Mortgagee's Duty

In *Cuckmere Brick Co. Ltd.* v. *Mutual Finance Ltd.* [1971] Ch. 249 the plaintiffs had charged land to the defendants by way of a mortgage to secure a loan of £50,000. After two years the defendants' statutory power of sale became exerciseable. In their advertising with respect to the sale they failed to publicize that there was planning permission for one hundred flats to be built on the mortgaged property. The plaintiff mortgagors drew the defendants' attention to the omission and asked that the sale be delayed so that the public could be made aware of the planning permission for the flats. The defendants agreed to mention the possibility of flats at the auction, but would not consent to any postponement. When the auction did take place the property sold for £44,000—a price substantially less than the £75,000 the plaintiffs alleged the property to be worth.

It was held in the English Court of Appeal following *Tomlin* v. *Lace* (1889) 43 Ch.D. 191 that a mortgagee in exercising his power of sale owed a duty to the mortgagor to take care to obtain a proper price, or as Salmond L.J. said, "the proper market price". The majority of the Court, with Cross L.J. dissenting, also held that on the evidence the trial Judge had been justified in finding that the defendants had been in breach of such duty in selling without adequately publicizing the planning permission for flats and refusing to postpone the auction sale.

The Court of Appeal granted leave to appeal to the House of Lords and it is expected that the appeal will allow the doubt as to whether it is the mortgagee's duty to obtain the best price, market price, proper price, or merely to act reasonably, to be resolved.

Legislation

Recently there have been several minor amendments in specialised areas of real property law but no major developments. The Property Law Amendment Act, 1971 adds section 102A to the Property Law Act, 1952. The new section provides for the payment of surplus money from the sale of a mortgaged property by the mortgagee to the Secretary of the Treasury if the mortgagor cannot be located after reasonable inquiries have been made.

B. V. Harris

TORTS

Defamation—qualified privilege

Macarthur J. in *Dunford Publicity Studios Ltd.* v. *News Media Ownership Ltd. and Gordon* [1971] N.Z.L.R. 961, reassessed the law relating to qualified privilege. The action arose following two articles in the newspaper *Truth* relating to a road safety competition which had initially been supported by the Minister of Transport. This support was withdrawn when he realised the competition was being run for profit. The first article printed a press statement by the Minister setting out his position with some background information on the competition. The second article was printed the following week and was headed, 'Auck-

landers Stung by Card Capers!' It contained information and comment about people who alleged they had been affected by the competition. The plaintiff company sued for defamation regarding both articles but succeeded only in respect of the second article.

The decision seems to go further than previous cases and suggests that qualified privilege for newspapers goes beyond the limits of mere 'reports'. Macarthur J. quotes (at 961) with approval a passage from Gatley, *Libel and Slander* (6th ed.) at 244, which laid down a reasonably broad principle:

> The publication of defamatory matter in a newspaper will be privileged where the matter published is of general public interest and it is the duty of the defendant to communicate it to the general public.

In *Truth (N.Z.) Ltd.* v. *Holloway* [1960] N.Z.L.R. 69 the Court of Appeal had denied the existence of a general principle extending privilege to newspapers other than in the case of the publication of reports. Macarthur J. was able to distinguish that case on its facts.

Nervous shock

Mt Isa Mines Ltd. v. *Pusey* (1971) 45 A.L.J.R. 88 has brought nervous shock into line with other injuries sustained as a result of negligence. The action arose following an accident involving two employees of the appellant company. Both were very badly burned when negligently using a multimeter. The respondent, who was also employed by the appellant company, went to their assistance and helped one of the men to an ambulance. The respondent continued to work for about four weeks thereafter without apparent ill effects, but then developed symptoms of mental disturbance diagnosed by a psychiatrist as a type of schizophrenia. He was awarded $10,000 damages for personal injuries caused by the appellant's negligence in failing to properly instruct his employees in the use of the equipment.

It was established that the illness suffered by the respondent was extremely rare, and the appellant company alleged that they did not owe a duty of care as neither the precise kind of injury suffered nor indeed any psychological disturbance was reasonably forseeable. The majority of the High Court of Australia was clear that the precise kind of nervous injury suffered was not forseeable, but nevertheless all five Judges held that some class of psychosomatic nervous shock was forseeable, and that the respondent's illness belonged to that class. They then applied the well-established principle that there is liability if the precise form of injury falls into a class of injury that is forseeable.

The High Court used forseeability as the criterion of liability both for establishing the duty of care and for testing remoteness, but they seem to have stretched forseeability so as to include virtually any direct consequence. In so doing they appear to be moving back to the *In re Polemis* [1921] 3 K.B. 560 principle, a doctrine which was specifically rejected in the *Wagon Mound No. 1* [1961] A.C. 388.

This case also introduces questions of nervous shock into situations where there is no relationship between the parties. Windeyer J. outlined the development of the law of negligence in the nervous shock cases. At first recovery was limited to relatives only and this was gradually extended to rescuers. He could see no reason for not extending liability to include any person suffering 'nervous shock' which was reasonably forseeable. Thus in Australia cases of nervous shock will now receive the

full application of the broad principle from *Donoghue* v. *Stevenson* [1932] A.C. 562 and it will be interesting to see if New Zealand courts follow this very wide interpretation of forseeability.

Legislation—Animals Act, 1971 (U.K.)

