PELIS AND ANOTHER v. ARNAASHAL

COURT OF APPEAL
WIMALARATNE, J. (PRESIDENT) AND VICTOR PERERA, J.
C.S. (S.C.) 678/73 (F),
D.C. GALLE 7801,
DECEMBER 6, 1979.

Cause of action – Delict – Essentials for liability under the Aquilian Action – Culpa – Dolus – Doctrine of abuse of rights.

The plaintiff was a cultivator of a paddy field and the defendants were cultivators of another lying to the south of the plaintiff's field. The plaintiff having prepared his field for sowing, pulled down the *wakkadas* in order to drain the water which normally flows through the defendants' field to the *ela* in the south. The defendants blocked the *pitawana* of their field and thereby prevented the flow of water from the plaintiff's field. This act of the defendants resulted in about 2 acres of the plaintiff's field being inundated with water which extent of land could not be cultivated during that season thereby causing loss to the plaintiff. Plaintiff claimed damages.

Held :

The defendants owed no duty towards the plaintiff to open the *pitawana* of their field to permit water from the plaintiff's field to be drained in to the *ela.* The plaintiff had therefore no cause of action under the Lex Aquilia. An act (or omission) would constitute an abuse of rights, if such act is done by a person with the sole or predominant object of harming another, but with no appreciable or legitimate interest to himself. Plaintiff's action fails as the object of the act of the defendants appears to have been to save their own field from disaster.

Cases referred to:

(1) *Haynes* v. *Harwood* (1935) 1 KB at 152,
(2) *Union Government* v. *National Bank of S. Africa Ltd.* (1921) A.D. 121 at 134.
(3) *Bradford Corporation* v. *Pickles* (1895) A.C. 587.
(4) *Mathews* v. *Young* (1922) A.D.. 492 at 506.
(5) *Holywood Silver Fox Farm* v. *Emmett* (1936) 2 K.B. 468.
(6) *Union Government* v. *Marais* (1920) A.D. 240.
(7) *Kirsch* v. *Pinus* (1927) T.P.D. 199 at 206.
(8) *Van Eck and Van Rensberg Etna Stores* (1947) 2 S.A. 984 at 999.
(9) *Milwaard* v. *Glaser* (1949) (4) S.A. 931 at 942.
(10) *Herschel* v. *Mrupe* (1954) 3 S.A: 464 at 485.
(11) *Jayawardene* v. *William* 21 NLR 379.
(12) *David* v. *Abdul Cader* 65 NLR 253.

APPEAL from the District Court of Galle.

N R. M. Daluwatte for defendants-appellants.

Nihal Seneviratne for plaintiff-respondent.

Cur adv vult.

16th January, 1980.
WIMALARATNE, J. (President, Court of Appeal)

The plaintiff-respondent is the cultivator of a paddy field called lot 4 of Majuwana Waturawa. The defendants-appellants are the cultivators of the field to the south, called lot 2 of Bogahaliyadda Kumbura. Both these fields form portions of a large tract of paddy field (yaya) which is about 90 acres in extent. An *ela* which runs along the western boundary of Majuwana Waturawa flows under a culvert across the road separating the two fields, along the western boundary of Bogahaliyadda and enters the Digane Ela which is to the South of Bogahaliyadda. Majuwana Waturawa is on a slightly higher elevation than Bogahaliyadda. It is from the Digane Ela that the cultivators of this yaya draw their water for cultivation.

The plaintiff's case was that on 1.9.69 after spraying insecticide he built the necessary *wakkadas* to store water in his field. He then ploughed and mudded the field for the purpose of sowing his field with a variety of seed paddy called R4 which gave a greater yield but took a longer time to harvest than the older variety of seed. On 16.9.69 he pulled down the *wakkadas* to drain the water, which normally flows through the defendants field to the *ela* on the South. The defendants wrongfully and unlawfully blocked the *pitawana* of Bogahaliyadda *kumbura* and thereby prevented the water from his field flowing into the *ela* to the South. As a result of this wrongful and unlawful act of the defendants about 2 acres of Majuwana Waturawa was inundated with water and could not be cultivated during the *Maha* season in October 1969. He claimed from the defendants a sum of Rs. 2250/- as damages.

