PENNO v. *GOVERNMENT OF MANITOBA: INTERFERENCE WITH UNDERGROUND WATER — LANDOWNER'S CAUSE OF ACTION IN NUISANCE OR NEGLIGENCE*

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"The law as to water, although it has developed in its own way, with special refinements, should not be separated absolutely from modern developments in the mainstream of common law . . . "[1]

In *Penno* v. *Government of Manitoba*,[2] the Manitoba Court of Appeal has channelled the law relating to underground water into the mainstream of the law of torts. The defendant, as part of a flood control system, constructed a drainage ditch through a section of the plaintiff's farm land which it had expropriated for this purpose. The drain caused the underlying water table to drop approximately three feet, which resulted in the production of poorer crops from the plaintiff's land, with a consequent depreciation in the value of the property. The majority of the Court held that a cause of action would lie in either nuisance or negligence for interference with the plaintiff's established use of the underground water in growing crops.

This is a significant departure from the traditional law relating to percolating water. A landowner has at common law no proprietary right in water below the surface of his land which does not flow in a known and defined channel. Such water becomes his property only if it is collected and reduced into his possession. In a line of cases commencing with *Acton* v. *Blundell* in 1843,[3] it was established that a landowner is entitled to abstract percolating water from his own land, even though this interferes with his neighbour's use of the water. His neighbour has no right to the continued flow of the water, and his

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1. *Penno* v. *Government of Manitoba* (1975) 64 D.L.R. (3d) 256 (Man. C.A.), at 278 per Matas J.A.

2. *Id.* affirming the decision of Solomon J. (1974), 49 D.L.R. (3d) 104 (Man. Q.B.). *Penno* was considered and impliedly approved by the Ontario Court of Appeal in *Pugliese* v. *National Capital Commission*: (1977) 79 D.L.R. (3d) 592, on a reference under s. 35 of the Judicature Act, R.S.O. 1970, c.228 by Galligan J., (1977) 15 O.R. (2d) 335. It was held that the extraction of underground water by the defendants, causing subsidence of the plaintiffs' land with considerable damage to the building thereon, could give rise to a cause of action in nuisance or negligence. This case may be under appeal to the Supreme Court of Canada.

3. *Acton* v. *Blundell* (1843), 12 M. & W. 324, 152 E.R. 1223; *Chasemore* v. *Richards* (1859), 7 H.L.C. 349, 11 E.R. 140; *Popplewell* v. *Hodkinson* (1869), L.R. 4 Exch. 248; *Mayor, Aldermen and Burgesses of the Borough of Bradford* v. *Pickles* [1895] A.C. 587 (H.L.).

injury is *damnum absque injuria*. This has been interpreted by the English courts as an absolute rule, which applies even though the appropriation was made unreasonably or maliciously,[4] and which leaves no room for a claim in nuisance or negligence.[5]

In marked contrast, the majority of the Court in *Penno* declined to adopt the traditional approach of examining the nature and extent of a landowner's rights over subsurface water, and held that the issue should be resolved by general considerations of the law of torts. Monnin J.A., with whom Guy J.A. concurred, stated that the plaintiff, having made proper use of the water for "many years", was entitled to claim damages if the defendant's interference with his use was negligent or constituted a nuisance. He held that, on the facts of the case, the defendant had created a nuisance. The construction of the drain had seriously disturbed the water table on the plaintiff's land, with adverse consequences on crop production.

Matas J.A., with whom Freedman C.J.M. concurred, dealt first with the defendant's contention that, since s. 7 (1) of the Water Rights Act, R.S.M. 1970, c. W80 had vested property in all underground water in the Crown, the plaintiff's common law right to use the water had been abolished and he could make no claim for interference with his use. This argument was rejected. Section 7 (1) expressly preserves any "inconsistent" individual rights, and accordingly, the plaintiff's right to tap percolating water was maintained. Furthermore, the statute itself conferred on the plaintiff a right to use the water for certain specified purposes.[6] Apparently, Matas J.A. did not intend to suggest that the plaintiff had a right to *maintenance* of the flow of the water, but was simply asserting that the plaintiff could properly continue to use the water under his land at such level as he might find it.

