Asif Tufal

BREACH OF STATUTORY DUTIES

THE IMPORTANCE OF DISCOVERING PARLIAMENT'S INTENTION

***X (minors) v Bedfordshire CC* [1995] 3 All ER 353**

See cases on Negligence - public policy.

IS THE BREACH ACTIONABLE?

***Lonrho Ltd v Shell Petroleum* [1981] 2 All ER 456**

See Law Report

INITIAL PRESUMPTIONS

***Wentworth v Wiltshire County Council* [1993] 2 All ER 256**

The plaintiff was a dairy farmer whose farm was served by a road which the Milk Marketing Board's tanker used to make bulk collections of milk from the farm. The road fell into disrepair and became dangerous to traffic and from 10 January 1980 the board refused to allow its tankers to use the road to collect milk from the plaintiff's farm. In consequence the plaintiff had to give up his dairy herd and resort to less profitable farming activities and had to increase his bank overdraft because of the loss of profits from the farm. In November 1980 the plaintiff availed himself of the procedure under s59 of the Highways Act 1959 to establish in the Crown Court that the highway authority was under a duty to repair the road, under s44, and obtained an order requiring it to repair the road, whereupon the authority did in fact repair the road. In November 1991 the plaintiff brought an action against the highway authority claiming that since s1(1) of the Highways (Miscellaneous Provisions) Act 1961 had removed the exemption of highway authorities for liability for non-repair of roads he could claim damages for breach of the authority's statutory duty to repair the road. The judge awarded the plaintiff damages for loss of profit. The highway authority appealed, contending, inter alia, that it was not liable to the plaintiff because no action lay for purely economic loss under s1(1) of the 1961 Act.

It was held by the Court of Appeal, inter alia, that on its true construction s1(1) of the 1961 Act afforded only a limited cause of action for breach of a highway authority's duty of repair in favour of a limited class of persons, namely users of the highway who could prove that they had suffered physical injury to persons or property while using the highway when it was in a dangerous condition due to want of repair or maintenance. A person such as the plaintiff who did not claim on account of his own user of the highway for passage but relied instead on its user by others for the purposes of his business, eg to deliver or collect goods from the business, was not within the class of persons who could bring an action under s1(1) of the 1961 Act and the only remedy in such a case lay under the procedure under s59 of the 1959 Act. The appeal would therefore be allowed.

***Issa and another v Hackney LBC* [1997] 1 All ER 999**

The plaintiffs lived with their parents in accommodation owned by the defendant local authority. In 1988 an environmental health consultant

concluded that the condition of the premises, which were severely affected with condensation and associated mould growth, was prejudicial to health and therefore constituted a statutory nuisance under Pt III of the Public Health Act 1936. Thereafter the defendants pleaded guilty to an offence under the 1936 Act and were fined £500. The plaintiffs subsequently commenced civil proceedings against the defendants for damages for ill-health resulting from the condition of the premises.

It was held by the Court of Appeal that Part III of the 1936 Act was a self-contained code dealing with the abatement of statutory nuisances under which the power to impose a fine was only one of several methods of enforcement for which provision was made by the Act. It followed that, since criminal sanctions were not the only method of enforcement provided, there was no ground for construing that part of the Act so as to incorporate the creation of a civil cause of action. Accordingly the assistant recorder's awards of damages would be discharged and the plaintiff's actions dismissed.

O'Rourke v Camden LBC **[1997] 3 All ER 23**

The plaintiff applied to the defendant local authority for accommodation under s63 of the Housing Act 1985 when he had nowhere to go after leaving prison. Section 63 required a local authority to provide accommodation for those who were homeless and had a priority need. After an initial refusal, the local authority provided temporary accommodation but after 12 days the local authority evicted him and did not offer him any other accommodation. The plaintiff brought an action against the local authority claiming damages for, inter alia, wrongful eviction without providing alternative accommodation in breach of the local authority's duty under s63. The county court judge struck out the claim as disclosing no cause of action on the grounds that the claim lay only in public law and that the plaintiff's remedy was by way of judicial review.

It was held by the House of Lords that whether the duty contained in s63 of the 1985 Act to provide accommodation for homeless persons gave rise to a cause of action sounding in damages depended on whether the Act showed a legislative intention to create such a remedy. The fact that the duty to provide accommodation was enforceable in public law by individual homeless persons, that the Act was a scheme of social welfare, intended on grounds of public policy and public interest to confer benefits at the public expense not only for the private benefit of people who found themselves homeless but also for the benefit of society in general, and that the existence of the duty to provide accommodation was largely dependent on the housing authority's judgment and discretion, as was the type of accommodation to be provided, all indicated that it was unlikely that parliament had intended s63 to create private law rights of action. It followed that the breach of statutory duty which was the subject of the plaintiff's complaint did not give rise to a cause of action in private law.

Cutler v Wandsworth Stadium Ltd **[1949] All ER 544**

By the Betting and Lotteries Act 1934, s11(2), so long as a totalisator is being lawfully operated on a licensed dog-racing track, the occupier "(a) shall not … exclude any person from the track by reason only that he proposes to carry on bookmaking on the track; and (b) shall take such steps as are necessary to secure that … there is available for bookmakers space on the track where they can conveniently carry on bookmaking in connection with dog races run on the track on that day; and every person who contravenes, or fails to comply with, any of the provisions of this sub-section shall be guilty of an

offence." Section 30(1) imposes substantial penalties, on summary conviction and on conviction on indictment, for a breach of (inter alia) s11. A bookmaker brought an action against the occupier of a licensed dog-racing track for a breach of his obligation under s11(2).

