

**LEGAL BASES FOR CLAIMS
IN RESPECT OF
FAST FERRY OPERATIONS**

BY

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- 1 Essentially, so far as the maritime law is concerned, the introduction of fast ferries has not brought with it any new legal concepts or special legal problems.
- 2 They tend to operate less as ferries traditionally have (ie. Cross river, cross harbour). although in many respects, fast ferries have been with us for many years - for example the Sydney Harbour hydrofoils.
- 3 People tend to use the term “fast ferries” to more often than not refer to the modern catamaran hulled high speed craft typically seen in the form of the Sydney RiverCats and the Brisbane CityCats on the one hand, and the inter-island “Condor” in New Zealand and the many very large passenger and car ferries such as are typically built in Tasmania.
- 4 However, some modern fast ferries are monohull designs. These vessels travel at speeds similar to the more familiar catamaran- hulled vessels.
- 5 The introduction of these vessels have provided the opportunity for movement of passengers and cars:-
 - 5.1 at a greater frequency; and
 - 5.2 at a higher speedthan was previously economical.
- 6 So far as liability for damage caused by collisions is concerned, there is no distinguishing feature of fast ferries which requires discussion in this paper.
- 7 However, the increased frequency and speed of these vessels have brought to the fore issues relating to damage which can be caused by the wash of the vessels.
- 8 It should be emphasised that there is no difference legally between wash generated by a relatively slow moving monohulled vessel and that generated by a fast ferry.

- 9 This paper will examine the legal bases upon which liability might arise for damage caused by the wash of fast ferries.

THE BASIS OF A CLAIM

- 10 The types of complaints typically arising from the conduct of fast ferry operations can be summarised as relating to:-

- damage to river walls;
- river bank erosion;
- damage to buildings adjoining the river;
- erosion of sand and beaches;
- damage to pontoons and moored vessels;
- wash flowing over river walls;
- noise.

- 11 There are three bases upon which persons whose rights may be adversely affected may be able to establish a claim in respect of the operations of fast ferries. They are:

- 11.1 breach of statutory duty;
- 11.2 negligence;
- 11.3 nuisance.

- 12 There is no question of a strict liability for damage caused by the wake of a vessel. As Lord Blackburn said in *The River Wear Commissioners -v- Adamson & Ors* [1877] 2 AC 743 at 767:-

“My Lords, the Common Law is, I think as follows:-

Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect, there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case, the owner of the injured property must bear his own loss, unless he

can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by showing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is the owner.

But he does establish such a liability against a person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land, and a ship or a float of timber on water, to take reasonable care and use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage."

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COMMON LAW ACTION FOR BREACH OF A STATUTORY DUTY

- 13 Some statutory prohibitions or prescriptions provide their own remedy for breach
- 14 Where the statute provides the remedy, generally a breach of such a provision will not give rise to any independent cause of action at the suit of somebody who has suffered damage as a result of the breach.
- 15 The cause of action for breach of statutory duty involves a claim to enforce a private civil right based on a breach of a public statutory duty.
- 16 In Queensland, the principal applicable statutory provisions are contained in the *Transport Operations (Marine Safety) Act and Regulations*. Sections 43(1) and (2) relevantly provide:-

"A person involved with a ships operation (including the owner) ... must not cause the ship to be operated unsafely.

... a person causes a ship to be operated unsafely if the person causes the ship to be operated in a way that ... causes a marine incident."

17 Section 123 defines a marine incident as:-

*"... (g) material damage caused by a ship's operation; or
... (j) danger of serious damage to a structure caused by a ship's operation."*

18 Regulation 96 provides:

*"A person must not operate a ship at a speed at which the ship's wash is reasonably capable of causing -
(a) a marine incident; or
(b) damage to the shoreline."*

19 Section 43 and regulation 96 both provide for the payment of penalties for a breach. There must be doubt, that a breach of these provisions could form the basis of a common law action for breach of statutory duty in the sense of being a separate cause of action.

20 Rather, it appears to have been the intention of the legislature that the sanction for a breach be as provided for in the Act and regulations, namely, the payment of a penalty. (See *Bowling -v- Weinert* [1978] 2 NSWLR 282 which found that the 1969 New South Wales equivalent regulations did not give rise to a private action for breach. See also *Sibley -v- Kars* (1967) 118 CLR 424 which is one of a long line of cases holding that the analogous Acts and Regulations pertaining to the operations of motor vehicles do not give rise to a discrete cause of action for breach. Importantly however, these cases have similarly held that a breach of regulations controlling road traffic might constitute evidence of a separate cause of action in negligence).

