CASE NOTES

KAKOURIS v. GIBBS BURGE & CO. PTY LTD[1]

Negligence—Breach of statutory duty by employer—Defence of contributory negligence—What amounts to.

Since *Piro v. Foster*[2] it has been clear law that contributory negligence is available as a defence to an action for damages based on breach of statutory duty. In the industrial area, however, there has been some degree of uncertainty as to what conduct is required in law to constitute contributory negligence. After the decision in *Kakouris v. Gibbs Burge & Co. Pty Ltd*[3] there can be no room for this uncertainty.

In *Kakouris's* case[4] the plaintiff sued his employer to recover damages for personal injuries alleged to have been sustained when his hand and arm were caught in the roller of the pressing machine he was assisting to operate. In the Supreme Court before Little J., the jury returned a verdict in his favour by finding the defendant company in breach of its statutory duty under section 174 of the Labour and Industry Act 1958 (which requires dangerous parts of machinery to be fenced) but assessed the plaintiff's contributory negligence at 60 *per cent.* Damages were reduced accordingly.

The plaintiff appealed to the Full Court on the ground that the trial judge had misdirected the jury on the issue of contributory negligence in relation to a claim based upon breach of statutory duty.

The appellant argued that the jury should have been directed that if they found that the plaintiff, when he was injured, was guilty of only 'mere carelessness, inadvertence or lack of judgment', he was not, in law, contributorily negligent, and damages should not be reduced.[5] Support for this rule was to be found in the decision of Lowe J. in *Mannu v. Ford Motor Co.*[6] and in what that decision was based upon, namely, some observations made by Latham C.J. and Dixon J. in *Davies v. Adelaide Chemical & Fertilizer Co. Ltd.*[7] Paraphrasing the remarks of Latham C.J. and Dixon J., the appellant contended that the defendant's statutory duty to fence the dangerous parts of the pressing machine was intended to protect workers from the consequences of thoughtlessness although not from the consequences of wilful disobedience.[8] It was reasoned that if this were not the case and thoughtlessness, inadvertence and such matters could constitute contributory negligence, the effect would be to convert into a defence the very thing that section 174 was designed to guard against.[9]

This argument was rejected; *Mannu v. Ford Motor Co.*[10] was overruled and the appeal was dismissed.

[1] [1970] V.R. 502. Supreme Court of Victoria, Full Court: Winneke C.J., Pape and Adam JJ. The judgment of the court was read by Pape J.
[2] (1943) 68 C.L.R. 313.
[3] [1970] V.R. 502.
[4] *Ibid.*
[5] *Ibid.* 504-5.
[6] [1962] V.R. 464.
[7] (1946) 74 C.L.R. 541, 545 (Latham C.J.), 552 (Dixon J.).
[8] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502.
[9] *Ibid.* 504, 506.
[10] [1962] V.R. 464.

The Full Court was unanimous in holding that there was no such rule of law as was arrived at by Lowe J. in *Mannu's* case[11] whereby, 'mere carelessness, inadvertence or lack of judgment' could never constitute contributory negligence in an action by an employee against his employer for damages for breach of the statutory duty under section 174.[12] Whether an injured worker's thoughtlessness or inadvertence does constitute contributory negligence in any particular case depends upon a finding that the evidence of that case justifies the conclusion that the 'plaintiff [has] failed to take such reasonable care for his own safety as could be expected from an ordinary workman in all the circumstances'.[13] In accordance with Lord Wright's classic statement in *Caswell v. Powell Duffryn Associated Collieries Ltd*[14] that it is

> all-important . . . to adapt the standard of what is negligence to the facts, and to give due regard to the actual conditions under which men work in a factory or mine, to the long hours and the fatigue, to the slackening of attention which naturally comes from constant repetition of the same operation, to the noise and confusion in which the man works, to his pre-occupation in what he is actually doing at the cost perhaps of some inattention to his own safety,

the Full Court further held that, in determining whether a worker has been guilty of contributory negligence, a relevant circumstance to take into account may be the possibility of excusable thoughtlessness or inadvertence.[15]

