

Foll
Multi Modal
Ltd v Polakow
78 ALR 553

Foll
Swan v
Williams
(Demolition)
Pty Ltd (1987)
9 NSWLR 172

[HIGH COURT OF AUSTRALIA.]

WOOLWORTHS LIMITED APPELLANT ;
DEFENDANT,

AND

CROTTY RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

Compensation to Relatives—Lord Campbell's Act—Application of Act—Death caused
by breach of contract—Compensation to Relatives Act 1897-1928 (N.S.W.) (No. 31
of 1897—No. 8 of 1928), secs. 3, 4.

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SYDNEY,
Dec. 2, 3, 17.
Latham C.J.,
Rich and
McTiernan JJ.

• The application of the *Compensation to Relatives Act* 1897-1928 (N.S.W.)
(Lord Campbell's Act) is not limited to cases where death is caused by a tort ;
the Act applies also to cases where death is caused by a breach of contract.

Decision of the Supreme Court of New South Wales (Full Court) : *Crotty*
v. *Woolworths Ltd.*, (1942) 59 W.N. (N.S.W.) 164, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales by Elizabeth Catherine Crotty under the *Compensation to Relatives Act* 1897-1928 (N.S.W.), to recover from the defendant, Woolworths Ltd., the amount of the pecuniary loss occasioned to her and her husband by the death of their son.

The declaration, as amended, contained four counts :—(a) based on sec. 19 (1) of the *Sale of Goods Act* 1923-1937 (N.S.W.), alleging breach of an implied condition in the contract of sale of an electric light globe purchased by the plaintiff's said son from the defendant that the globe was reasonably fit for the purpose for which it was required, whereby the said son was killed ; (b) alleging that the defendant in selling warranted that the globe was reasonably fit to be used for the purpose of illumination, the breach resulting in death ; (c) that

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the defendant well knew the globe to be dangerous and neglected to warn the deceased of the danger; and (d) based on sec. 19 (2) of the Act, alleging breach of an implied condition that the globe was of merchantable quality.

According to the evidence, the deceased in December 1940, through the medium of his sister, purchased from the defendant an electric light globe. He had a long piece of flex with a connection at one end which he plugged into the electric light socket in his bedroom. At the other end of the flex there was a brass socket into which he inserted the globe which had been supplied by the defendant. He then led the flex out from his bedroom across the yard into a garage—which was otherwise unlighted—hung it over a rafter, and thus obtained light for working on his motor-car. For over twelve months he had resorted to this practice without coming to any harm. On this occasion, however, he was found dead under the car, having been electrocuted. The globe was hanging down, from a rafter, inside the engine part of the car. The points by which the plug of the globe were held in the socket were touching the metal work of the engine. The globe was defective in that the solder by which the wiring is fixed in the plug had been allowed to run and make contact with the brass cover of the plug, so that, when the plug was in use, the brasswork and anything with which it came in contact became electrified. It was this which caused the death of the deceased.

The trial judge ruled that there was no evidence to support count c. He, in effect, left the other counts to the jury, and invited them, as well as returning a general verdict, to answer the following specific questions:—(1) Did the plaintiff's daughter buy the globe from the defendant? (2) Was the globe, if so bought, used in the garage on 18th December 1940? (3) Did the defendant impliedly warrant that the globe was fit for the purpose to which it was subsequently put by the deceased? (4) Was it reasonably fit for such purpose?

The jury returned a verdict for the plaintiff in the sum of £331 19s. 6d., and answered the questions as follows:—(1), (2), and (3) Yes. (4) No.

The Full Court of the Supreme Court dismissed an appeal by the defendant: *Crotty v. Woolworths Ltd.* (1).

From that decision the defendant appealed to the High Court.

