Privy Council Appeal No. 30 of 1965

Allan William Goldman – – – – – – *Appellant*

v.

Rupert William Edeson Hargrave and others – – *Respondents*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JUNE, 1966

Present at the Hearing:

LORD REID
LORD MORRIS OF BORTH-Y-GEST
LORD PEARCE
LORD WILBERFORCE
LORD PEARSON

[*Delivered by* LORD WILBERFORCE]

This consolidated appeal from a decision of the High Court of Australia, reversing that of the Supreme Court of Western Australia, arises out of a bush fire, which developed in the grazing area of Gidgegannup, Western Australia, and did extensive damage to the respondents' properties. The High Court decided that the appellant, on whose property the fire started, was liable for the damage, and this decision the appellant now contests.

The circumstances in which the fire started are concisely stated in the judgments of the High Court, which accepted the findings of the trial judge. There was an electrical storm on 25th February 1961, and a tall redgum tree, about 100 feet in height, in the centre of the appellant's property, was struck by lightning. This tree was about 250 yards from the western boundary of the appellant's property (in which direction the respondents' properties lie) and rather less from the eastern boundary. The redgum caught fire in a fork 84 feet from the ground and it was evidently impossible to deal with the blaze while the tree was standing. Early in the morning of 26th February, the appellant telephoned the district fire control officer, appointed as such under the Bush Fires Act, and asked for a tree feller to be sent. Pending his arrival the appellant cleared a space round the tree of combustible material and sprayed the surrounding area with water.

The tree feller arrived at mid-day on 26th February, at which time the tree was burning fiercely, and it was cut down. The trial judge found, and the High Court accepted the finding, that up to this point the appellant's conduct in relation to the fire was not open to criticism.

But the judge also found that if the appellant had taken reasonable care he could, on the Sunday evening (26th February), or at latest early on the next morning, have put out the fire by using water on it. The appellant indeed claimed that he spent two hours on Monday, 27th February, in extinguishing the fire, but his evidence as to this was rejected. The judge referred to evidence which indicated that the appellant's method of extinguishing a fire of this kind was to burn it out. "You burn it out" he was reported as saying "that is the only way I know to put a fire out".

On Tuesday 28th February, the appellant was away from the property for a substantial part of the day, and it was found that he did not at any time after 27th February take any steps which could be regarded as reasonable to prevent the fire from spreading. On Wednesday 1st March there was a change in the weather; the wind, which had previously been light to moderate, freshened to about 20 m.p.h. with stronger gusts. The air temperature rose some 10° to 105°F. The fire revived and spread over the appellant's paddock towards the west and on to the respondents' properties: it was not observed by the appellant until about noon on 1st March and by then it could not be stopped. The damage to the respondents' properties followed.

It is important at once to deal with an argument, as to the facts, which was advanced by the respondents at the trial. It was sought to contend that although the fire commenced accidentally, the appellant, whether by heaping combustible material on to it, after the tree had been felled, or even by permitting the tree to burn in the way in which it did on the ground, had adopted the fire as his own—as suus ignis—and had made use of it for his own purpose or advantage.

Their Lordships (in agreement with the High Court) do not accept this view of the facts. The result of the evidence, in their Lordships' opinion, is that the appellant both up to 26th February and thereafter was endeavouring to extinguish the fire; that initially he acted with prudence, but that there came a point, about the evening of 26th February or the morning of 27th February, when, the prudent and reasonable course being to put the fire out by water, he chose to adopt the method of burning it out. That method was, according to the finding of the trial judge, unreasonable, or negligent in the circumstances: it brought a fresh risk into operation, namely the risk of a revival of the fire, under the influence of changing wind and weather, if not carefully watched, and it was from this negligence that the damage arose. That a risk of this character was foreseeable by someone in the appellant's position was not really disputed: in fact danger arising from weather conditions is given official recognition in the Bush Fires Act, 1954–8, which provides for their classification according to the degree of danger arising from them.