In an attempt to rationalise the law relating to animals, the Animals Act 1971 has now been passed in England. It may be desirable that New Zealand follow this lead and alter some of the well established principles which no longer have relevance to present day circumstances.

Section 1 sweeps away the present common law rules regarding animals *ferae naturae, scienter* and cattle trespass and the special provisions of the Dogs Act, 1906 (U.K.) dealing with owner's liability for injury to cattle or poultry.

Section 2 imposes strict liability on keepers of animals belonging to "dangerous species" or animals belonging to "harmless species" which have abnormal or dangerous characteristics of which their keepers are aware.

Section 6(2) defines "dangerous species" as animals not commonly domesticated in the British Islands, or those species whose fully grown animals normally have such characteristics that they are likely, unless restrained, to cause severe damage. While this section simplifies the old law it still places a somewhat arbitrary obligation on keepers of animals which are not "commonly domesticated" in the British Isles. The criticism which was previously levelled at the *ferae naturae* classification would still appear to be valid. An animal of an exotic species, regardless of how docile that species normally is, is subject to absolute liability.

Section 6(3) defines "keeper" and gives the term a wider application than was the case at common law. It now includes the head of a household of which a member under the age of 16 years owns the animal, or has it in his possession.

Section 11 includes disease and any impairment of mental condition as injuries giving rise to damages, thus enabling a plaintiff to recover for nervous shock resulting from the activities of animals. To recover for disease the plaintiff must show the respondent knew the animal had the disease. The common law relating to *mansuetae naturae* has been incorporated into the Act. The second essential of the *scienter* principle, that of knowledge of dangerous propensity by the keeper is still required, but as before the knowledge can be acquired vicariously through the keeper's servants or a member of his household, thus incorporating the principle laid down in *Baldwin* v. *Casella* (1872) L.R. 7 Ex. 352 and *Applebee* v. *Percy* (1874) L.R. 9 C.P. 647.

Liability has been extended, in that under section 2(2)(b) the fact that a particular animal belonging to a non dangerous species, shares dangerous characteristics with other animals at certain times of the year or in special conditions does not preclude liability where the keeper knows of the presence of these characteristics in his animal at the time of injury.

Section 3 imposes strict liability for damage done by dogs to livestock. The definition of livestock applicable to this section is contained in section 11 and is much wider than the common law "avers".

Section 4 replaces the common law action for cattle trespass and imposes strict liability on the owner of trespassing livestock for any damage done when it strays on to someone's land and causes damage

there. This when linked with the extended definition of damage under s.11 rationalises the problems which have previously been experienced with the type of damage for which a plaintiff could recover. This does not alter the position in cases such as arose in *Manton* v. *Brocklebank* [1923] 2 K.B. 212 where an animal is on land with permission but by its behaviour exceeds the permission given. This decision has been widely criticised and it will be interesting to see whether English courts decide to give "trespass" a wider meaning in this context and thus bring it into line with human trespass.

The liability outlined in ss. 2, 3 and 4 is strict, but not absolute and s.5 outlines five defences. Liability is excluded if the damage is due wholly or partly to the plaintiff's own fault, but a failure to fence will not mean the plaintiff is at fault, unless he is under a duty to do so. This rule incorporates the principle most recently enunciated in *Crow* v. *Wood* [1971] 1 Q.B. 77. It is also a defence if risk has been voluntarily assumed, but this defence cannot be pleaded as between employer and employee. Thus in a case such as *Rands* v. *McNeil* [1955] 1 Q.B. 253, this defence would no longer be available. A keeper is not subject to liability in the case of injury to a trespasser, provided the animal either was not kept to protect persons or property, or was so kept that keeping it there for that purpose was not unreasonable. It is further a defence if a dog injures livestock if the livestock are trespassing and the dog either belongs to the occupier or its presence on the land is authorised by him. Finally the defence of "consent" at common law regarding livestock straying on to land from a highway has been incorporated into the Act, provided the livestock is lawfully on the highway.

The much criticised principle upheld in *Searle* v. *Wallbank* [1947] A.C. 341 has been abolished by s.8 of the Act, which provides an ordinary duty of care to prevent damage from animals straying on to the highway. There are exceptions to this liability where stock is kept on common land, or in areas where fencing is not "customary". The latter exception is vague and it is to be hoped that should New Zealand pass a similar Act this provision will not be incorporated. It is widely considered that the circumstances which originally prompted this exception to liability are no longer relevant, and as the New Zealand Court of Appeal declined in *Ross* v. *McCarthy* [1970] N.Z.L.R. 449 to upset it, it is apparent that suitable legislation is required to remedy the situation.

Section 9 deals with protection of livestock. The rule in *Cresswell* v. *Sirl* [1948] 1 K.B. 241 which gave a limited right to shoot a trespassing dog which is in pursuit of cattle, poultry or sheep, has been modernised and extended. The section requires that a dog must be worrying or about to worry livestock and there must be no other reasonable means of ending or preventing the attack, or alternatively the dog must have been worrying livestock and is still in the vicinity of the worrying and is not under the control of any person, and there are no practicable means of ascertaining the dog's owner or keeper.

The Act goes a long way towards solving the problems which have arisen with the necessity of developing suitable modern rules to ensure that owners and controllers of animals keep them under effective control. New Zealand urgently requires legislation in a similar vein, but it is hoped more consideration will be given to the classification of dangerous and non dangerous species resulting in a classification which is less arbitrary than that adopted by the English Act.

N. W. King