Menzies K.C. (with him *Shand*), for the appellant. The provisions of Lord Campbell's Act are applicable to cases of tort, but are not

applicable to cases of breach of contract. This is supported by the words of the preamble, which refers to compensation in respect of persons "killed by accidents" (*Admiralty Commissioners v. S.S. Amerika* (1); *Holdsworth, History of English Law*, 4th ed. (1935), vol. 3, pp. 336, 451, 676). Observations to the contrary in *McCarthy v. Hoyts Theatres Ltd.* (2), *Grein v. Imperial Airways Ltd.* (3) and *Henwood v. Municipal Tramways Trust (S.A.)* (4) are *obiter dicta* and erroneous. In the consideration of this matter two rules or principles must be considered, namely, (a) the *actio personalis moritur cum persona* rule, and (b) the rule stated in *Baker v. Bolton* (5) that in a civil court the death of a human being cannot be complained of as an injury. The word *personalis* has not the same meaning as personal. It has a specialized meaning. *Sanders v. Esterby* (6), *Clark v. Thomson* (7) and *Fawcett v. Charter* (8) show how far an action in contract has survived. The position is compendiously stated and correctly summarized in *Benham v. Gambling* (9). As it is not true in an action of breach of contract that no action at law is now maintainable against the person who may have caused the death of another person, the action on contract is not within the operation of the *Compensation to Relatives Act* 1897-1928, and the respondent's claim therefore fails. The rule *actio personalis moritur cum persona*, if it ever applied to actions on contract, has been so limited in its application that there is no field of operation for Lord Campbell's Act. Therefore, if the remedial language expressed in the preamble to that Act is to be given any meaning, it must be directed to the possibility of the rule then existing. Lord Campbell's Act deals not only with the *actio personalis moritur cum persona* rule; it also deals with survival of a cause of action, that is, *actio in personam* in both its branches. In *Jackson v. Watson & Sons* (10) the rule in *Baker v. Bolton* (5) was not treated as applying to the case of contract. It is shown in *Rose v. Ford* (11) that the decision in *Admiralty Commissioners v. S.S. Amerika* (1) did not overrule *Jackson v. Watson & Sons* (10); therefore *Admiralty Commissioners v. S.S. Amerika* (1) must be treated as confined to a case of tort. It was not in any sense true to say that in 1846, the year in which the Act was enacted, no action in contract was maintainable against a person who by his contractual wrongful act had caused the death of another person, because in fact it was maintainable.

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(1) (1917) A.C. 38.

(2) (1932) 38 A.L.R. 326, at pp. 328, 329.

(3) (1937) 1 K.B. 50, at pp. 70, 88.

(4) (1938) 60 C.L.R. 438, at p. 444.

(5) (1808) 1 Camp. 493 [170 E.R. 1033].

(6) (1617) Cro. Jac. 417 [79 E.R. 356].

(7) (1620) Cro. Jac. 571 [79 E.R. 489].

(8) (1623) Cro. Jac. 662 [79 E.R. 573].

(9) (1941) A.C. 157, at p. 160.

(10) (1909) 2 K.B. 193.

(11) (1937) A.C. 826.

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That statement is confirmed by *Jackson v. Watson & Sons* (1). There is a sharp distinction between the case where the default is delictual and where it is contractual.

Barwick K.C. (with him *Kinsella*), for the respondent. For the purpose of this part of our argument it is conceded that Lord Campbell's Act only applies to extend the area of the action of tort. The cause of action on which the respondent succeeded is now, and was at the time of the passing of that Act, tortious. The essence of the present right, that is to say the right that arises under sec. 19 (1) and (2) of the *Sale of Goods Act* 1923-1937, involves two factors, (a) a trader who is dealing in the goods, and (b) the reliance of the purchaser upon the judgment of the trader with the knowledge of the latter. Those two factors existed prior to 1846 and have survived to the present time. Those factors gave rise to a duty in the first place sounding in tort, though later sounding in contract. Though ultimately it has become solely a matter of contract, there is still a duty not to sell goods that are unfit (*Holdsworth, History of English Law*, 4th ed. (1935), vol. 3, pp. 385, 386, 430, 432; vol. 8, pp. 68, 70; *Williamson v. Allison* (2); *Stuart v. Wilkins* (3); *Brown v. Edgington* (4)). The precise counterpart of the statutory duty appears in the last-mentioned case. It is implied from the transaction, just as the present condition is implied. A warranty count to the effect of the form shown in the 3rd schedule to the *Common Law Procedure Act* 1899, as it appears in *Betts, Louat and Hammond's Supreme Court Practice* (N.S.W.), 3rd ed. (1939), p. 237, was considered in *Cutts v. Buckley* (5). It is sufficient to show that even as late as 1852, when the original *Common Law Procedure Act* was framed, the purely and exclusively contractual nature of express warranty was not in mind; that it had not emerged clearly, and, in point of fact, did not emerge clearly until *Heilbut, Symons & Co. v. Buckleton* (6). "Wrongful" does not merely mean tortious; it must include any act which might have given rise to an action on the case in 1846. *Heilbut, Symons & Co. v. Buckleton* (6) shows that in 1846 it would have been proper in the present matter to have declared on the case. There is a large area, a nebulous area, where tort or contract might both have been brought in 1846. The framers of the Act had not in mind the distinction which is now in mind between tort and contract (*Marzetti v. Williams* (7); *Brown v.*