This conclusion has an important bearing upon the nature of the legal issue which has to be decided. It makes clear that the case is not one where a person has brought a source of danger on to his land, nor one where an occupier has so used his property as to cause a danger to his neighbour. It is one where an occupier, faced with a hazard accidentally arising on his land, fails to act with reasonable prudence so as to remove the hazard. The issue is therefore whether in such a case the occupier is guilty of legal negligence, which involves the issue whether he is under a duty of care, and if so, what is the scope of that duty. Their Lordships propose to deal with these issues as stated, without attempting to answer the disputable question whether if responsibility is established it should be brought under the heading of nuisance or placed in a separate category. As this Board has recently explained in *Overseas Tankship (U.K.) Limited v. The Miller Steamship Co. Pty. Limited (Wagon Mound No. II)* the tort of nuisance, uncertain in its boundary, may comprise a wide variety of situations, in some of which negligence plays no part, in others of which it is decisive. The present case is one where liability, if it exists, rests upon negligence and nothing else; whether it falls within or overlaps the boundaries of nuisance is a question of classification which need not here be resolved.

What then is the scope of an occupier's duty, with regard to his neighbours, as to hazards arising on his land? With the possible exception of hazard of fire, to which their Lordships will shortly revert, it is only in comparatively recent times that the law has recognised an occupier's duty as one of a more positive character than merely to abstain from creating, or adding to, a source of danger or annoyance. It was for long satisfied with the conception of separate or autonomous proprietors, each of which was entitled to exploit his territory in a "natural" manner and none of whom was obliged to restrain or direct the operations of nature in the interest of avoiding harm to his neighbours.

This approach, or philosophy, found expression in decisions both in England and elsewhere. In *Giles v. Walker* (1890) 24 Q.B.D. 656 a claim that an occupier had a duty to protect his neighbour against the invasion of thistledown was summarily rejected by the Queen's Bench Division. And, in a similar field, it was held in 1908 by the High Court of Australia, (*Sparke v. Osborne* 7 C.L.R. 51) that an occupier was not under a duty to prevent a noxious weed, prickly pears, from attacking a neighbour's fence. The case was decided on a demurrer to a pleading in which negligence was not alleged. In relation to fires, there were similar decisions. In Australia, in 1879 the Supreme Court of Victoria decided on a demurrer to a pleading which alleged negligence, that an occupier of land on which a fire accidentally occurs is not under any duty to put it out (*Batchelor v. Smith* 5 V.L.R. (Cases at Law) p. 176). In New Zealand, in 1888 the Supreme Court in Banco held that there is no legal duty cast upon the owner of land upon which a fire originates to prevent it from spreading to the land of another, though he was present immediately after it was lighted and might have put it out (*Hunter v. Walker* 6 N.Z.L.R. 690). It is interesting to see (since the present case is concerned with an accidental fire) that Richmond J. in a learned judgment examines the common law from the Year Book 2 Hen. 4, 18, and expresses this opinion upon the state of the law prior to the statute 6 Anne C.31. " (The authorities) leave it doubtful what would be the responsibility of the owner for damage done by a fire beginning on his property the origin of which is not known. It seems to have been supposed that at common law the owner would be answerable for such fires, which may be properly called, so far as the owner is concerned, accidental "—and in fact his decision, against liability, was based upon an exempting statute—the Fires Prevention (Metropolis) Act 1774 (replacing the earlier 6 Anne C.31) to which reference will later be made.

That, at common law an occupier of premises from which fire escapes was liable if either the origin, or the escape of the fire was due to his negligence seems also to have been the opinion of Sir John Salmond—see *Eastern Asia Navigation Co. Ltd. v. Fremantle Harbour Trust Commissioners*, where Fullagar J. in the High Court of Australia left the point open (1950) 83 C.L.R. 353 at p. 393.

Lastly in 1905 the Supreme Court of South Australia in *Havelberg v. Brown* [1905] S.A.L.R. 1 held that an occupier who remains passive is under no responsibility, and that if he interferes, he is liable only upon proof of negligence. The argument against responsibility is powerfully stated by Way C. J. where, referring to the occupier's duty, he says:

> " It is one example among many of imperfect obligations, of a moral as opposed to a legal duty, and one can see how difficult it would be to frame a law making an occupier liable for a fire arising upon his premises, annexing to him legal responsibilities, when he was in no way connected with the act. Should such a legal duty apply in all cases, irrespective of age or sex? Should it be made applicable in spite of the absence or illness of the owner, or in the case of a fire out of his sight or without his knowledge? Is it to apply to a man who is weak or unskilful? The slightest reflection must shew any one how difficult it would be to frame a law that would be applicable to all cases, and any one who has seen, as most of us have, the frequent bush fires in the hills adjacent to Adelaide, will understand that there really is no necessity for any such law. People not only extinguish dangerous fires from self-interest, and for the preservation of themselves and their families, but in the summer we see every week the whole countryside turning out and using the utmost endeavours to prevent danger to life and injury to the property of others."

