TORT — BREACH OF STATUTORY DUTY — RIGHT OF CIVIL ACTION — CAUSATION — PLAINTIFF ALSO IN BREACH

Thorne v. Council of the Municipality of Bankstown[1]

T., while employed by the defendants, died from injuries resulting from his being crushed by a power crane operated by him. An action was brought by his mother under the Compensation to Relatives Act 1897-1951, alleging (a) that the deceased did not hold the certificate of competency prescribed by the Scaffolding and Lifts Act 1912-48; (b) that this situation constituted a breach of the defendant council of s. 27 (3) of that Act; (c) that such breach conferred on a person injured as a result a right of action at law for damages; (d) and that such right of action was not denied in the instant case by insufficient causal connection between the breach and the injury. It was held by the court[2] that the plaintiff could recover.

It is submitted that there is little importance in the decisions of the court on the first two allegations, since both were concerned with the interpretation of N.S.W. domestic legislation. It will be to more purpose to examine the discussion of the court on the problems of, firstly, in what circumstances breach of a statutory duty will give rise to a civil action by some person, injured by such breach, against the party at fault; and, secondly, the causal connection between the breach and the injury necessary to support the claim.

It will be necessary to exclude any consideration of the problem of causation in discussing the question of actionability, since it is only if the legislature has intended an action to lie that the courts are even faced with the factual problem of causal connection.

It is submitted, in the light of the conflicting judicial opinions that have been given, that the question of the shifting of the burdens of proof should be avoided[3], and all the following considerations used merely as a guide:

1. If the statute is passed for the benefit of a definable person or group of persons then an action will probably lie, but if the statute be passed for the benefit of the public generally an action probably will not lie.[4]

[1] (1954) 54 S.R. (N.S.W.) 310. Supreme Court of New South Wales; Herron, Bereton and Maguire JJ.

[2] Herron and Bereton JJ., Maguire J. dissenting.

[3] Offered for example are the opinions of Vaughan Williams L.J. in *Groves v. Wimborne* [1898] 2 Q.B. 402 and Maugham L.J. in *Monk v. Warbey* [1935] 1 K.B. 75. Both learned judges considered that *prima facie* an action would lie if the statute was passed for the benefit of a particular class of persons, but whereas Vaughan Williams L.J. considered that a statutory penalty was really a matter to be taken into account, Maugham L.J. considered that the general rule was overthrown and *prima facie* no action would lie.

[4] *London Armoury Co. v. Ever Ready Co.* [1941] 1 K.B. 752, 754. But cf. *Monk v. Warbey* [1935] 1 K.B. 75, where the 'group' of persons was, to say the least, extraordinarily large.

2. The fact that the breach of the duty gives rise to liability to a statutory penalty inclines slightly against actionability.

(a) The fact that the penalty is fairly large inclines heavily against actionability.[5]

(b) The fact that the penalty is payable to the person injured inclines heavily against actionability.

(c) The fact that the penalty is small goes toward correcting any inclination against actionability,[6] and the smaller the penalty the greater is the degree of correction.

(d) The fact that the penalty is payable to the Crown goes towards correcting any inclination against actionability.[7]

3. The larger the definable group of intended beneficiaries would seem to be, the less is the inclination towards actionability.

4. The fact that the injury done, though undoubtedly within the contemplation of the legislature, is out of all proportion to the magnitude of the breach inclines against actionability.[8]

5. It is submitted that the fact that the person injured is in breach of a statutory duty himself, should incline against actionability.[9]

If we consider these points as merely a guide and not a set of concise rules it is submitted that these conflicting decisions which would appear to draw extraordinarily fine distinctions can be justified on the ground that considerations of justice and policy are entitled to be taken into account. This would obviate the necessity for the frantic distinguishing that appears in this class of case, where an unfriendly authority would appear to compel the court to an unfair result.

Now let us consider the second problem – that of causation. It is submitted that this problem is all too often confused with the prior problem of actionability. The case of *Gorris v. Scott*[10] was decided on the ground that action did not lie because the damage caused was not of a kind contemplated by the Act. It is submitted that this consideration is irrelevant; that the inquiry resultant from the breach of a statutory duty cannot be taken into account in considering whether the action should lie; that the problem of actionability should be decided from the words of the statute alone; that when, and if, it is decided that an action does lie, then the problem of whether the action *will* lie will include the question whether the accident with its consequent injury was causally dissociated with the

[5] *Atkinson v. Newcastle & Gateshead Waterworks Co.* (1877) 2 Ex.D. 441. But cf. *Scammell v. Hurley* [1929] 1 K.B. 419.

[6] Per Vaughan Williams L.J. in *Groves v. Wimborne, loc. cit.*

[7] *Monk v. Warbey, loc. cit.*

[8] *Atkinson v. Newcastle & Gateshead Waterworks Co., loc. cit.*, but cf. *Read v. Croydon Corporation* [1938] 4 All E.R. 631.

[9] Per Maguire J. in his dissent in the instant case.

[10] (1874) L.R. 9 Ex. 125.

breach of the statutory duty. It is not a problem of whether the action does lie, but whether it will succeed on the facts.

Just as in an action for negligence, the plaintiff must satisfy the court that his injuries were caused by the breach of duty 'and in this case the ordinary principles of law apply and the plaintiff will succeed on this issue if he establishes a balance of probability in his favour'.[11]

To return to the instant case, it is enough to say that the two majority judges held that the statute *did* allow an action to lie and that the breach of the statutory duty was constituted by an omission of a safeguard,[12] that the statute contemplated a certain type of accident, that this was such an accident, and since it was caused by a breach of statutory duty, therefore causation was established.

With regard to the point made by the dissentient judge that the deceased was in breach of the statute himself and so could not recover,[13] it is submitted that this point could be of importance as constituting another guide for the courts to follow in deciding actionability. The point has probably never arisen before, most other cases being concerned with duties purely in the competence of the defendant party, and it is a pity that it was not considered more fully by the majority of the court.

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[11] Lord Macmillan in *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152, 168.

[12] i.e. the certificate. The court held that the certificate itself was more than a licence, that is, that the certificate *determined* competency and not that possession or lack of it was purely a formality.

[13] (1954), 54 S.R. (N.S.W.) 316, 329.