Negligence

21 Where operations are carried out by a public authority, it is liable for its negligence in the same way as would a private individual. See *Northern Territory v Mengel* (1995) *Aust Torts Rep* 81-335 at 62,325

- 22 A person navigating a river generally speaking owes a duty of care to the owners of property bordering on or adjacent to the river to avoid damage to the property. (per Lord Brandon of Oakbrook in *The Hua Lien* [1991]1 Lloyds Rep 309 at 329). The duty owed is similar to that owed to owners of other vessels.
- 23 A public right exists to navigate upon the sea (see *Denaby and Cadeby Main Collieries Leed v Anson* [1911] 1 KB 171) and upon tidal navigable waters (see *Halsbury Vol 49(2)* para 722; *Miles v Rose* (1814) 5 Taunt 705; *Iveagh v Martin* [1961] 1 QB 232 (at 272) and *Bak v Huat* [1923] AC 429. Such a right may even exist over certain non tidal rivers and lakes (see *Halsbury Vol 49(2)* para 742)
- 24 The right was recognised in the New Zealand High Court in *Fullers Cruises Northland Limited and Ors -v- Bay of Islands Enterprises Limited* (unreported - Barker J 13/1/92).
- 25 The right does not necessarily extend beyond the right to navigate. (See for example. the US position as expressed in *4 No 1 Douglaston Manor Inc v Bahrakis & Ors* New York Court of Appeals 11 February 1997 (noted in 453 LMLN 15/3/97).
- 26 The right to navigate must be exercised reasonably. (See *Original Hartlepool Collieries Co. -v- Gibb* [1877]5 ChD. 713).
- 27 The right must not be exercised such as to cause damage to a fishery (see *The Octavian Stella* (1887)57 LT 632; *The Swift* [1901]P 168; *The Bien* [1911]P 40.
- 28 The owner of the foreshore must do nothing which interferes with the right of navigation. (see *Lyon v Fishmongers' Company* (1876) 1 AC 663; *John Young & Co v The Banker Distillery Co* [1893] AC 693; *Orr Ewing v Colquhoun* (1877) 2 AC 839).
- 29 If damage is caused by negligence, the ship is liable (see *Colchester Corp -v- Brooke* (1845)7 QB 339. *The Swift* [1901] P168).

30 Claims for damage caused by wash are not, of course, confined to fast ferries. In *The Royal Eagle* (1950) L1.LLR 543, the court was considering a claim for damage allegedly done by the wash of a vessel in the River Thames.

31 The Royal Eagle was a passenger paddle steamship proceeding at the relevant time up Long Reach on the River Thames. Another vessel, the Braywood, was moored on the south bank of the river. It was alleged that the Royal Eagle passed at such a speed that the wash caused the Braywood to bump heavily on its mooring, causing damage to the hull.

32 Pilcher J sitting in the Admiralty Division (with an Elder Brother of Trinity House) expressed the position as:

“There is no question at all that any vessel navigating the River Thames should be navigated at such a speed and in such a manner as to not endanger the safety of other vessels, or their moorings. It is also clear I think that once it is established that damage has been caused to a moored vessel or to her moorings by a disturbance of the water created by another vessel... the onus then lies upon the vessel causing the disturbance in the water to satisfy the court that she was in fact navigating without negligence.”

33 Whether this view of the shifting of the onus holds good is arguable, but is beyond the scope of this paper. What is clear enough is that the liability is not founded upon any notion of strict liability, but must rely on the plaintiff having a cause of action in negligence.

34 In the case of *The Royal Sovereign* (1950) 845 L1.LLR 549, Lord Meriman (President) in the Admiralty, also sitting with an Elder Brother, stated:

“In the absence of any sort of notice to the contrary...any up-coming or down-going vessel is entitled to assume that craft liable to be subject to wash...are moored in a seaworthy manner”

35 At page 555 he went on:

"My own opinion is, although I have no doubt whatsoever that the surging and rolling of the Pilgrim was occasioned by the Royal Sovereign's wash, that there was nothing excessive about it."