It was held by the House of Lords, that on a true construction of the Act of 1934, the obligation imposed by s11(2) on the occupier of a track was intended for the benefit of the public who resorted to the track and not for the benefit of the bookmakers, and a breach of the statutory duty was a public and not a private wrong, and, therefore, since penalties for the breach were provided by s30(1) of the statute, it was to be inferred that the duty under s11(2) was not intended to have the additional sanction of civil liability, and the bookmaker had no right of civil action against the occupier.

Reffell v Surrey County Council **[1964] 1 All ER 743.**

The plaintiff, a girl aged twelve, was a pupil at a school which was controlled and maintained by the defendants, a local education authority. Going quickly along a corridor she put out her hand to stop a swing door that was swinging towards her. Her hand went through the glass panel of the door and she was injured. The glass was one-eighth inch thick and was not toughened. From 1945 onwards the defendants had appreciated the danger of one-eighth inch glass in doors. The plaintiff claimed damages for breach of statutory duty under s10(2) of the Education Act 1944 and reg 51 of the Standards for School Premises Regulations 1959, in that the "construction and properties of the materials", namely, the glass panel, were not such that the "safety of the occupants shall be reasonably assured" as required by reg 51.

It was held in the Queen's Bench Division that the defendants were liable in damages because- (1) an action lay for breach of statutory duty under s10(2) and reg 51, which imposed an absolute duty of which the test of breach was an objective test, namely, that there would be breach of duty if safety were not reasonably assured, and, on the facts, safety had not been reasonably assured. (2) on the facts, negligence on the part of the defendants, or breach of their common duty of care under the Occupiers' Liability Act 1957, s2(2), was established.

Phillips v Britannia Hygienic Laundry **[1923] 2 KB 832**

A motor lorry, being a light locomotive within the meaning of the Locomotives on Highways Act 1896 and a motor car within the meaning of the Motor Cars (Use and Construction) Order 1904, made under s6 of the 1896 Act, was being driven along a highway. Through no fault of its owners the lorry was in such a condition as to cause danger to persons on the lorry in that one of its axles was defective. The axle broke, and a wheel came off and damaged another vehicle. The owner of the damaged vehicle brought an action against the owners of the lorry for a breach of the Order ("The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway.").

It was held by the Court of Appeal that it was not intended by the Act or the Order that every one injured through a breach of the Order should have a right of action for damages; but that the duty imposed by the Order was a public duty only to be enforced by the penalty imposed for a breach of it, and not otherwise. Atkin LJ stated that 'the obligations of those who bring vehicles upon highways have been already well provided for and regulated by the common law'.

McCall v Abelesz and another **[1976] 1 QB 585**

The plaintiff was a tenant in a house in which there were other tenants. The house was bought by the new landlords at an auction sale without it having been seen by them. The landlords' manager went to see the house after the gas board had cut off the supply of gas to the house because the bill owing by the previous owners had not been paid. The two other tenants left, each owing rent. The gas supply was not restored until six months later and for a time the electricity and water supplies to the house were also cut off. The tenant, who did not accept the landlords' offer of alternative accommodation, claimed damages for harassment based solely on breach of s30(2) of the Rent Act 1965. The landlords appealed, claiming that s30 created a purely criminal offence and gave no civil right to damages.

It was held by the Court of Appeal, allowing the appeal, that s30(4) of the Rent Act 1965 preserved the existing adequate civil remedies for harassment of a residential occupier of premises and s30(2) of the Act, which was clearly a penal provision, did not create a new statutory cause of action for damages.

Per curiam: the necessary intention on the part of the landlords to cause the tenant to give up his occupation was not proved so as to constitute an offence under s30(2) of the Act of 1965.

Groves v Lord Wimborne **[1898] 2 QB 402**

The plaintiff was a boy employed in the service of the defendant. Amongst the machinery in the works was a steam winch with revolving cog-wheels, at which the plaintiff was employed. These cog-wheels were dangerous to a person working the winch unless fenced. There was evidence that there had originally been a guard or fence to these cog-wheels, but it had for some reason been removed, and there had been no fence at the wheels while the plaintiff was employed at the winch, a period of about six months. While the plaintiff was so employed, his right arm had been caught by the cog-wheels, and was so much injured that the forearm had to be amputated.

It was held by the Court of Appeal that an action will lie in respect of personal injury occasioned to a workman employed in a factory through a breach by his employer, the occupier of the factory, of the duty to maintain fencing for dangerous machinery imposed by him by s5(4) of the Factory and Workshop Act 1878. The defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection.

Issa v Hackney LBC **[1997] 1 All ER 999**

See above.

Monks v Warbey and others **[1935] 1 KB 75**

The plaintiff claimed damages for personal injuries sustained by him as the result of a collision between a motor coach driven by him and a motor car belonging to the defendant Warbey. The motor car had been lent by Warbey to the defendant Knowles on whose behalf it was being driven by the defendant May, negligently. Warbey, the owner of the car, was insured against third party risks, but neither Knowles nor May was insured against those risks. The plaintiff alleged that the defendant Warbey by permitting the car to be used by Knowles and may, when no policy of insurance was in

force in relation to such user, committed a breach of the duty imposed by s35 of the Road Traffic Act 1930.

It was held by the Court of Appeal that the owner of a motor car who, in contravention of s35(1) of the Road Traffic Act 1930, permits his car to be used by a person who is not insured against third party risks, is liable in damages to a third party who has been injured by the negligent driving of the uninsured person. In such a case the object and purview of the Act show that the penalties prescribed by s35(2) were not intended to be the sole remedy for a breach of the owner's statutory duty. Where a person uninsured against third party risks is permitted by the owner to use a car, and injury is caused by his negligent driving to a third party, the latter may, where the uninsured person is without means, sue the owner of the car directly for damages for breach of his statutory duty and need not first sue the uninsured person.