As was explained by the Full Court,[16] the remarks of Latham C.J. and Dixon J. in *Davies v. Adelaide Chemical & Fertilizer Co. Ltd*[17] certainly did not necessitate the rule arrived at by Lowe J. in *Mannu v. Ford Motor Co.*[18] Not only were these remarks made at a time when contributory negligence was a complete defence and not merely a ground for reduction of damages,[19] they were also made only after Latham C.J. and Dixon J. (and McTiernan J. as well) had treated the question of contributory negligence as one of fact to be tested by reference to whether the plaintiff's conduct, having regard to all the circumstances of that case, showed that he had been guilty of a want of reasonable care for his own safety.[20] Similarly with *Piro v. Foster*[21] where Latham C.J. said that '[t]he question . . . whether an inference of contributory negligence should be drawn from facts which are not in doubt . . . is one of fact, depending upon the circumstances of each case.'[22]

Starke J. said that '[i]t was . . . for the defendants to establish that the plaintiff's failure to exercise that degree of care and caution which an ordinary

[11] *Ibid.*
[12] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502.
[13] *Ibid.* 506.
[14] [1940] A.C. 152, 178-9.
[15] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502, 508-9. Note also the remarks of Karminski L.J. in *Mullard v. Ben Line Steamers Ltd* [1971] 2 All E.R. 424, 431 when speaking of the Factories Act in England: 'It is right to avoid too strict a standard of care on the part of a workman, which would in effect defeat the protective object of the statutory regulations'. See also *Staveley Iron & Chemical Co. Ltd v. Jones* [1956] A.C. 627, 648 *per* Lord Tucker.
[16] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502, 506-7.
[17] (1946) 74 C.L.R. 541, 545 (Latham C.J.), 552 (Dixon J.).
[18] [1962] V.R. 464.
[19] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502, 506.
[20] *Ibid.* 507.
[21] (1943) 68 C.L.R. 313.
[22] *Ibid.* 322. Strangely, these remarks of Latham C.J. were not quoted by the Full Court.

prudent workman would have shown in the circumstances was the substantial or material co-operating cause of the accident'.[23]

Moreover, to do as Lowe J. did in *Mannu's* case[24] and hold that inadvertence and thoughtlessness cannot constitute contributory negligence in relation to a claim based on breach of the statutory duty under section 174 (thinking that this is what Latham C.J. and Dixon J. intended by their remarks in *Davies'* case[25]) would have the effect of restoring the doctrine of *Bourke v. Butterfield and Lewis*[26] that contributory negligence is no defence to breach of statutory duty for, if the proposed rule applied, it would be difficult to visualize any case where, short of wilful and serious misconduct, a finding of contributory negligence could properly be made.[27] Since in every case other than where there was wilful misconduct on the part of the worker the provision of a guard pursuant to the statute could be said to be necessary to protect the plaintiff from 'the very danger that the statute was designed to protect him against',[28] the practical availability of the defence of contributory negligence would be virtually abolished.[29] But wilful and serious misconduct was expressly negatived in *Caswell's* case[30] as the only basis on which a finding of contributory negligence could be made.[31] Further, it would be absurd to attribute to Dixon J. and, in particular, Latham C.J. in *Davies'* case,[32] the intention of restoring the authority of *Bourke's* case[33] because *Bourke's* case[34] was overruled by the High Court (led by Latham C.J.) in *Piro v. Foster*[35] in which, of course, it was held that contributory negligence was available as a defence to breach of statutory duty.