That a person who takes some action (though mistaken) to deal with an accidental fire should not be in a worse position as regards civil liability than one who does nothing is clearly a consideration of importance not to be overlooked when stating a rule as to liability.

These three decisions relating to fires were followed by the learned trial judge in the present case.

A decision which, it can now be seen, marked a turning point in the law was that of *Job Edwards Ltd. v. The Company of Proprietors of the Birmingham Navigations* [1924] 1 K.B. 341. The hazard in that case was a fire which originated in a refuse dump placed on land by the act of a third party. When the fire threatened to invade the neighbouring land, the owners of the latter, by agreement, entered and extinguished the fire at a cost of some £1,000. The issue in the action was whether the owners of the land, where the fire was, were liable to bear part of the cost. The Court of Appeal by a majority answered this question negatively, but Scrutton L. J.'s dissenting judgment contained the following passage:

> "There is a great deal to be said for the view that if a man finds a dangerous and artificial thing on his land, which he and those for whom he is responsible did not put there; if he knows that if left alone it will damage other persons; if by reasonable care he can render it harmless, as if by stamping on a fire just beginning from a trespasser's match he can extinguish it; that then if he does nothing, he has 'permitted it to continue,' and becomes responsible for it. This would base the liability on negligence, and not on the duty of insuring damage from a dangerous thing under *Rylands v. Fletcher* (L.R. 3 H.L. 330). I appreciate that to get negligence you must have a duty to be careful, but I think on principle that a landowner has a duty to take reasonable care not to allow his land to remain a receptacle for a thing which may, if not rendered harmless, cause damage to his neighbours."

One may note that this passage is dealing with a different set of facts from that involved in the case then under consideration: the one referring to a fire just beginning which can be extinguished by stamping on it, the other concerned with a smouldering dump to extinguish which involves both effort and expense, so that it is quite possible to approve both of the majority decision and of the passage quoted from the dissenting judgment.

This was followed in 1926 by *Noble v. Harrison* [1926] 2 K.B. 332. The damage there was caused by an overhanging tree with a latent defect and the decision was against liability. The judgment of Rowlatt J. in the Divisional Court contains this passage:

> "a person is liable for a nuisance constituted by the state of his property (1) if he causes it; (2) if by neglect of some duty he allowed it to arise; and (3) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it."

It will be seen that the learned judge in the third category makes no distinction according to whether the "nuisance" is caused by trespassers or by natural causes, and that he does not enter into any question as to the limits of the effort or expenditure required of the occupier. As a general statement of the law it was cited with apparent approval by Dixon J. in *Torette House Proprietary v. Berkman* (1939) 62 C.L.R. 637 at p. 652.

In 1940 the dictum of Scrutton L. J. passed into the law of England when it was approved by the House of Lords in *Sedleigh-Denfield v. O'Callaghan* [1940] A.C. 880. Their Lordships need not cite from this case in any detail since it is now familiar law. It establishes the occupier's liability with regard to a hazard created on his land by a trespasser, of which he has knowledge, when he fails to take reasonable steps to remove it. It was clear in that case that the hazard could have been removed by what Viscount Maugham described as the "very simple step" of placing a grid in the proper place. The members of the House approved the passage just cited from Scrutton L. J.'s judgment and Viscount Maugham and Lord Wright also adopted the statement of the law in Salmond's Law of Tort 5th Ed. (1920) pp. 258–265: "When a nuisance has been created by the act of a trespasser or otherwise without the act, authority, or permission of the occupier, the occupier is not responsible for that nuisance unless, with knowledge or means of knowledge of its existence, he suffers it to continue without taking reasonably prompt and efficient means for its abatement."

The appellants, inevitably, accept the development, or statement, of the law which the *Sedleigh-Denfield* case contains—as it was accepted by the High Court of Australia. But they seek to establish a distinction between the type of hazard which was there involved, namely one brought about by human agency such as the act of trespasser, and one arising from natural causes, or act of God. In relation to hazards of this kind it was submitted that an occupier is under no duty to remove or to diminish it, and that his liability only commences if and when by interference with it he negligently increases the risk or danger to his neighbour's property.