Richardson v Pitt-Stanley and others **[1995] 1 All ER 460**

The plaintiff suffered a serious injury to his hand in an accident at work, and in due course obtained judgment against his employers, a limited company, for breach of the Factories Act 1961, with damages to be assessed. The company went into liquidation and there were no assets to satisfy the plaintiff's judgment. The company had also failed to insure against liability as required under the Employers' Liability (Compulsory Insurance) Act 1969. By s5 of that Act such a failure was a criminal offence and where such an offence was committed by a company with the consent or connivance of, or facilitated by any neglect on the part of, any director or secretary of the company, he was also guilty of that offence. The plaintiff brought an action against the directors and secretary of the company, whom he alleged had committed an offence under s5 of the 1969 Act, claiming as damages a sum equal to the sum which he would have recovered against the company had it been properly insured.

It was held in the Court of Appeal (Sir John Megaw dissenting) that on its true construction, the 1969 Act did not create a civil liability as well as a criminal liability on the part of the employer for failure to insure against liability for bodily injury or disease sustained by an employee in the course of employment, and without the creation of that primary liability the directors of a corporate employer had no civil liability to pay damages to an injured employee. Moreover, there was no need or purpose in creating any civil liability for failure to insure for the benefit of the injured employee in view of the liabilities which already existed for breach of the common law duty of care or breach of the statutory duty under the Factories Acts. It followed that the defendants had no civil liability to pay damages to the plaintiff in respect of the failure to insure, which did no more than involve the plaintiff in economic loss, namely the inability to recover damages and thereby enforce his remedy. *Monks v Warbey* [1934] All ER Rep 373 distinguished.

Quinn v McGinty **(1998) Current Law Year Book 5805**

Quinn sought damages from M, director of company LP. Quinn had been injured while working for LP, but as LP had no assets and were uninsured, Quinn maintained that the directors were personally liable as a consequence of their failure to arrange insurance as required by the Employers' Liability (Compulsory Insurance) Act 1969. The sheriff accepted McGinty's contention that no civil liability arose. Quinn appealed.

It was held by the Sheriff Principal, allowing the appeal, that (1) the 1969 Act had been designed to protect a distinct class of persons, namely employees,

any incidental benefit to employers did not affect that view, *Richardson v Pitt-Stanley* [1995] not followed, and (2) while s1 of the 1969 Act created an obligation on the part of the company to insure, s5 obliged the officers of a company to ensure that s1 was complied with.

***Atkinson v Newcastle Waterworks Co* (1877) 2 Ex. D. 441**

The mere fact that the breach of a public statutory duty has caused damage does not vest a right of action in the person suffering the damage against the person guilty of the breach; whether the breach does or does not give such right of action must depend upon the object and language of the particular statute.

By the Waterworks Clauses Act 1847 the undertakers are: (1) to fix and maintain fire-plugs; (2) to furnish to the town commissioners a sufficient supply of water for certain public purposes; (3) to keep their pipes to which fire-plugs are fixed at all times charged with water at a certain pressure, and to allow all persons at all times to use the same for extinguishing fire without compensation; and (4) to supply to every owner or occupier of any dwelling-house, having paid or tendered the water-rate, sufficient water for domestic purposes. By s43 a penalty of £10 (recoverable summarily before two justices, who may award not more than half the penalty to the informer, and are to give the remainder to the overseers of the parish) is imposed on the undertakers for the neglect of each of the above duties, and for the neglect of (2) and (4) they are further to forfeit to the commissioners or ratepayers a penalty of 40s. a day, for each day during which such neglect continues after notice in writing of non-supply.

The plaintiff brought an action for damages against a waterworks company for not keeping their pipes charged as required by the Act, whereby his premises, situated within the limits of the Defendants' Act, were burnt down.

It was held by the Court of Exchequer Chamber (reversing the decision of the Court of Exchequer), that the statute gave no right of action to the plaintiff. The court regarded it as startling that the water company should virtually become insurers of the safety from fire, so far as water can produce that safety, of all the houses in the district.

***Read v Croydon Corporation* [1938] 4 All ER 631**

The defendant corporation owned and maintained two water wells for the purpose of supplying water to residents of the borough. The adult plaintiff was a ratepayer in the borough, and the infant plaintiff, his daughter, resided with him in the house in respect of which he paid the water rate. It was admitted that, as a result of drinking water supplied from one of the wells, the infant plaintiff contracted typhoid. The infant plaintiff claimed damages in respect of her illness, and the adult plaintiff claimed certain special damage incurred in consequence of that illness. It was found upon the facts that the defendants had not been negligent in the selection of the gathering ground, nor in the selection and supervision of its workmen, but that they had been negligent in that, during the carrying out of certain work at the well, precautions in the form of continual analysis of the water, searching inquiry into the antecedents of the workmen, and incessant supervision over them, were not taken. The plaintiffs contended, inter alia, (1) that the failure, on the part of the defendant corporation, to supply pure and wholesome water, amounted to common law negligence, (2) that there was a contract for the sale of goods - namely, water - and that there was a breach of the implied warranty contained in the Sale of Goods Act 1893, s14, (3) that there was a

breach of contract for the rendering of services – namely, the supply of water – which included an implied warranty similar to that contained in the Sale of Goods Act 1893, s14, and (4) that the defendants were guilty of breaches of their statutory duty under the Waterworks Clauses Act 1847, s35, and under the Public Health Act 1936, ss111, 115.