The defendants' position was that the cultivators of this tract of 90 acres worked their fields on a mutual understanding regarding the date of sowing. The *Maha* crop was sown towards the beginning of October and the *Yala* during the middle of February. The cultivators obtained their supply of water at the same time. According to a Gazette notification issued in 1969 by the Commissioner of Agrarian Services sowing for the *Maha* crop could begin only on 1.10.69 and for this purpose the field had to be prepared earlier. By 14.9.69 the 2nd defendant had built the *wakkadas* and collected water for Bogahaliyadda by blocking its *pitawana* in order to prepare his field for sowing on 1.10.69. Had he complied with the plaintiff's request to open the blockade of the *pitawana* of Bogahaliyadda, the drainage of water from Majuwana Waturawa on 16.9.69 would have made Bogahaliyadda unfit for sowing on 1.10.69. Therefore the failure of the plaintiff to cultivate an extent of 2 acres of Majuwana Waturawa was due to his own fault in commencing the sowing on 16.9.69.

The learned District Judge has taken the view that the plaintiff's cause of action is based on negligence. Having defined negligence as the breach of a legal duty to take care which results in damage, undesired by the defendant to the plaintiff (*Winfield on Torts* in 2nd Edition p. 439) he says "The test of the duty is the judgment of a reasonable man. In the present case the 2nd defendant admitted that on 14.9.69 he blocked the *pitawana* of the field called Bogahaliyadda. Lot 4 of Majuwana Waturawa cultivated by the plaintiff lay immediately to the north of the defendants' field across the road. The defendants as reasonable prudent men should have foreseen that the likely result of their act would be that the water would inundate the portion of the field prepared by the plaintiff for sowing and that he would be unable to sow the paddy by mid September".

It was also the plaintiff's evidence that on 14.9.69 he met the defendants and asked them not to block the flow of water because he had to commence sowing his field on 15.9.69. Although the defendants promised to let out the water storing sufficient water for their use, they did not keep to that undertaking, and allowed the water to remain until long after the date for sowing by the plaintiff had expired. Although the defendants denied that the plaintiff saw them to make the request, the learned District Judge has accepted the plaintiff's evidence. He draws the conclusion that the defendants, in not letting out the water even after they were apprised of the situation by the plaintiff shows that "the defendants were fully aware of the consequences of their act and intended such consequences. The 1st and 2nd defendants had committed a breach of the legal duty they owed the plaintiff to take care that the water they stored in their field did not inundate the field cultivated by the plaintiff"

Learned Counsel for the defendants-appellants has contended that the plaintiff has no cause of action in delict. The essentials for liability in the Aquilian action are (1) a wrongful act (or omission) on the part of the defendant; (2) pecuniary loss resulting thereby to the plaintiff and (3) fault on the part of the defendant. The first requirement means that the act complained of must involve the violation of a right vested in the plaintiff, which means the violation of a legally protected interest pertaining to the plaintiff. Whilst the second requirement speaks for itself, the third requisite means that the loss must be imputable to the defendant; that means that the defendant must have either intended the loss or else that by the exercise of reasonable care he could have prevented it. In other words he must be guilty of *dolus* or *culpa.*

Now, *culpa* denotes the absence of care where there is a duty to exercise care, and thus denotes conduct which is both wrongful and

careless. Likewise *dolus* denotes not merely intention, but intentional and wrongful infliction of harm. For *dolus* to be actionable there has also to be a duty to refrain from doing the act which caused the harm. It is therefore clear that whether liability is based on *culpa* or *dolus*, the plaintiff must establish that the act which resulted in pecuniary loss to him was the result of a wrong done by the defendant; that it was the breach of a duty which the defendant owed to the plaintiff.

Learned Counsel for the defendants-appellants relied strongly on the absence of a right vested in the plaintiff with a corresponding duty on the part of the defendant that the water from the plaintiff's field should go via the defendants field into the Ela. No right in the nature of a servitude was either pleaded, put in issue or proved at the trial. What then, asks Counsel, was the legally protected interest of the plaintiff which the defendant has violated ? "Negligence in the air will not do; negligence in order to give a cause of action must be the neglect of some duty owned to the person who makes the claim" per Greer, L.J. in *Haynes v. Harwood.*[1] That is the English Law. So is the Roman Dutch Law, for "Negligence is the neglect of duty, and where there is no duty towards the party affected, there can be no negligence" per Solomon, J.A. in *Union Government v. National Bank of S. Africa Ltd.*[2]

Dolus, in the wide sense with which we are concerned here as being an element necessary to found in action under the Lex Aquilia means wilful and conscious wrong doing. An intentional act, even if it is done with the knowledge that it will cause harm to the plaintiff will not suffice if there is no duty to refrain from committing the act. In *Bradford Corporation v. Pickles* [3] the defendant abstracted water percolating through undefined channels beneath his land, which would otherwise have reached the plaintiff's adjoining reservoir. To abstract percolating water was in itself lawful, and the fact that the defendant might have acted with bad motive towards the plaintiff (in that he wanted to make the plaintiff pay an inflated price for the land, which they required in connection with their reservoir) did not therefore make his act wrongful or actionable. "If it was a lawful act, however ill the motive might be, he had a right to do it", observed Lord Halsbury, L.C. at p. 594. So too in the Roman Dutch Law. "There is no onus upon a defendant until the plaintiff has proved that a legal right of his has been infringed. Under the Lex Aquilia there is only an action for *damnum injuria datum* – for pecuniary loss inflicted through a legal injury – and the defendant is not called upon to answer the plaintiff's case before the plaintiff has proved the pecuniary loss and that it directly results from what is, in the eye of the law, an injuria", per de Villiers, J. A. in *Mathews v. Young.*[4]