Their Lordships would first observe, with regard to the suggested distinction, that it is well designed to introduce confusion into the law. As regards many hazardous conditions arising on land, it is impossible to determine how they arose—particularly is this the case as regards fires. If they are caused by human agency, the agent, unless detected in flagrante delicto, is hardly likely to confess his fault. And is the occupier, when faced with the initial stages of a fire, to ask himself whether the fire is accidental or man-made before he can decide upon his duty? Is the neighbour, whose property is damaged, bound to prove the human origin of the fire? The proposition involves that if he cannot do so, however irresponsibly the occupier has acted, he must fail. But the distinction is not only inconvenient, it lacks, in their Lordships' view any logical foundation.

Within the class of situations in which the occupier is himself without responsibility for the origin of the fire, one may ask in vain what relevant difference there is between a fire caused by a human agency such as a trespasser and one caused by Act of God or nature. A difference in degree—as to the potency of the agency—one can see but none that is in principle relevant to the occupier's duty to act. It was suggested as a logical basis for the distinction that in the case of a hazard originating in an act of man, an occupier who fails to deal with it can be said to be using his land in a manner detrimental to his neighbour and so to be within the classical field of responsibility in nuisance, whereas this cannot be said when the hazard originates without human action so long at least as the occupier merely abstains. The fallacy of this argument is that, as already explained, the basis of the occupier's liability lies not in the use of his land: in the absence of "adoption" there is no such use; but in the neglect of action in the face of something which may damage his neighbour. To this, the suggested distinction is irrelevant.

On principle therefore, their Lordships find in the opinions of the House of Lords in *Sedleigh-Denfield v. O'Callaghan* and in the statements of the law by Scrutton L. J. and Salmond, of which they approve, support for the existence of a general duty upon occupiers in relation to hazards occuring on their land, whether natural or man-made. But the matter does not rest there. First, the principle has been applied to the specific hazards of fire by the more recent decision of the Supreme Court of New Zealand in *Boatswain v. Crawford* [1943] N.Z.L.R. 109. That was a case of a fire of unknown origin which could easily have been controlled in its initial stages. The Court held the defendant liable for breach of duty following expressly *Sedleigh-Denfield v. O'Callaghan* and applying the passage above quoted from Salmond on Torts. The High Court of Australia, which may be taken to be aware of the present day conditions as regards Bush Fires, considered that this decision is now to be preferred to the older cases as in accordance with the trend of the law, and their Lordships agree with their view. A still later case in New Zealand, *Landon v. Rutherford* [1951] N.Z.L.R. 975, followed *Boatswain v. Crawford*—though, as was pointed out by Taylor J. and Owen J. in their judgment in the High Court of Australia, it placed too heavy an onus of proof on the defendant. Secondly, it appears that the movement of American decisions has been towards the development of a duty of care on the part of occupiers in relation to hazards arising on their land both generally and of fire. Their Lordships were referred to three successive series of the American Law Reports Annotated in the years 1926, 1937 and 1951 referring to a number of decided cases in various jurisdictions, all of which, save one, point in the same direction.

The cumulative result of these is to establish the occupier's duty of care towards his neighbour to a similar extent as the English and New Zealand cases. Their Lordships were also referred to the Restatement of the Law of Torts the relevant portion of which (Vol. IV para. 839–40) dates from 1939. This makes a distinction between invasions of a neighbour's interest arising from a natural condition of land and other invasions, which is expressed in somewhat general terms and which is of less direct application to such a case as the present than the American decisions.

Thirdly their Lordships have considered the modern text books of authority on the law of torts, Clerk and Lindsell 12th Ed. 1961, Salmond 13th Ed. 1961, Winfield 7th Ed. 1963, Fleming 1965, as well as a formative article by Dr. A. L. Goodhart in 4 Cambridge Law Journal (1932) p. 13. All of these endorse the development which their Lordships find in the decisions, towards a measured duty of care by occupiers to remove or reduce hazards to their neighbours.