It was held in the King's Bench Division: (1) the defendants were guilty of negligence at common law. (2) where one person is by statute bound to supply water and another is entitled to receive it, there is no contractual relationship between these two persons, although the rights and obligations arising out of a statutory provision may be similar to, or identical with, those arising out of ordinary contract. (3) the defendants were guilty of a breach of statutory duty under the Waterworks Clauses Act 1847, s35, but that breach conferred a right of action upon a ratepayer only, and not upon persons resident in his household. This remedy was, therefore, confined to the adult plaintiff. (4) although the Waterworks Clauses Act 1847 provides a penalty for a breach of a statutory duty, upon the proper construction of that Act, this is not an exclusive remedy, and an action for damages can also be brought in respect of a breach of that duty.

[Editorial Note. The common law principles affecting water supply were recently before the Court of Appeal in *Barnes v Irwell Valley Water Board* [1938] 2 All ER 650, and the decision here applies those principles in much the same way as the Court of Appeal there applied them.]

***Clegg Parkinson & Co v Earby Gas Co* [1896] 1 QB 592**

The plaintiffs claimed £50 damages from the defendants for breach of contract to supply gas continuously as required by the plaintiffs, and in accordance with the Earby and Thornton Gas Order 1894, alleging that on certain days no gas had been supplied, and on other days only a deficient and impure supply at less than the prescribed pressure had been given. Alternatively, the plaintiffs claimed damages for breach of the defendants' statutory duties under the Earby and Thornton Gas Order 1894, and the Act confirming the same, and under the Gasworks Clauses Act 1871. The plaintiffs had taken and paid for a supply of gas from the defendants, but there was no written or express contract between them.

It was held in the Queen's Bench Division, on appeal from the county court, that an action will not lie against a gas company, to which the provisions of the Gasworks Clauses Act 1871 apply, for damages sustained by a consumer by reason of their failure to give him a supply of gas sufficient in amount and in purity to satisfy the requirements of the Act. The consumer's only remedy is to proceed for penalties under s36 of the Act (which provided for a fine of 40s for each day of non-supply and a fine not exceeding £20 for gas supplied under less pressure, of less illuminating power, or of less purity than it ought to be according to the provisions of the Act).

Wills J. stated: "In my opinion this is one of those cases in which the principle applies, that, where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take proceedings provided by the statute. When large numbers of people are supplied with gas, the undertakers might speedily be ruined if any one could bring an action of this kind against them. It seems to me that, upon the above principle, an action of this kind cannot be maintained."

BENEFIT OF A CLASS

***Solomons v Gertzenstein Ltd and others* [1954] 2 All ER 625**

The plaintiff was employed by a manufacturing furrier who occupied premises on the second floor of a building. The second defendants, who were the lessees of the whole building under the head-lease, had mortgaged their interest in the premises to a building society by a mortgage which incorporated the statutory power to appoint a receiver. The third defendant was a receiver appointed by the society under the mortgage, and as such was the agent of the second defendants. The third defendant had appointed a manager of the premises. A fire broke out on the premises and the plaintiff, who was on the third floor, being unable to escape by the stairs, climbed out of a window at the back of the premises and was injured. At the time of the fire a ladder below a trap-door leading to the roof of the premises was not in position and was lying in a passage way on the third floor. In an action for negligence and breach of the statutory duty imposed by s133(2) of the London Building Acts (Amendment) Act 1939 on owners of premises to maintain means of escape from fire in good condition and efficient working order the plaintiff contended that the third defendant was the "owner" of the premises within that sub-section.

As regards the liability of the third defendant, it was held by the Court of Appeal: (1) the third defendant, being an agent, was not the "owner" of the premises within s133(2) of the Act of 1939, as the definition of "owner" applicable for the purposes of that enactment was the definition prescribed by s5 of the London Building Act 1930, which did not extend to agents, and was not that prescribed by s33(1) of the Act of 1939 which did include an agent; the third defendant was not, therefore, liable to maintain means of escape from fire in good condition and efficient working order within s133(2) of the Act of 1939. (2) the plaintiff had failed to show that the means of escape from fire were not in good condition or efficient working order and, although the efficiency of the means of escape might have been impaired, the third defendant, whether directly or because of the inaction of the manager appointed by him, was not responsible for such impairment; and, therefore, the plaintiff failed to establish any breach of s133(2) of the Act of 1939.

It was held further (Somervell LJ dissenting) that the duty imposed by s133 to keep and maintain means of escape in case of fire was imposed principally for the benefit of a particular, ascertainable class, namely, persons in the building, and those persons had a right of action for a breach of statutory duty notwithstanding that penalties were also imposed for such breaches.

Groves v Lord Wimborne [1898] 2 QB 402 applied.

***London Passenger Transport Board v Upson* [1949] All ER 60**

The Pedestrian Crossing Places (Traffic) Regulations 1941, reg 3, provides: "The driver of every vehicle approaching a crossing shall, unless he can see that there is no foot passenger thereon, proceed at such a speed as to be able if necessary to stop before reaching such crossing." A pedestrian was knocked down by an omnibus while on a pedestrian crossing controlled by traffic lights. The lights were in favour of the omnibus driver, but his view of the crossing was masked by a stationary taxi-cab which was drawn up at the kerb on the crossing. When the omnibus became stationary, its front wheels were on the crossing.