To found an action under the Lex Aquilia on the ground of *dolus* there must be a breach of a duty to refrain from doing that which he knows will involve the violation of another's legal right. Thus damage caused by the disturbance of a servitude or the inducement of a breach of contract is *prima facie* actionable. There can be several categories of such infringements of rights in which the intentional infliction of pecuniary damage may give rise to a cause of action, although the mere failure to take care to avoid causing it would not. But on the other hand there can be many causes – when there is no such duty – in which a person may with impunity do that which he knows will cause another financial loss. They are not actionable. They are cases of *damnum sine injuria.* In the present case the defendants owed no duty towards the plaintiff to open the *pitawana* of their field to permit the water from the plaintiff's field to drain into the Ela. The plaintiff had therefore no cause of action under the Lex Aquilia.

There is a finding by the learned trial Judge that the defendants were fully aware of the consequences of their act, and intended such consequences. Logically, therefore, the doctrine of the "abuse of rights" arises for consideration. By this doctrine an act which is otherwise lawful becomes an actionable wrong if the sole or dominant motive which prompted it was a desire to injure another.

English Law still appears to be dominated by the House of Lords decision in *Bradford Corporation v. Pickles* (above) decided in 1895 in accordance with which a person is at liberty to do with his property what he likes, except for certain statutory restrictions, and some isolated decisions in 'nuisance cases' which have given preference to the plaintiff's reasonable economic interest as against the defendants unsocial use of his private property rights – see *Hollywood Silver Fox Farm v. Emmett.*[5] "Keep within the law, and you may gratify your malice to your hearts content, seems to be the view in English Law" – **C. K. Allen, Legal Duties, 96** referring to *Bradford v. Pickles.*

In the United States there seems to be a distinct tendency towards recognition of abuse of rights as a tort. In many of the U.S. jurisdictions "spite fences" are not permitted. The right to use ones property for the sole purpose of injuring another is not one of the immediate and indestructible rights of ownership – **Restatement, Torts** Section 389. In most Continental systems although the doctrine of abuse of rights is recognised there has been little attempt to give a definite content to the theory – see *R. C. Gutteridge, "Abuse of Rights"* Cambridge Law Journal V (1933) p. 22. **W. Friedmann in Law in a Changing Society** (abridged edition) p. 30 takes the view that the practical significance of the whole doctrine is very much smaller that its theoretical interest. "In the practice of American,

French, German or Swiss courts, it means little more than that the very unusual kind of landowners who creates obstacles out of spite for his neighbour, or who prefers to leave a piece of land unused rather than grant a right of passage, may be restrained by the courts".

There was no general rule in Roman Law against the abuse of proprietary rights, although there are passages in the Digest from which it might be inferred that a person who used his property *animo nocendi vicino,* that is, for the purpose of injuring his neighbour, is not permitted to shelter himself from liability behind the maxim *'qui sue jure utitur nemini facit injuriam'* – **McKerren, The Law of Delict** (6th Ed.) 47.

One of the passages attributed to Ulpian is **Digest 39.3.1.12** which is as follows:–

> "Then Marcellus writes that no action can be brought against one who by digging on his own land intercepts another's spring, not even the *actio doli;* and certainly he ought not to have it, if he did it, not with the intention of hurting his neighbour but of using his own land better". (Lawson's translation).

Although **Buckland and Mcnair** in **Roman Law and Common Law** (2nd Ed.) 96 seem to take the view that there was no rule of Roman Law that a man might not exercise his rights merely for the detriment of another, with no economic or betterment aim for himself, Innes, C.J. in *Union Government v. Marais*[6] has paid tribute to Ulpian by remarking that notwithstanding Groenewegan's statement of the doctrine of abuse of rights not being observed in Dutch practice "the high authority of Ulpian cannot be lightly disregarded" at 247.