Matas J.A. also rejected the defendant's contention that the plaintiff could not succeed since he had no proprietary right in the water, holding that the plaintiff's "long established use" of the underground water was sufficient to entitle him to maintain an action in negligence or, alternatively, in nuisance. Examining the facts of the case, he found that negligence was established. In view of the extensive research and planning resources available to the defendant, the adverse effects on the plaintiff's land were or ought to have been foreseeable, and accordingly the defendant was under a duty of care. This duty

4. *Mayor of Bradford* v. *Pickles, Id.*
5. *Langbrook Properties, Ltd.* v. *Surrey County Council* [1969] 3 All E.R. 1424 (Ch.).
6. See sections 2(g), 8(2), 12(1).

had been breached when the defendant designed a drainage scheme without adequate concern for the overall effects of the system and without adequate testing or consideration of the available information. The defendant was therefore liable for the direct and forseeable damage which had resulted to the plaintiff's land.

The action in nuisance would also succeed. The defendant had created a nuisance by interfering with the natural flow of surface water and the natural pressure of underground water so as to cause damage to the plaintiff's land.

Hall J.A., dissenting, considered that since the approach of the majority was a marked departure from the common law on the subject; it was, if necessary, more properly a matter for legislative intervention. He applied the strict rule of *Acton* v. *Blundell*[7] and held that the plaintiff had no cause of action.

The approach of the majority is to be welcomed as a progressive step in the direction suggested by Matas, J.A. in the opening quotation. The strict English rule of *damnum absque injuria* has been outmoded by advances in the field of hydrology. Although it may originally have been considered unjust to impose liability for interference with underground water since generally the user would have been unable to predict whether his action would cause damage to his neighbour, this early rationale is no longer supportable. Modern technology largely enables prediction of the consequences which will result from extraction of underground water, and in such circumstances it is acceptable to impose liability.

However, while welcoming the result in *Penno*, it is to be regretted that the Court did not deal more fully with the traditional cases concerning landowner's rights or explain why, as a matter of policy, it decided not to follow them. Monnin J.A. did not even refer to the leading cases of *Acton* v. *Blundell*[8] and *Chasemore* v. *Richards*[9]. He made no mention of *Langbrook Properties, Ltd.* v. *Surrey C.C.*,[10] a recent English decision on precisely the same issue, where Plowman J. held that no action could lie in tort for interference with underground water. *Mayor of Bradford* v. *Pickles*,[11] a not inconsiderable obstacle to the imposition of tort liability, was cursorily dismissed as having "no bearing on the instant case." Matas J.A. dealt with *Acton* v. *Blundell* and *Mayor of Bradford* v. *Pickles* by suggesting, without explaining why, that their authority had been weakened

7. *Supra* note 3.
8. *Id.*
9. *Supra* note 3.
10. *Supra* note 5.
11. *Supra* note 3.

by the introduction of the Water Rights Act. He noted the decision in *Langbrook*, but declined to follow it, saying[12] that "the case is to be decided on principles of negligence and should not be confined to an examination of the common law decisions dealing with refinements and distinctions of landowners' rights over surface or percolating water." Thereafter he considered only general principles of tort liability and did not address the logical problems which arise from the traditional law concerning landowners' rights. Some fundamental issues inevitably arise which cannot be sidestepped or ignored. If a landowner is entitled to abstract underground water to whatever extent he pleases, how can it be said that he has committed the *unlawful* interference with his neighbour's use or enjoyment of land required to establish nuisance? If his neighbour has no right to the *maintenance* of the water at any particular level or quantity, and has only the right to use the water as he finds it, how can he complain of interference with the flow? Unfortunately the majority judgments do not specifically address these perplexing questions.

The imposition of liability in nuisance or negligence necessarily involves a modification of landowners' traditional rights over underground water: the appropriating landowner's rights are reduced, and his neighbour's rights are increased. In effect, a new concept of landowners' rights has been introduced and it is unfortunate that the Court did not elaborate on these important aspects of the case.

12. *Supra* note 1, at 273.