan J at 546 speaks of 'knowledge ... that that conduct is calculated to produce injury' (where 'calculated' appears to mean 'likely in the ordinary course'). The majority (at 540) speak 'for present purposes' of the act merely involving 'a foreseeable risk of harm'. However this tentative position, whilst suggested in the English Court of Appeal in *Bourgoin SA v Ministry of Agriculture* [1986] QB 716, may be a too broad and negligence-related test.

9 On the intentional-versus-negligence dichotomy, see (1995) 69 ALJR 527 at 545-548 per Brennan J.

10 Id at 541-542.

One can imagine the sour taste left by this judicial hair-splitting. Mengel's right to recover in negligence may have been lost on grounds of onus of proof. A finding of fact seemingly unnecessary at trial (under the *Beaudesert* principle, it fell to the Government to prove that the act was authorised) became pivotal on appeal, where Mengel was unable to prove that a reasonable inspector would have known his/her actions to be unauthorised. The case illustrates that the retrospectivity inherent in developing and reforming case law inevitably leaves at least one of the litigants in a watershed case feeling robbed. (Mengel's senior counsel published two pieces strongly in support of his client's legal arguments prior to the High Court's decision.[11])

Clarifying *James v The Commonwealth*

In the Court of Appeal, Priestley J also found for Mengel on the basis of the action on the case established in *James*. According to Priestley J's formulation, plaintiffs could recover, *inter alia*, whenever they suffer loss because they felt compelled to refrain from exercising property rights, in the face of an express or implied threat by a governmental authority of unlawful interference with that property. The High Court rejected this as a misreading of *James*, highlighting the requirement, for liability under *James*, that the defendant have a certain degree of intention to harm. In other words, the 'threat' needs to be more than a mistaken but honest purported exercise of power.[12] In *Mengel*, it was never suggested that the inspectors 'threatened' Mengel by acting without *bona fides*.

The Rule of Law as a Cause of Action?

In even more summary mode, the High Court dismissed the attempt by Angel J, in the Court of Appeal, to fashion a dramatic and general form of liability attaching to unauthorised governmental action. In essence, Angel J (with whom Thomas J agreed) claimed that the 'rule of law' requires a government to compensate whenever it accidentally acts outside the statutory limits on its power and causes damage to a citizen. The joint judgment of the High Court rejected this approach as unsupported by either principle or authority.[13] This was both a

11 G Hiley, 'Crown Liability for Unlawful Conduct: *Northern Territory of Australia v Mengel*' (1994) 18 *UQLJ* 125 and 'Liability of Governmental Authorities for Unlawful and Intentional Conduct which Indirectly Causes Damage' (1995) 25 *QLSJ* 245.

12 (1995) 69 ALJR 527 at 543.

13 Id at 543-544.

damning and ironic indictment of Angel J's Quixotic attempt at judicial creativity. In an earlier and different forum, Angel J extolled the need for the common law to draw on a 'solid philosophical foundation' and 'fundamental values'.[14] Such a broad-brushed approach to judicial creativity seems similar to that adopted by the current High Court - it is therefore ironic that Angel J's conservative 'rule of law' approach was not, in substance, acceptable to the Court.

Whither the Law of Tort(s)?

In choosing to overrule *Beaudesert*, rather than attempting to salvage it through reworking, the High Court again demonstrated its desire to rationalise and streamline the law of torts. The decision in *Mengel* can be seen as following in the spirit of *Burnie Port Authority v General Jones*,[15] where *Rylands v Fletcher* strict liability was 'absorbed' into the general law of negligence.

The tenor of the Court's approach was to characterise *Beaudesert* as an unnecessary and anomalous cause of action that cuts across an area which should properly be left to negligence law. To intentionally do something which causes harm (albeit inevitable harm) is not to intend harm (the province of misfeasance). Rather, such conduct falls in the province of negligence law. There is therefore no need for *Beaudesert* liability.

The decision in *Mengel* demonstrates two forces at work. One, undoubtedly, is that the current High Court is simply more active than previous benches. Hence, we have witnessed regular, significant changes to doctrine across a range of tortious issues (eg *Theophanous v Herald and Weekly Times*[16]). The other is the High Court's attempt, under the imperialistic banner of negligence law, to simplify and generalise tort remedies for unintentional harms,. Sir Anthony Mason recently spoke in favour of this 'harmonisation' in favour of negligence law, and the need to remove 'arcane' legal distinctions in this area of the law.[17] He has reiterated these comments in the context of the Court's developments in tort and other areas, maintaining that the efforts demonstrate 'a commendable desire to simplify the law

14 D Angel, 'Some Reflections on Privity, Consideration, Estoppel and Good Faith' (Paper delivered to the 27th Australian Legal Convention, Adelaide, 1991) at p 1 of the original.

15 (1994) 179 CLR 520.

16 (1994) 68 ALJR 713.

17 Sir Anthony Mason, speaking at a public forum in Sydney, organised and broadcast by the ABC Radio National programme, *Late Night Live*, 24 May 1995.

and eliminate unnecessary complications and distinctions'.[18] These comments receive support when it is considered that negligence law in this country has come to be dominated by the notion of proximity, especially as developed by Justice Deane, itself a generalised principle in the Dworkinian sense. The fault principle that lies at the heart of negligence liability (ie the reasonableness standard) is similarly a broad, principled notion.

Those with a preference for broad, simplified, civil-law style legal doctrine may be aesthetically pleased by such developments. One could invoke the scientific notion of Ockham's Razor. Others, particularly plaintiff lawyers and those who prefer more discrete, rule-laden law, may be less pleased. As Professor Fleming recently commented, there is room in the common law for other forms of liability, stricter than negligence.[19] Few will mourn the passing of *Beaudesert* liability, but it will be interesting to see if the High Court continues this streamlining operation. If it does, we may end up with a law of tort (ie negligence) rather than a law of torts.

18 Sir Anthony Mason, 'An Australian Common Law?' (Paper delivered to the Australasian Law Teacher's Association's 50th Anniversary Conference, 1 October 1995).

19 Comments made in criticism of *Burnie Port*, at a breakfast seminar hosted by the University of Queensland Law Graduate's Association, 24 May 1995.