It was held by the House of Lords that a crossing controlled by lights did not cease to be "a crossing" within the meaning of reg 3 even when a green light

was being shown to on-coming traffic, and, therefore, as the omnibus driver was prevented by the stationary taxi-cab from seeing that there was no foot passenger on the crossing, and, nevertheless, approached at such a speed that he could not stop before reaching the crossing, he was guilty of a breach of reg 3, and the breach was a contributing cause of the accident. The pedestrian's contributory negligence did not adeem the driver's failure to obey the regulation, but, under the Law Reform (Contributory Negligence) Act 1945, s1(1), merely reduced the amount which the pedestrian was entitled to recover.

Cutler v Wandsworth Stadium Ltd **[1949] 1 All ER 544**

See above.

PUBLIC RIGHTS

Lonhro Ltd v Shell Petroleum Co Ltd **[1981] 2 All ER 456**

See Law Report.

BREACH OF STATUTORY DUTY AND NEGLIGENCE

Lochgelley Iron & Coal Co v M'Mullan **[1934] AC 1**

The pursuer in an action under the Common Law of Scotland claimed damages for the death of his son, a miner lately in the employment of the defenders. The pursuer averred that, in breach of s49 of the Coal Mines Act 1911, which provides that the roof of every working place shall be made secure and that a person shall not (with an immaterial exception) work in any working place which is not so made secure, his son was ordered or permitted to work in a working place where the roof had not been made secure, and that, while he was there at work, part of the roof fell and killed him. By s29(1) of the Workmen's Compensation Act 1925: "When the injury was caused by the personal negligence or wilful act of the employer or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take proceedings independently of this Act …".

It was held by the House of Lords that these averments disclosed a case of "personal negligence of the employers" within the meaning of s29(1) of the Workmen's Compensation Act 1925, and that the action was competent.

Lord Atkin stated, at p9: "… I find the result to be that the employer is alleged to have committed a breach of a duty owed by him to his servant to take a particular precaution (namely, support of the roof) for his servant's safety whereby the servant was injured. In my opinion that state of facts constitutes negligence of the employer; and I am unable to conceive of any accurate definition of negligence which could exclude it. All that is necessary to show is a duty to take care to avoid injuring; and if the particular care to be taken is prescribed by statute, and the duty to the injured person to take the care is likewise imposed by statute, and the breach is proved, all the essentials of negligence are present. I cannot think that the true position is, as appears to be suggested, that in such cases negligence only exists where the tribunal of fact agrees with the Legislature that the precaution is one that ought to be taken. The very object of the legislation is to put that particular precaution beyond controversy."

THE AMBIT OF THE STATUTE

Chipchase v British Titan Products **[1956] 1 All ER 613**

The plaintiff was a painter employed at the defendants' factory. He was working with a bucket of paint on a staging which he had himself erected, consisting of two pairs of steps and a nine-inch plank. The plank was six feet above the ground; had it been six feet six inches above the ground it would have been necessary, pursuant to reg 22(c) of the Building (Safety, Health and Welfare) Regulations 1948 to have had staging of a width of not less than thirty-four inches. The plaintiff fell from the staging and was injured. He claimed against the defendants damages for negligence at common law, contending that, although the regulation did not apply, the requirements of the regulation were a guide to the standard of care which lay on the defendants at common law and showed that there ought to have been a plank wider than nine inches.

On appeal from a dismissal of his claim, it was held by the Court of Appeal that it was right to approach the question of negligence at common law independently of the regulation, as it did not, on the facts, apply, and there was no reason for the court to interfere with the decision that the defendants had not been guilty of negligence.

Hartley v Mayoh & Co and another **[1954] 1 All ER 375**

In breach of the duty of the defendant firm, the occupiers of a factory, under reg 9 of the Regulations for the Generation, Transmission, Distribution and Use of Electrical Energy in Premises under the Factory and Workshops Acts 1901, 1907 and 1908, ordinary tumbler switches similar to those in use in a house, adjoining the main switchboard, were used to control the electricity supply in the lighting circuit of the factory. Through the negligence of the defendant electricity board and their predecessors, the connections from these tumbler switches to the master switchboard had been transposed, with the result that current still flowed from the live wire of the tumbler switches, when switched on. The defendant board did not discover this defect after they had done work in the factory in the 1930's, 1946 and 1950, and did not point out to the defendant firm that the tumbler switches were obsolete.

Firemen summoned to a fire at the factory were directed by the manager to the main switchboard and the master switch, where they switched it off. One of the firemen was electrocuted, and, in an action by his widow, the trial judge found both defendants guilty of negligence and the defendant firm in breach of statutory duty, and apportioned the responsibility for the damage as to ninety per cent against the defendant board and as to ten per cent against the defendant firm. The Court of Appeal held that:

(1) the fireman was not a person for whose benefit the electricity regulations were made, not being of the class of "persons employed" to protect whom power to make regulations was conferred by s60(1) of the Factories Act 1937, as amended, and the defendant firm were, therefore, not liable for their breach of their statutory duty in respect of his death.
(2) although the primary cause of the accident was the defendant board's negligence in not discovering the defect in the connections, and in not informing the defendant firm that the tumbler switches were obsolete, in view of the requirements of reg 9 of the electricity regulations the defendant firm were under a duty to know where their main switches were, and the manager was negligent in not knowing this and in failing to warn the firemen,

who were invitees, of the unusual danger presented by the fact that they were not the usual type of main switch and might so be overlooked and, therefore, the apportionment of the responsibility for the damage must be upheld.

