## TORT—CONTRIBUTORY NEGLIGENCE—BREACH OF BY-LAW

*Henwood v. Municipal Tramways Trust.*[1]

A striking illustration of the socioligical approach in the judicial process is afforded by the judgments of the High Court in *Henwood v. Municipal Tramways Trust.*[1]

The Court was urged by counsel to recognise as a principle of English law that the illegality of a plaintiff's conduct is a disqualification from recovery for tort. The facts were that a passenger on one of the defendant's tramway lines, being suddenly taken ill, leaned out over the guard rail on the off side of the tram, thereby committing a breach of the by-law against leaning out; his head struck against a standard carrying overhead wires, and he died as a result of the injuries received. His parents brought an action against the Tramways Trust under the South Australian equivalent of Lord Campbell's Act, but it was dismissed by the Supreme Court of that State on the ground that "it was a general principle in the law of tort that if the damage suffered by the plaintiff has been directly brought by an act of his which is unlawful he can never complain of a wrongful or negligent act or omission on the part of the defendant from which the damage otherwise flows as a reasonable or probable consequence." On this question the case was carried on appeal to the High Court.

Astonishing as it may seem, the Court discovered very little English authority on the point. What little there was, consisting of *obiter dicta* in the advice of the Judicial Committee in *R. v. Broad,*[2] the judgment of Sir John Salmond in the New Zealand case of *R. v. Canning,*[3] and uncertain opinions in text-books based on these dicta and American cases, rather supported the existence of such a principle. Still there was no precedent binding on the Court, and the consequences that would flow from the adoption of such a general rule were so distasteful to the judges that they unanimously rejected it. Such a rule would function badly, would be out of harmony with modern conditions. As Dixon and McTiernan JJ. pointed out, "In a mechanical age there are many provisions made by or under the authority of a statute regulating in their own interests the conduct of persons pursuing occupations or activities attended with danger. Probably the last thing intended by the framers of such legislation or subordinate legislation is that a failure on the part of such a person to observe a specified precaution, although penalised, shall result in absolving from civil liability to him another person whose negligence is a cause of disaster." Viewed from this angle of the presumed purpose of the law, the arguments of defendant's counsel crumbled away. Crime and tort are distinct branches of the legal system; an act falling within the province of one has no necessary connection with an act provided for in the other. Why should the wrongdoer of necessity suffer a double penalty; is there not rather a presumption that the law in prescribing the one form of sanction intends to exclude the other. This presumption is, of course, excluded where it is apparent that the law, in addition to

1. 60 C.L.R. 438.
2. (1915) A.C. 1110 at 1120.
3. (1924) N.Z. L.R. 118.

making the one act illegal and visiting the actor with a criminal sanction intends to expose him to the additional sanction of disqualification from all civil remedies otherwise available to him for injuries received while engaged in the illegal act. The purpose of the law and the intention of the law-maker must be our guide; in no event, concluded the Court, can we accept as a categorical rule the principle formulated by the trial judge and pressed by defendant's counsel. Its only support is that afforded by the maxim "*ex turpi causa non oritur actio*," a maxim which has never been and should never be, extended beyond its original sphere, the law of contract.

In fairness to the defence, it should be noted that it did not rest exclusively, nor even mainly on the general principle that an illegal act is a bar to a civil remedy otherwise available. It fell back into a more tenable position—one buttressed by the presumed intention of the legislature—that the breach of a law which prescribes the standard of care owed to oneself should be regarded, on the analogy of statutory negligence, as conclusive evidence of contributory negligence, when one sues for damages sustained through the negligence of another person. If the breach of a statutory duty *pro tanto* vests a right of action in the victim of the breach, then why should not the breach of a statutory duty of care to oneself debar one from any right for injury resulting from such breach? However, this reasoning appeared fallacious to the learned Judges. A private right of action arises in the case of statutory negligence because the statute so intended (or, at least, the Court, having regard to the nature, object and purposes of the statute, deems it so to intend). Here the duty of care is owed to a class of persons other than that bound by it; it cannot vest rights in other persons, nor protect them from a breach of duty, unless that is the clear intention of the statute. "No penal provision should receive an operation which deprives a person offending against it of a private right of action which, in the absence of such a statutory provision, would accrue to him." In the instant case it was easy to decide that the by-law did not so intend, for it had been laid down by the High Court in an earlier decision that it was ultra vires for a subordinate authority (acting under similar powers to those conferred on the Tramways Trust) to limit its civil liability for its negligent or wrongful acts. Therefore, for the present by-law to be a valid one, it could not be given this extended meaning.

One concession, however, the Court was prepared to make to the defendant, and that was that the breach of the by-law was an important factor to be taken into consideration when determining the existence, or otherwise, of contributory negligence. The question must be asked, has the plaintiff, when due account is taken of the relevant circumstances, including the existence of a by-law designed to secure his safety and the prominent display of notices of warning in the tram-car, and, not least, the compelling urge of sickness, failed to show that care for his own safety which an ordinary prudent man would display in a like situation.

## "ACCEPTANCE" UNDER SEC. 9 OF THE GOODS ACT, 1928.

*In re a Debtor*[1]

This case is of importance in that it settles a difficulty as to the nature of an acceptance which obviates the necessity of a note or memorandum in writing for a contract for the sale of goods. Sec. 9 (I) of the Victorian Act (sec. 4 (I) of the English Sale of Goods Act), provides that a note or memorandum in writing of the contract is necessary to render it enforceable, unless "the buyer shall accept part of the goods and actually receive the same." Sec. 9 (3) (England Sec. 4 (3)) provides that "there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not." The difficulty arises over sec. 40 of the Victorian Act (sec. 35, England) which states that a buyer shall be deemed to have accepted the goods when he intimates that he has accepted them, or when the goods have been delivered to him, he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time he retains the goods without notifying the seller of his rejection of them. There has been a strong current of opinion that acceptance under sec. 40 (sec. 35, Eng.) is not an acceptance under sec. 9 (sec. 4), and that its importance lies simply in the fact that it prevents a buyer from subsequently rejecting goods which are not in accordance with the requirements of the contract, and leaves the buyer in the position of having to keep and pay for the goods, subject to his claim for damages arising out of the defective nature of the goods. This English decision establishes that this is not the case. In this case, goods to the value of £65 were sold by verbal contract of sale to a debtor. The goods were delivered to an employee of the debtor and remained on his premises for upwards of three weeks. The debtor did not himself act in relation to the goods. The Court (Farwell and Morton JJ.) held that this was an acceptance within sec. 35 of the English Act (sec. 40, Vic.) and that this constituted an acceptance within sec. 4 (sec. 9) rendering compliance with sec. 4 (3) (sec. 9 (3)) unnecessary. The purpose of sec. 4 (3) is to make contracts which comply with it unenforceable even though there has been no acceptance within sec. 35. The two forms of acceptance were not contradictory since certain acceptances outside sec. 35 might fall within sec. 4 (3). This point might well be illustrated by the case of *Abbot & Co. v. Wolsey.*[2] The two forms of acceptance might be regarded rather as complementary.

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1. (1939) 1 Ch. 225.
2. (1895) 2 Q.B. 97.

## NATURAL LAW AND HUMAN LIBERTY.

Much has been said and written in recent years about the infringement of democratic rights and liberties. It is safe to say in the present trend of politics that such rights as we have will be increasingly restricted