McKerren says (at p. 48) that many of the medieval commentators on the Roman Law express the view that a man may not use his property with the intention of injuring or spiting his neighbour. The views of the medieval jurists have been admirably summarised by **Dr. J. E. Scholtens**, Professor of Roman Law in the University of Witwatersran, Johannesburg, in a contribution he has made in Col. LXXV Part I (1958) page 39 of the **South African Law Journal.** The limited purpose of the article, he says, is to investigate whether the doctrine of 'abuse of rights' may be accepted as part of the law of South Africa. In discussing the question whether the doctrine was part of the Roman Law as received in Western Europe the writer, after an exhaustive survey of the writings of the Glossators and Post Glossators, suggests that they took the view that an act is unlawful when it is done *animo necendi* with the intention to injure another's interests, or that a right may not be exercised *ad aemulationem alterius,* that is out of jealousy or rivalry or to spite another.

The consensus of opinion in the Roman Dutch Law appears to have been in favour of the recognition of a doctrine founded on abuse of rights. In the Southern Netherlands the doctrine of abuse of rights was recognised by Zoesius and Perezius, whilst in the Northern Netherlands we have the authority of Voet (39.3.4) who says:–

> "Then again if a person by digging on his own ground has cut off the spring of a neighbour, not with the intention of harming the neighbour but of improving his own land, no suit can be brought against him, so also can no suit be brought against him who cuts off a rushing stream so that the water may not come down on to his land, if perhaps harm is done to a neighbour to whom the inflow of water could have been beneficial. It is allowed to every single person to divert water and thus to hinder its onflow, provided that he has done this not with the intention of harming his neighbour, but to prevent harm to himself". (Gane's translation).

The doctrine made its appearance also in the practice of the law; Scholtens gives us an illustration on opinion given by two Utrecht advocates in the year 1621.

> "The question to be decided was whether the one party had lawfully erected a certain building on his property. The advocates state the law to be that everybody is entitled to do on his own property what furthers his own advantage even if this might be injurious to another, provided that he does not do so *ad aemulationem.* They add the further preliminary statement that a person is presumed to build to his own advantage and not in order to spite another. The decision finally arrived at was that on the facts of the case the defendant did not appear to have erected the building in order to spite and injure his neighbour."

Although Groenewegen had raised a dissenting voice in his comment on Digest 39.3.1.12 and stated that the above rule was not observed in the practice of the law of his time, a decision of the Wooge Raad reported by Bynkershock in the 18th century cast doubts on the correctness of the statement of Groenewegen.

The modern law also contains authority which reflects the attitude of the majority of the Roman Dutch jurists. In *Union Government v. Marias (supra)* Innes, C.J. expressed his unreserved acceptance of Ulpians approach to the problem. In *Kirsch v. Pincus*[7] Barry, A. J. A. was of opinion that, where property is used in an ordinary and reasonable manner, the *animus nocendi* might make a difference. In *Van Eck and Van Rensberg v. Etna Stores,*[8] Davis, A.J.A., although

not committing himself, suggested that the principle that a wrong motive cannot affect the validity of an act, may possibly admit of an exception in circumstances where an owner used his right only with the intention of injuring another. In *Milwaard v. Glaser*[9] and in *Herschel v. Mrupe*[10] Van den Heever, J. A. thought it probable that a remedy would be granted by the Roman Dutch Law where a man did something which otherwise would not be illegal, out of malice towards another.

Two decisions of our Courts have a bearing on the subject of abuse of rights. In *Jayawardene v. William*[11] Bertram, J.J. took the view that a lawful act does not become unlawful because of a malicious motive. The learned Chief Justice appears to have been influenced much by the House of Lords decision in *Bradford v. Pickles (supra)* a quarter of a century earlier. But a more cautious view appears to have been taken 40 years later by the Privy Council in the case of *David v. Abdul Cader*[12] where Viscount Radcliffe held that an applicant for a statutory license is entitled to damages if there had been a malicious misuse of the statutory power to grant the license. This ruling of the Privy Council is entirely consistent with the recognition in our country of a doctrine of abuse of rights. The doctrine, as Scholtens observes, may be considered as being in conformity with modern conceptions of equity and justice.

There is, therefore, sufficient authority for the recognition of a doctrine of abuse of rights under our law. I would formulate the doctrine so accepted as follows:- An act (or omission) would constitute an abuse of right if such act is done by a person with the sole or predominant object of harming another but with no appreciable or legitimate interest to himself.

The evidence in this case does not show that the predominant intention of the defendants in blocking the *pitawana* of Bogahaliyadda was to injure the plaintiff. The object appears to have been to save their own field from disaster. I would hold that there has been no abuse of rights by the defendants.

I would allow this appeal, set aside the judgment of the learned District Judge and dismiss the plaintiff's action with costs. The defendants will also be entitled to the costs of appeal.

VICTOR PERERA, J. – I agree.

Appeal allowed.