Knapp v Railway Executive **[1949] 2 All ER 508**

On approaching a level crossing, built under the Brighton and Chichester Railway Act 1844, in a motor car the plaintiff found the gate closed across the road and stopped his car about a car's length away, but, owing to the hand-brake being in some way released, the car moved slowly down the slope towards the level crossing and struck the gate. The gate was not securely fixed across the road as it should have been, with the result that it swung back across the railway line and was struck by a train which was approaching at high speed, the driver of the train being injured. The train driver brought an action against the plaintiff, alleging that his injuries were caused by the plaintiff's negligence in allowing his car to strike the gate of the level crossing. The action was settled for £400 and the plaintiff brought an action against the railway company under the Law Reform (Married Women and Tortfeasors) Act 1935, s6(1)(c), alleging that they had contributed to the accident by failing to keep the gate securely closed, in breach of their duty under s274 of the Act of 1844.

It was held by the Court of Appeal that on a true construction of the Act of 1844, the whole purport of s274 was merely to protect the road-using public against danger from the railway, and the words "conducive to public safety" in the proviso meant the safety of the public using the highway and did not include persons who might be travelling on the railway. Therefore, the benefit of the section could not be claimed by a driver employed by the railway company, and, as the train driver had no right of action under the section, the plaintiff was not entitled to contribution from the railway company under Law Reform (Married Women and Tortfeasors) Act 1935, s6(1)(c).

Gorris v Scott **(1874) LR 9 Ex 125**

When a statute creates a duty with the object of preventing a mischief of a particular kind, a person who, by reason of another's neglect of the statutory duty, suffers a loss of a different kind, is not entitled to maintain an action in respect of such loss.

The defendant, a shipowner, undertook to carry the plaintiff's sheep from a foreign port to England. On the voyage some of the sheep were washed overboard by reason of the defendant's neglect to take a precaution enjoined by an order of the Privy Council, which was made under the authority of the Contagious Diseases (Animals) Act 1869, s75.

It was held that the object of the statute and the order being to prevent the spread of contagious disease among animals, and not to protect them against the perils of the sea, the plaintiffs could not recover.

Nicholls v F. Austin Ltd **[1946] AC 493.**

The plaintiff, while operating a circular saw belonging to her employers, the defendants, was injured through a piece of wood flying out of the machine which was fenced so as to comply with the requirements of the Woodworking Machinery Regulations 1922, which by s150 of the Factories Act 1937 were to be deemed to have been made under that Act. By s14(1)

every dangerous part of any machinery was to be securely fenced, and the Secretary of State was given power to "make regulations requiring the fencing of materials or articles which are dangerous while in motion in the machine" but none had been made.

It was held by the House of Lords that the defendants were not in breach of any statutory obligation, since the obligation to fence imposed by s14(1) was an obligation to guard against contact with any dangerous part of a machine and not to guard against dangerous materials ejected from it, a matter depending solely on the making of regulations under the discretionary power conferred by s14(3) on the Secretary of State and not exercised by him.

Close v Steel Co. of Wales **[1961] 2 All ER 953**

The plaintiff, while employed by the defendants in their instrument workshop, operated an electric drilling machine. The bit of the drill shattered and a piece entered his left eye. Although bits not infrequently shattered, there was no evidence of any such accident having happened previously, for the fragments of a shattered bit were light and did not fly out with force.

On appeal against dismissal of a claim for damages for breach of statutory duty under the Factories Act 1937, s14(1), to fence a dangerous part of machinery, it was held by the House of Lords:

(1) the defendants were not in breach of their duty under s14(1) because danger from the use of the bit in the drill in the ordinary course of affairs was not a reasonably foreseeable danger, and the bit was not, therefore, a "dangerous" part of machinery.
(2) If, however, the bit were a dangerous part of machinery, then – (a) the obligation to fence securely imposed by s14(1) was a requirement that the dangerous part should be fenced securely for the purpose of preventing the body of the operator coming into contact with the machinery. *Nicholls v Austin Ltd* [1946] 2 All ER 92 and *Carroll v Andrew Barclay Ltd* [1948] 2 All ER 386 followed and accepted as binding; and (b) the obligation to fence securely, so imposed, did not require the dangerous part to be fenced for the purpose of preventing fragments of it, if shattered (or fragments of the material on which the machine was working) flying out of the machine.

Per Lord Goddard: if in a factory there is a machine which it is known from experience has a tendency to throw out parts of the machine itself or of the material on which it is working, so as to be a danger to the operator, the absence of a shield to protect him may well afford him a cause of action at common law.

Donaghey v Boulton & Paul Ltd **[1968] AC 1**

Donaghey was a workman employed by O'Brien & Co who were engaged by Boulton & Paul Ltd (who were themselves sub-contractors) to lay asbestos sheets on the roof of an aircraft hangar. Donaghey was working under the supervision of the foreman of O'Brian & Co. The foreman of Boulton & Paul Ltd was exercising some degree of general supervision and was responsible for providing safety appliances for both their men and those of the sub-contractors. The foreman instructed Donaghey to adjust a sheet of asbestos and, in doing so, he overbalanced and fell through a hole in the sheeting, sustaining injury. Donaghey brought an action against Boulton & Paul Ltd alleging (inter alia) breach of statutory duty.

It was held by the House of Lords: (1) that Boulton & Paul Ltd owed a duty under the Building (Safety, Health and Welfare) Regulations 1948 inasmuch as they had not divested themselves of the control of the work, which was accordingly being physically performed by them. *Ginty v Belmont Building Supplies* [1959] 1 All ER 414 distinguished. (2) Regulation 31(3) (which provided for suitable and sufficient equipment where work was being done on roofs) applied to this case and should have been complied with by Boulton & Paul Ltd whose failure to supply crawling-boards was the cause of the accident; it was immaterial that Donaghey fell, not through the fragile material, but through a hole in the roof. *Gorris v Scott* (1874) LR 9 Ex 125, distinguished.