> It would, we think, be impossible having regard to its decision in *Piro v. Foster*[36] . . . to attribute to the High Court [in *Davies v. Adelaide Chemical & Fertilizer Co. Ltd*[37]] an intention to restore the authority of *Bourke's Case*[38] by the adoption of a doctrine which made it virtually impossible for a finding of contributory negligence ever to be made in an action based on breach of statutory duty.[39]

In overruling *Mannu's* case,[40] the Full Court did not deny that the legislature, by enacting section 174, intended to protect both the careful and the careless worker from injury. What was denied, however, was that this legislative intention meant that a worker, whose injuries were partly caused by his own thoughtlessness or carelessness, could never be found guilty of contributory negligence.[41] Quite clearly, this denial was well-founded for, if an intention to protect workers fully from the consequences of thoughtlessness, inadvertence and such matters were to be attributed to the legislature with regard to

[23] *Ibid.* 328.
[24] [1962] V.R. 464.
[25] (1946) 74 C.L.R. 541, 545 (Latham C.J.), 552 (Dixon J.).
[26] (1926) 38 C.L.R. 354.
[27] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502, 506.
[28] *Mannu v. Ford Motor Co.* [1962] V.R. 464, 465.
[29] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502, 506.
[30] [1940] A.C. 152.
[31] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502, 506.
[32] (1946) 74 C.L.R. 541, 545 (Latham C.J.), 552 (Dixon J.).
[33] (1926) 38 C.L.R. 354.
[34] *Ibid.*
[35] (1943) 68 C.L.R. 313.
[36] *Ibid.*
[37] (1946) 74 C.L.R. 541.
[38] (1926) 38 C.L.R. 354.
[39] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502, 506-7.
[40] [1962] V.R. 464.
[41] *Kakouris v. Gibbs Burge & Co. Pty Ltd* [1970] V.R. 502, 506, 510.

section 174 of the Labour and Industry Act 1958, then a like intention should have been attributed by the High Court to the legislatures which enacted the provisions (similar to section 174) dealt with in *Piro v. Foster*[42] and *Davies v. Adelaide Chemical & Fertilizer Co. Ltd.*[43] Since the High Court in neither case attributed such an intention, the Full Court in *Kakouris's* case[44] was merely expressing what was implicitly, if not explicitly, recognized and sanctioned by high authority.

The Full Court in *Kakouris's* case[45] rightly denied that the remarks made by Latham C.J. and Dixon J. in *Davies'* case[46] necessitated Lowe J.'s ruling in *Mannu v. Ford Motor Co.*[47] But even if the contrary were true, neither the remarks, nor the ruling in *Mannu's* case[48] could, it seems, be regarded as authoritative following the recent decision of the High Court in *Sungravure Pty Ltd v. Meani.*[49] Following that decision, at least in relation to common law negligence, it is clear, in law, that 'a clear line of distinction' cannot be drawn between inadvertence and negligence for the simple reason that an inadvertent or thoughtless act may also amount to a negligent act depending upon the circumstances of the case.[50] Windeyer J. (with whose discussion of the authorities Kitto, Menzies and Owen JJ. agreed) when discussing *Caswell's* case[51] said[52] that the case gave 'no support' to the 'remarkable proposition' that it established or recognized a rigid distinction in law between a heedless or inadvertent act and negligence when the matter sued upon was an occurrence in a factory. Whilst Windeyer J. carefully noted that the case before the High Court concerned common law negligence and not breach of statutory duty,[53] his observations nevertheless seem particularly appropriate to the later decision in *Kakouris v. Gibbs Burge & Co. Pty Ltd.*[54]

> When a worker in a factory is alleged to have been wanting in care for his own safety, the jury may, of course, as part of the totality of circumstance, have regard to such things as inattention bred of familiarity and repetition, the urgency of the task, the man's preoccupation with the matter in hand, and other prevailing conditions. They may consider whether any of these things caused some temporary inadvertence to danger, some lapse of attention, some taking of a risk . . . excusable in the circumstances because not incompatible with the conduct of a prudent and reasonable man. But . . . [n]egligence, is, in every case, a question of fact. In no case can the answer to that question be found in words, however eloquent, uttered by judges, however eminent, about the facts of some other case.[55]

