

High Court Notes

CASE NOTE

NTA and Ors -v- Arthur John Mengel and Ors
(The "Banka Banka" Case)

FC 95/017

HC unreported 19 April 1995

Appeal allowed (7:0):-

1. overruling *Beauesert Shire Council -v- Smith* (1966) 120 CLR 145,

2. critically dismissing the 'new' principles of liability espoused by Priestley J and Angel J in the Court of Appeal of the Northern Territory, and

3. discussing and settling the principles basic to the cause of action for misfeasance in public office.

The Facts and Issues:

The plaintiffs' claim was for economic loss caused by the imposition of movement restrictions on cattle by government inspectors purporting to act under the authority of the BTEC scheme. The facts as found at trial and the issues considered by the High Court are best summarised in the words of Brennan J at p. 34:

"The facts found by Asche CJ at the trial of this action show that the restrictions on movement of the plaintiffs' (respondents') stock which were observed in obedience to the directions given by ... (the Inspectors') caused the plaintiffs financial loss and that the Inspectors knew that the giving of those directions would cause such a loss. Neither Inspector had statutory power or authority to give the directions which he gave. On the other hand, neither Inspector was actuated by a desire to inflict injury on the plaintiffs. Nor was either Inspector found to have given directions otherwise than in good faith, believing that he was empowered to give the directions and that it was his official duty in circumstances to do so.

On these findings, was the plaintiffs' loss compensable as damages for a tort? It is not sufficient for a plaintiff to show merely that he has suffered a loss that was caused by the defendant's conduct. 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.

Beauesert:

The Court held that the principle in *Beauesert*, namely,

"... 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",

is too far reaching, uncertain in scope, and against the trend of legal development. The law in this country and in other common law countries has developed to provide recovery for harm which is inflicted either negligently or intentionally. The law as it exists adequately protects individuals and there is no sound policy or legal reason why a principle such as that in *Beauesert* is required. Accordingly, *Beauesert* was considered to be an anomaly and was overruled.

In this case, the acts of the Inspectors were not 'unlawful' in the sense that they were forbidden by law (eg. breach of a statute or the criminal law), rather, they may have been 'unauthorised' (in the sense that unknown to the Inspectors a Gazette notice did not apply). Thus *Beauesert* would not have applied in any event.

Misfeasance in Public Office:

The Court took the opportunity to make a definitive statement on the scope of the law in this area. The majority held (at p 25) that liability requires:

"... an act which the public officer knows is beyond power and which involves a foreseeable risk of harm"

and, as to knowledge (at p 26), that it:

"... 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."

Brennan J, in a separate judgment (with which Deane J agrees, P 56), traces the history of misfeasance and concludes (at p 39) that:

"... malice, knowledge and reck-

less 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.

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 avoidance of damage to persons who might be affected by the exercise of the authority or powers of the office rather than the advancing of the public interest, would be the focus of concern."

'New' Causes of Action and Liability of Governments:

The Court went on to reject 'new' causes of action formulated by Priestley J (based on *James v the Commonwealth* (1939) 62 CLR 229), because it did not require an intention to harm, and by Angel J (based on the constitutional principle of the rule of law), because it is not supported by authority or principle and may be contrary to statute.

The Court confirmed that, subject to misfeasance in public office, governments and their officers are to be treated the same as individuals; their liability is not greater or less than that of an individual.

The High Court has thus again retreated from adventures into 'new' areas of negligence as a cohesive, rational framework for determining liability for wrongful acts.

DL

Amendments to the High Court Rules

Amendments to the High Court Rules shall come into operation 29 May 1995.

Copies of the amendments can be obtained by contacting the Law Society on 815104.