CAUSATION AND DEFENCES

CAUSATION

***McWilliams v Sir William Arrol & Co* [1962] 1 WLR 295**

See cases on Negligence - Causation.

***Bonnington Castings Ltd v Wardlaw* [1956] AC 613)**

See cases on Negligence - Causation.

***Ginty v Belmont Building Supplies* [1959] 1 All ER 414**

The plaintiff, an experienced asbestos sheeter, was employed by the first defendant which carried on business as roofing contractors. The plaintiff had been instructed and understood that he was not to work on asbestos roofs without using boards, and he knew that there were statutory regulations on the subject. The plaintiff and his mate were sent to the second defendant's factory to strip the existing asbestos roof on the second defendant's spreading shop and to replace it with new asbestos sheeting. When the plaintiff and his mate arrived at the second defendant's factory, they were taken to the builder's yard, were supplied with a ladder, and were shown the different kinds of boards and were told to help themselves to what they wanted. On July 30, employees of the second defendant noticed that the plaintiff was working on the roof without using boards, and they then took two duckboards from the builder's yard and placed them by the wall of the spreading shop, on the side where the plaintiff was working where they could be seen by him, but they did not tell the plaintiff or his mate that they had done this. On August 3, the plaintiff went on to the roof without using boards, fell through the roof and was seriously injured. It was held in the Queen's Bench Division:

(1) boards had been "provided" within reg 31(3) of the Building (Safety, Health and Welfare) Regulations 1948 and, similarly, means for ensuring the plaintiff's safety had been provided within s26(2) of the Factories Act 1937, and accordingly no breach of duty on the part of the plaintiff's employer under reg 4 and reg 31(3)(a), or on the part of the second defendant, as occupier of the factory, under s26(2) of the Factories Act 1937, was established.
(2) under reg 4 and reg 31(3)(a) of the Regulations of 1948, there was an obligation on the employer not merely to provide the boards but also (vicariously) to use the boards, and there was also an obligation on the plaintiff to use the boards; though the plaintiff, and through him, his employer both were in breach of duty under these regulations, since the

boards were not used, yet the plaintiff was not entitled to recover damages against his employer because the fault was the plaintiff's, and there was no fault on the part of his employer which went beyond or was independent of the plaintiff's own omission.
(3) in failing to use the boards which had been "provided" for his use the plaintiff did something likely to endanger himself and was in breach of ss119(1) and (2) of the Factories Act 1937.

Per Curiam: the important and fundamental question in a case like this is the usual question – whose fault was it? – not the question whether there was a delegation of statutory duty.

***Boyle v Kodak Ltd* [1969] 2 All ER 439**

The plaintiff sustained injury when he fell off a ladder while engaged in painting the outside of a large oil storage tank which was some 30 feet high. For safety it was necessary to lash the top of the ladder to a rail round the roof of the tank to prevent it from slipping sideways, and the accident occurred while the plaintiff was going up the ladder in order to lash it. For some reason never discovered the ladder slipped when he was about 20 feet up and he fell with the ladder. Regulation 29(4) of the Building (Safety Health and Welfare) Regulations 1948 provides: "Every ladder shall so far as practicable be securely fixed so that it can move neither from its top nor from its bottom points of rest. If it cannot be so securely fixed it shall where practicable be securely fixed at the base or if such fixing at the base is impracticable a person shall be stationed at the base of the ladder to prevent slipping." It so happened that there was a staircase running round the outside of the tank by which it would have been possible for the plaintiff to reach the top of the tank, and he could then have lashed the top of the ladder to the rail, come down the staircase and then mounted the ladder. The plaintiff appealed against the dismissing of his action.

It was held by the House of Lords that on a claim for damages for breach of statutory duty, an employer to avoid liability must show that he has complied with his statutory duty by taking all reasonable steps to prevent his employees from committing breaches of the relevant regulations. Thus, if the employer ought to have realised that there was a substantial risk that skilled workmen would not be sufficiently familiar with the regulations imposing a statutory duty on them, in situations where no danger was apparent, it would be his duty under the regulations to instruct the workmen on what steps they must take to avoid a breach. This duty exists even where failure to give such instructions did not amount to negligence at common law. Appeal allowed.

***McCreesh v Courtaulds plc* [1997] Current Law Year Book 2625**

McCreesh appealed against a finding dismissing his action against Courtaulds, his employers, for negligence and breach of statutory duty following an accident in which he suffered a cut across the palm of his left hand resulting in the amputation of his little finger and severe diminution of function of the remaining fingers. M was the only joiner employed by C and he had been in the job for nine weeks when the accident happened. When he was shown the joinery workshop he was not given any instructions by the safety officer as to how to use the circular saw and, although there was a guard available for the saw, there was evidence that the guard had never been used. M's account as to how the accident occurred was rejected and it was found that M had adopted an unsafe procedure for cutting wood, a procedure he knew to be unsafe. It was held by the trial judge that, although C's

inadequate supervision was part of the background to the accident, M was solely responsible for the accident.

It was held by the Court of Appeal, allowing the appeal and apportioning liability at 75 per cent to M and 25 per cent to C, that, as the judge found that C's lack of supervision was part of the background to the accident, it was not open for him to exonerate C entirely from breach of its statutory duty. The absence of instructions as to how to use the saw safely and the practice of permitting the use of the saw unguarded constituted a wrongful act leading to causation or contribution on the part of C. *Ginty v Belmont Building Supplies* [1959] 1 All ER 414 applied. In order to exonerate C, it would be necessary to have found that M's adoption of an unsafe procedure was the sole cause of the accident and that the accident would have occurred even if the saw had been guarded which was not the case.

