NATIONAL COAL BOARD vs. J. E. EVANS et al 1951 2KB 861

Trespass – Negligence – No Liability without Fault

In the instant case the Court of Appeal was called upon for the first time to determine whether liability can be imposed for trespass in the absence of negligence or intent.

The predecessor of the plaintiffs in title had laid an electric cable through and under the lands of the Glamorganshire County Council, without the knowledge of the Council. The cable was damaged by contractors employed by the Council to excavate a trench across the property; the damage was not reported to the plaintiffs who suffered a loss. The trial judge, Donovan J., found that there was no negligence but imposed liability for trespass; the Court of Appeal accepted the finding of no negligence, but reversed the trial judge on the trespass issue.

The negligence issue was resolved in accordance with the well-established principles: the defendants had acted as reasonable men in assuming that the ground plans, which did not show the position of the cable, were correct; there was no duty of care requiring them to ascertain the presence of the cable, and, in the absence of any such duty, there could be no liability.

It was sought to escape liability based on trespass by invoking the doctrine of inevitable accident. Rejecting this plea, Donovan J. stated: "This absence of information (regarding the presence of the cable) affords (the defendants), in my opinion, no defence against the allegation of trespass" (1). It is clear that the trial court felt itself precluded by the authorities from drawing any other conclusion. Perhaps it is of some significance that it was the view taken of the authorities by the Court of Appeal, rather than any divergence on principle, that distinguishes the result reached by that Court and in the court of first instance.

The Court of Appeal reviewed four principal authorities:

Weaver vs. Ward (2) where it was stated: "Therefore no man shall be excused of a trespass, except it may be judged utterly without his fault." In the instant case, in the principal judgment, Cohen L. J. took this to mean: "where the defendant was entirely without fault, he would have a good defence to an action of trespass" (3).

Leame vs. Bray (4) where Grose J. intimated that neither accident nor misfortune afford an excuse for trespass; this was regarded in the instant case as dicta, neither cited nor approved in any later case.

(1) page 873
(2) 1616 Hob. 134
(3) page . . . 874
(4) 1803 3 East 593

In Holmes vs. Mather (5) the third case to be considered, Bramwell B. asserted the result of the authorities led to the conclusion: "if the act that causes the injury is an act of direct force, vi et armis, trespass is the proper remedy, where the act is wrongful either as being wilful or as being the result of negligence. Where the act is wrongful for either of these reasons no action is maintainable, though trespass would be the proper form of action if it were wrongful". (6) Though these remarks were made in relation to a highway accident, the Court of Appeal took the view that a more general application must be given to them.

Finally, the Court of Appeal considered the much disputed judgment (7) of Denman J. in Stanley vs. Powell (8) in which his lordship, after a review of earlier cases, concluded that where neither intent nor negligence is proven, no action would lie for injury to the person resulting by accident from the lawful act of another.

The defendants in the instant case were on the property in the exercise of their lawful employment; they were, on the facts, utterly without fault with respect to damage to the cable. On the view taken of the authorities – a view which it has been suggested elsewhere should have been predicated on "more adequate investigation of the relevant case law" (9) – the Court of Appeal concluded that, since there was an absence of fault on the part of the defendants, liability could not be imposed for trespass.

The decision marks a departure in the fundamental common law rule regarding proprietary trespass. The rule has been that the absence of negligence or intent affords no defence to an action of trespass. Thus, in the famous case of Entick vs. Carrington (10), it was stated: "Every invasion of property, be it ever so minute, is a trespass". By an application of the doctrine evolved in Stanley vs. Powell (8), which was a case of trespass to the person, the Court of Appeal mitigated the effect of the Entick vs. Carrington rule. It has been said that Stanley vs. Powell is "the sole decision supporting a departure from the fundamental common law doctrine" (11). Stanley vs. Powell is, however, not only approved in the instant case, but is applied to an invasion of proprietary interests.

It is submitted that it is open to Canadian Courts to follow or to reject this decision. By following the decision the Courts can bring the two categories of proprietary trespass (land and chattels) into a consistent position with trespass to the person. Both from a legal and a social point of view this would be a desirable advance in the law; it would also be in accord with the position already reached in the common law courts in the United States (12).

(5) 1875 LR 10 Exch. 261
(6) page . . . 875
(7) Pollock on Torts 14th. Edition page 114
(8) 1891 1QB 86
(9) 1952 15MLR No. 1 page 81
(10) 1765 19St. Tr. 1030
(11) 1952 15MLR No. 1 page 83
(12) American Restatement (Intentional Harms) Chapter 2. Topics 1 and 2. Section 153 and 218.

Though there is much to commend the decision, a word of comment is in order. The judicial process has resolved the problem of whether there should be liability for trespass in the absence of intent or negligence by leaving the innocent party, who has suffered a loss due to a lawful act on the part of another innocent party, entirely without redress. Is there a more acceptable solution?

It is not within the scope of this note to discuss the incidence and apportionment of losses. There is, however, a trend towards compensation for all losses suffered in the course of peaceful pursuits. The common law rule regarding contributory negligence left the plaintiff with no right of recovery; this problem was solved by legislation which enabled the Courts to apportion the loss and award damages accordingly. The positions of negligent and innocent parties are not alike, but perhaps it would not be unprofitable to consider the possibility of some legislative approach to the problem of losses suffered by innocent parties and occasioned by innocent parties.

William A. Davidson, U.N.B. II Law

REX v WINDLE 1952 2 A.E.R.

Criminal Law – Insanity – Lack of knowledge that act causing death was "wrong" – Belief that act, while legally wrong, was morally right.

The defense of insanity in a murder trial, for about the last one hundred years, has been guided by the rule laid down in **McNaughten's case.** (1) The rule is, "Every man is presumed to be sane, and to possess a sufficient degree of reason, to be responsible for his crimes, until the contrary be proved to the satisfaction of the jury; to establish a defense on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong."

In the present case, the accused relied solely upon the defense of insanity. He was convicted before Devlin J. of murdering his wife by administering to her one hundred aspirin tablets. Devlin J. held that there was no case of insanity to be put to the jury, and the accused was found guilty. The case was appealed. The accused was a man of weak character who was involved in an unhappy marriage with a woman eighteen years his senior. She always talked of suicide as an escape from her sickness. The accused became obsessed with this idea and discussed it with his fellow workers. Just before the crime was committed, one of the workmen, in a jocular vein, suggested that the accused "give her a dozen aspirin". He then gave her the fatal dose. Subsequently he told the police that he supposed that he would be hanged for it.

1 1843, (10 Cl. and Fin. 200).