36 His Lordship found that the Pilgrim's system of mooring was not a seaworthy way to moor a craft in an estuary where:

"..she will necessarily be subjected to wash.."

NUISANCE

37 Nuisance provides a remedy for invasions of a person's use and enjoyment of their land. Remedies for an actionable nuisance include damages and injunction.

38 The cause of action exists independently of any cause of action in negligence (see *Hunter v. Canary Wharf Ltd* and *Hunter v London Docklands Development Corporation* [1991] 2 All ER 426; [1992] 2WLR 684

39 The fact that an enterprise causing a nuisance is important to the general public benefit does not excuse or justify what would otherwise be a nuisance. (See *Munro -v- Southern Dairies Limited* [1955] BLR 332.

40 If the activity creating the nuisance is one which is authorised by statute, then a defence of statutory authority may be available. The classic statement of the defence is to be found in *Allen -v- Gulf Oil Refining Limited* [1981] AC 1001, per Lord Wilberforce at 1011:

"It is now well settled that when parliament by express direction or by necessary implication has authorised the construction and use of an undertaking or works, that carries with it an authority to do what is authorised with immunity from any action based on nuisance. The right of action is taken away. To this there is

made the qualification, or condition, that the statutory powers are exercised without "negligence" - that word here being used in a special sense so as to require the undertaking, as a condition of obtaining immunity from actions, to carry out the work and conduct the operations with all reasonable regard and care for the interests of other persons."

41 The principle has also been stated in this way:

"A nuisance may be justified by statute if that nuisance is the inevitable consequence of the performance of statutory duties or the exercise of statutory powers or authorities."

(See *Yorke Brothers (Trading) Pty Ltd -v- Commissioner for Main Roads* [1983] 1 NSW LR 391.

42 Some of these issues were considered in *Hammersmith and City Railway Co -v- Brand* LR 4HL171. The case concerned a nuisance caused by the operation of a railway. Lord Chelmsford said at 202:

"Section 86 gives power to the company to use and employ locomotive engines. and if such locomotives cannot possibly be used without occasioning vibration and consequent injury to neighbouring houses ... it must be taken that the power is given to cause that vibration without liability to an action. The right given to use the locomotive would otherwise be nugatory, as each time a train passed upon the line and shook the houses in the neighbourhood actions might be brought by their owners, which would soon put a stop to the use of the railway."

43 The defence of statutory authority was very recently unsuccessfully pleaded in two cases involving nuisances caused to riparian owners by various governmental works. See *Van Son -v- Forestry Commission of New South Wales* [1995] Australian Torts Report 81-333 and *Lawrence -v- Kempsey Shire Council* [1995] Australian Law Report 81-344. In both cases the plea failed because the government department and council were unable to show (the onus lying with them) that the works were carried out without negligence so

that the damage caused was not the inevitable consequence of exercising the statutory power. For that reason these cases are distinguishable.

CAUSATION

44 It perhaps ought go without saying that in all cases, the injured landowner must establish that there is a causal link between the activity complained of and the loss sought to be recovered.

45 One aspect of this that is significant is the question of ownership of the property said to have been damaged.

46 Most rivers, such as the Brisbane River, are "tidal navigable rivers" (as defined by the *Land Act 1994*). Section 9(1) *Land Act 1994* provides:

"All land below the high water mark, including beds and banks of a tidal navigable river -

(a) is the property of the State ..."

47 As such, the river structures below the high water mark are not the property of the complainants who have no claim over them.

48 The principle issue of causation is, of course, one of the factual question - was it the wash which caused the damage concerned, or one or more of a number of factors acting upon the environment in which the property is located ? Insofar as the wash is a contributing factor, to what extent did it contribute ?

49 The courts do not require that a negligent act be the sole effective cause of damage (see *Smith v Auckland Hospital Board* [1965] NZLR 191 per Gresson J).

50 A consideration of whether an act complained of can be said to have "caused" the injury

complained of is to be governed by a value judgment by the court using, it seems, common sense. (See *March v Stramere* (1991) Aust Torts Rep 81-095; *Bennett v Minister of Community Welfare* (1992) Aust Torts Rep 81-163; *Christopher v The "Fiji Gas"* (1992) Aust Torts Rep 81-168).