DEFENCES

***ICI Ltd v Shatwell* [1964] 2 All ER 999**

G and J who were brothers, were certificated and experienced shotfirers employed by ICI Ltd. By their employers' rules, and by reg 27(4) of the Quarries (Explosives) Regulations 1959, G and J were required to ensure that no testing of an electric circuit for shotfiring should be done unless all persons in the vicinity had withdrawn to shelter. The statutory duty was imposed on G and J, not on their employers. The risk, which had been explained to G and J, was of premature explosions. On the day of the accident, while a third man had gone to fetch a longer cable so that a shotfiring circuit, which had been made in the course of their employment, could be tested from shelter, G invited J to proceed with him to make a test in the open. G and J were injured by the resulting explosion.

On appeal from an award of damages to G (both negligence and breach of statutory duty by J being found at the trial, and the award being of an amount reduced in respect of G's contributory negligence) in an action by G against the employers as vicariously responsible for J's breach of duty, it was held by the House of Lords that although J's acts were a contributing cause (Viscount Radcliffe dissenting as regards causation) of G's injury, the employers were not liable because –

(1) the employers not being themselves in breach of duty, any liability of theirs would be vicarious liability for the fault of J, and to such liability (whether for negligence or for breach of statutory duty) the principle volenti non fit injuria afforded a defence, where, as here, the facts showed that G and J knew and accepted the risk (albeit a remote risk) of testing in a way that contravened their employers' instructions and the statutory regulations.
(2) (per Viscount Radcliffe) each of them, G and J, emerged from their joint enterprise as author of his own injury, and neither should be regarded as having contributed a separate wrongful act injuring the other.

Per Lord Pearce (Viscount Radcliffe concurring): the defence of volenti non fit injuria should be available where the employer is not himself in breach of statutory duty and is not vicariously in breach of any statutory duty through neglect of some person of superior rank to the plaintiff and whose commands the plaintiff is bound to obey, or who has some special and different duty of care.

[Editorial Note. There was no breach of statutory duty by the employers: the defence of "volens" was admitted against vicarious responsibility only …

The defence is not available to an employer on whom a statutory obligation is imposed as against liability for his own breach of that obligation.]

Caswell v Powell Duffryn Associated Collieries Ltd **[1939] 3 All ER 722**

The defendants were the proprietors of a coal mine in which there was a conveyor belt. This was originally totally enclosed, but, in order that some rollers might be cleaned, it was found necessary to make a portion of the fencing removable. The correct method of cleaning was to have the engine stopped and to scrape one half of each roller with a scraper, and then, having moved the belt slightly by restarting the machinery, to scrape the remainder. A workman was found dead with his head inside the machinery. On the day in question, the machinery had been stopped only in order to allow full trucks to be removed from under the end of the conveyor and empty ones to be substituted.

It was held by the House of Lords: (1) contributory negligence is a defence to an action for breach of statutory duty. (2) the defendants had not established any contributory negligence on the part of the deceased workman. (3) the absence of a portion of the fencing amounted to a breach of statutory duty on the part of the defendants, which was a substantial cause of the accident. (4) the defendants had failed to show that "it was not reasonably practicable to avoid or prevent the breach" within the meaning of s102(8) of the Coal Mines Act 1911.

Per Lord Atkin: A system which involved work being done at a machine which might be set in motion without any signal to the workman engaged in cleaning it seems to me most defective. Any kind of signal could have been employed which would give the cleaner time to stop cleaning and close the fence.

Per Lord Wright: What is all important is to adapt the standard of what is [contributory] 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 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.

Whitby v Burt, Boulton & Hayward Ltd and another **[1947] KB 918**

The plaintiff was directed by the foreman of his employers, sub-contractors to the occupiers of a factory, to ascend to a low-pitched attic in the factory, the horizontal base of which was composed of corrugated iron sheets nailed on to wooden supports, and then to crawl along the sheets and pull out the nails from above, so that the sheets could be removed and used elsewhere in the factory. The occupiers had agreed with the sub-contractors that the sheets should be removed, but had left the manner and method by which they should be removed entirely to the sub-contractors. When the plaintiff had removed most of the nails and sheets, one of the wooden supports, obviously inadequate to bear the weight of a man, broke, and the plaintiff fell to the floor below and was injured. It was held by the Court of Appeal:

(1) that his employers, the sub-contractors, were liable to the plaintiff in damages at common law in that they had failed to use reasonable care to lay out the work, so that it should not be a source of danger to him, though the word "system" was hardly appropriate in the case of work which was not

repetitive; but that the occupiers of the factory were not liable to the plaintiff … . *Speed v Thomas Swift & Co* [1943] KB 557 applied.

(2) that the occupiers were liable to the plaintiff in damages under s26(1) of the Factories Act 1937, in that they had failed to provide and maintain, so far as was reasonably practicable, a safe means of access to the place at which the plaintiff had to work, ie, to take out the nails, and that this also was a cause of his injury.

(3) on a claim under s6(2) of the Law Reform (Married Women and Tortfeasors) Act 1935, for contribution made by the occupiers, liable under the Factories Act 1937, against the sub-contractors, liable at common law, that, since the occupiers had employed contractors to do the work leaving the method and manner of it entirely to the sub-contractors, all proper precautions were the province of the sub-contractors and the responsibility for the injury was that of the sub-contractors. Accordingly the contribution to be recovered by the occupiers should amount to a complete indemnity.

MISFEASANCE IN A PUBLIC OFFICE

Three Rivers District Council v Bank of England (No 3) **[1996] 3 All ER 558**

See Law Report.