(1) (1909) 2 K.B. 193.

(2) (1802) 2 East. 446, at p. 450 [102 E.R. 439, at p. 441].

(3) (1778) 1 Doug. 18, at p. 21 [99 E.R. 15, at p. 17].

(4) (1841) 2 Man. & G. 279, at p. 284 [133 E.R. 751, at p. 753].

(5) (1933) 49 C.L.R. 189.

(6) (1913) A.C. 30.

(7) (1830) 1 B. & Ad. 415, at pp. 424, 425, 427 [109 E.R. 842, at pp. 845-847].

Boorman (1); *Boorman v. Brown* (2); *Knights v. Quarles* (3)) —see also *Brown v. Holloway* (4). The respondent's right does not arise out of an express contract between the parties, as in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.* (5). The preamble to the English Act was discussed in *Osborn v. Gillett* (6). The title and verbiage of the *Compensation to Relatives Act* 1897 show that the Act has regard only to the event and not to the source of the possible liability in the defendant towards the deceased. The meaning of the words "wrongs" and "wrongful" is dealt with in *Holland on Jurisprudence*, 13th ed. (1924), pp. 256, 330-334. Breaches of contract have been referred to as wrongs (*South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.* (7); *British Homophone Ltd. v. Kunz and Crystallate Gramophone Record Manufacturing Co. Ltd.* (8); *Grein v. Imperial Airways Ltd.* (9); *Bradshaw v. Lancashire and Yorkshire Railway Co.* (10); *Jury v. Commissioner for Railways (N.S.W.)* (11)). Lord Campbell's Act and the *Compensation to Relatives Act* 1897-1928 give a right of action in every case where death is caused by an act, neglect, or default, which at the instance of the deceased would have been actionable irrespective of the nature of the action he would have been able or bound to bring. The matter is primarily one of construction. The Act is remedial (*Craies on Statute Law*, 4th ed. (1936), pp. 175-178; *Charlesworth, Law of Negligence*, (1938), p. 486; *Leggott v. Great Northern Railway Co.* (12)). An action in contract will survive to the extent, but only to the extent, that damage is done to the estate of a deceased person (*Finlay v. Chirney* (13); *Quirk v. Thomas* (14); *Salmond on Torts*, 7th ed. (1928), p. 92). Those authorities show that although the cause of action might survive damages for the personal injury of the deceased could not be obtained. That result was obtained by a gloss on the *actio personalis* rule. The rule in *Baker v. Bolton* (15) in application becomes complicated. The idea of damages surviving as distinct from the cause of action surviving has not been clearly held. The cause of action under the Act is neither tortious nor contractual; it does not bear any relation to the cause of action the deceased might have had.

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(1) (1844) 11 Cl. & F. 1, at pp. 30, 44
[8 E.R. 1003, at pp. 1014, 1018,
1019].

(2) (1842) 11 L.J. Ex. 437, at pp. 439,
440.

(3) (1820) 2 Brod. & B. 102 [129 E.R.
896].

(4) (1909) 10 C.L.R. 89, at pp. 106-
110.

(5) (1936) 1 K.B. 399.

(6) (1873) L.R. 8 Ex. 88, at p. 5.

(7) (1905) A.C. 239, at p. 253.

(8) (1935) 152 L.T. 589.