Although *Sungravure Pty Ltd v. Meani*[56] was strictly a case concerned with contributory negligence in relation to a claim based on common law negligence

[42] (1943) 68 C.L.R. 313.
[43] (1946) 74 C.L.R. 541.
[44] [1970] V.R. 502.
[45] *Ibid.*
[46] (1946) 74 C.L.R. 541, 545 (Latham C.J.), 552 (Dixon J.).
[47] [1962] V.R. 464.
[48] *Ibid.*
[49] (1964) 110 C.L.R. 24.
[50] *Ibid.* 33 *per* Kitto, Menzies and Owen JJ.
[51] [1940] A.C. 152.
[52] *Sungravure Pty Ltd v. Meani* (1964) 110 C.L.R. 24, 36.
[53] *Ibid.* 34-6.
[54] [1970] V.R. 502.
[55] *Sungravure Pty Ltd v. Meani* (1964) 110 C.L.R. 24, 37. See also *Mullard v. Ben Line Steamers Ltd* [1971] 2 All E.R. 424, 431 *per* Karminski L.J.
[56] (1964) 110 C.L.R. 24.

and not on breach of statutory duty, *Kakouris's* case[57] removes any doubt that these remarks are equally applicable, outside New South Wales,[58] to a claim based on breach of statutory duty. One is left to ponder the question, why should a worker in Victoria be treated differently from his counterpart in New South Wales?

DAMIEN J. CREMEAN

STRICKLAND v. ROCLA CONCRETE PIPES LTD[1]

Constitutional law—Corporations power of the Commonwealth—Trade Practices Act 1965-69—Constitution, section 51 (20)—Severance.

The Trades Practices Act 1965-69 (Cth) became fully operative on 1 September 1967. The Act enumerated a set of business practices and agreements prescribing them as 'examinable'.[2] Examinable agreements were made registerable[3] and details of them had to be furnished to the Commissioner of Trade Practices.[4] Any failure to do this was declared an offence, the penalty for which was a fine not exceeding $2000.[5]

The draftsman had before him the difficult task of framing an Act which would be *intra vires* the Parliament of the Commonwealth. To achieve its purpose the Act had to apply to both inter- and intra-state agreements and so the inter-state trade and commerce power[6] was not an adequate justifying head of power: agreements relating to goods produced and consumed in the one state and which thereby never became the subject of inter-state trade would not come within its terms. The power on which he most relied was section 51 (20) of the Constitution which provides that the Parliament shall have power to make laws with respect to—

> Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth.

The form of words adopted was less straightforward than might have been expected. When the Australian Industries Preservation Act 1906-07 (Cth) (the forerunner of the Trade Practices Act) was framed shortly after federation, it was phrased in such a way as to include the words 'foreign corporation, or trading or financial corporation formed within the Commonwealth'.[7]

Section 35 of the Trade Practices Act was far more widely drawn. It provided that—

> 35(1) . . . an agreement is an examinable agreement for the purposes of this Act if . . . it is an agreement the parties to which are or include two or more *persons* carrying on businesses that are competitive with each other . . . (italics added).

[57] [1970] V.R. 502.

[58] Contributory negligence is no defence to breach of statutory duty in New South Wales. See Statutory Duties (Contributory Negligence) Act 1945 (N.S.W.). See also Law Reform (Miscellaneous Provisions) Act 1965 (N.S.W.), s. 7.

[1] (1971) 45 A.L.J.R. 485. High Court of Australia; Barwick C.J., McTiernan, Menzies, Windeyer, Owen, Walsh and Gibbs JJ.

[2] Ss 35 and 36.

[3] S. 41(1).

[4] S. 42.

[5] S. 43.

[6] Constitution, s. 51(1).

[7] Australian Industries Preservation Act 1906-07 (Cth), ss 5(1) and 8(1).