So far it has been possible to consider the existence of a duty, in general terms. But the matter cannot be left there without some definition of the scope of his duty. How far does it go? What is the standard of the effort required? What is the position as regards expenditure? It is not enough to say merely that these must be "reasonable" since what is reasonable to one man may be very unreasonable, and indeed ruinous to another: the law must take account of the fact that the occupier on whom the duty is cast, has, ex hypothesi, had this hazard thrust upon him through no seeking or fault of his own. His interest, and his resources whether physical or material, may be of a very modest character either in relation to the magnitude of the hazard, or as compared with those of his threatened neighbour. A rule which required of him in such unsought circumstances in his neighbour's interest a physical effort of which he is not capable, or an excessive expenditure of money would be unenforceable or unjust. One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it. And in many cases, as for example in Scrutton L.J.'s hypothetical case of stamping out a fire, or the present case, where the hazard could have been removed with little effort and no expenditure, no problem arises. But other cases may not be so simple. In such situations the standard ought to be to require of the occupiers what it is reasonable to expect of him in his individual circumstances. Thus, less must be expected of the infirm than of the able bodied: the owner of a small property where a hazard arises which threatens a neighbour with substantial interests should not have to do so much as one with larger interests of his own at stake and greater resources to protect them: if the small owner does what he can and promptly calls on his neighbour to provide additional resources, he may be held to have done his duty: he should not be liable unless it is clearly proved that he could, and reasonably in his individual circumstance should, have done more. This approach to a difficult matter is in fact that which the Courts in their more recent decisions have taken. It is in accordance with the actual decision in the *Job Edwards* case where to remove the hazard would have cost the occupier some £1,000—on this basis the decision itself seems obviously right. It is in accordance with *Pontardawe R.D.C. v. Moore-Gwyn* [1929] 1 Ch. 656 where to maintain the rocks in a state of safety would have cost the occupier some £300. And if some of the situations such as those in *Giles v. Walker* (thistledown) and *Sparks v. Osborne* (prickly pears) were to recur to-day, it is probable that they would not be decided without a balanced consideration of what could be expected of the particular occupier as compared with the consequences of inaction. That *Giles v. Walker* might now be decided differently was indeed suggested by Lord Goddard C. J. giving the judgment of the English Court of Appeal in *Davey v. Harrow Corporation* 1958 1 Q.B. 60. In the present case it has not been argued that the action necessary to put the fire out on 26th to 27th February was not well within the capacity and resources of the appellant. Their Lordships therefore reach the conclusion that the respondents' claim for damages, on the basis of negligence, was fully made out.

One final point was raised by the appellant by way of defence to the claim. This was based upon the provisions of the Fires Prevention (Metropolis) Act 1774, 14 George III C.78 S. 86 which provides that no action shall lie against any person on whose estate "any fire shall accidentally begin". This Statute replaces the earlier Act of Anne (6 Anne C.31). It is accepted that this Statute is part of the law in Western Australia, and that it applies to such an area as that in which the fire in question arose.

The words "shall accidentally begin" are simple enough, but the simplicity is deceptive. Read literally they suggest that account need be taken of nothing except the origin of the fire and that given an accidental beginning, no supervening negligence or even deliberate act can deprive a defendant of the benefit of the Statute. But further reflection suggests a doubt both because such a result seems capable of producing absurdity and injustice, and because of the inherent difficulty of saying what the expression "any fire" is intended to mean. A fire is an elusive entity; it is not a substance, but a changing state. The words "any fire" may refer to the whole continuous process of combustion from birth to death, in an Olympic sense, or reference may be to a particular stage in that process—when it passes from controlled combustion to uncontrolled conflagration. Fortunately, the Act has been considered judicially and, as one would expect, the process of interpretation has taken account of these considerations. In *Filliter v. Phippard* (1847) 11 Q.B. 347 Lord Denman explained the purpose of the earlier Act (6 Anne C.31 S. 6) as being to remove the supposed common law liability of a person "in whose house a fire originated which afterwards spread to his neighbour's property" and held that it did not apply to a fire caused deliberately or negligently. This was carried further in *Musgrove v. Pandelis* [1919] 2 K.B. 43 where a fire started accidentally in the carburettor of a car, but spread because the chauffeur negligently failed to turn off the petrol tap. The Court of Appeal held that the Act did not apply. Bankes L. J. put it that the Act relieved an owner for a mere escape of fire from his premises but did not relieve him against a claim for damages for negligence. The fire which caused the damage was, he though, not the spark which caused the initial ignition, but the raging fire which arose from the act of negligence. Their Lordships accept this interpretation: it makes sense of the Statute, it accords with its antecedents, and it makes possible a reasonable application of it to the facts of the present case, that is to say that the fire which damaged the respondents' property was that which arose on 1st March as the result of the negligence of the appellant. The statutory defence therefore fails.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

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