(9) (1937) 1 K.B., at p. 70.

(10) (1875) L.R. 10 C.P. 189, at pp.
192, 194, 195.

(11) (1935) 53 C.L.R. 273, at pp. 276,
277.

(12) (1876) 1 Q.B.D. 599, at p. 605.

(13) (1888) 20 Q.B.D. 494, at pp. 498,
502-506.

(14) (1916) 1 K.B. 516, at p. 530.

(15) (1808) 1 Camp. 493 [170 E.R.
1033].

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Menzies K.C., in reply. The word “wrongful” as used in the operative part of Lord Campbell’s Act is defined in the preamble to that Act. In a remedial Act the recital of the general intention of parliament is of great importance and value. *Actio personalis* applies to tort and, except in certain anomalous cases which do not include this case, it does not apply to contract. Where the substantial ground is contract the plaintiff cannot by declaring in tort render somebody liable who would not otherwise have been liable (*Green v. Greenbank* (1)). The important element is the substance of the case (*Stuart v. Wilkins* (2)). Rights which arise from breach of contract and are not actionable in tort do not come within the scope and operation of the *Compensation to Relatives Act* 1897-1928. *Marzetti v. Williams* (3) and *Burnett v. Lynch* (4) were decided on the ground that the foundation of the claims was in contract.

Cur. adv. vult.

Dec. 17.

The following written judgments were delivered:—

LATHAM C.J. This is an appeal from a judgment of the Full Court of the Supreme Court of New South Wales refusing to set aside a verdict for the plaintiff (respondent in this appeal) in an action against the defendant (appellant) under the *Compensation to Relatives Act* 1897-1928 (Lord Campbell’s Act) to recover damages for herself and her husband caused by the death of her son. The question which arises upon the appeal is whether Lord Campbell’s Act applies in cases where death is brought about by a breach of contract, or whether the Act is limited to cases where death is the result of a tort.

The jury answered certain questions, and it is not contended that there was not evidence to support the answers given. From these answers, read in the light of the evidence, it appears that the plaintiff’s daughter bought an electric light globe from the defendant on behalf of her brother. Her brother used the globe. The globe was imperfectly constructed and the result was that the brother was electrocuted and died. The jury found that the defendant company impliedly warranted that the globe was fit for the purpose to which it was subsequently put by the deceased and that it was not reasonably fit for such purpose. Accordingly, the facts brought the case within the *Sale of Goods Act* 1923-1937, sec. 19 (1)—implied condition of reasonable fitness for a purpose made known to the seller, the facts

(1) (1816) 2 Marsh C.P. 485.

(2) (1778) 1 Doug. 18 [99 E.R. 15].

(3) (1830) 1 B. & Ad. 415 [109 E.R. 842].

(4) (1826) 5 B. & C. 589 [108 E.R. 220].

showing that the buyer relied on the seller's skill or judgment, the goods being of a description which it is in the course of the seller's business to supply. The jury gave a verdict for the plaintiff for £331 19s. 6d. There was no finding of negligence or other breach of duty creating a liability in tort. Thus the verdict depends entirely upon breach of contract and not upon tort.

The Full Court held that the *Compensation to Relatives Act*, which reproduced Lord Campbell's Act, applied to cases of breach of contract, and accordingly that the verdict should stand. The appellant contests this decision, and this is the only question which is raised upon the appeal, another ground depending upon unreasonable or illegal user of the electric light bulb by the deceased having been abandoned.

There is no direct authority upon the question. In the case of *Grein v. Imperial Airways Ltd.* (1), the subject was mentioned in the judgments of *Greene L.J.* and *Greer L.J.* It was held by the majority of the Court, *Greene L.J.* and *Talbot J.*, that Lord Campbell's Act did not apply to the case, but *Greene L.J.* "with some hesitation" expressed the opinion that a breach of contract causing death might be "a wrongful act neglect or default" within the meaning of Lord Campbell's Act. *Greer L.J.*, who was the dissenting judge, expressed the same opinion, but limited it to breaches of contracts to take care, that is, to negligent breaches of contract. Only one of the judges constituting the majority expressed any opinion, and that a doubtful one, upon the subject, and no decision upon the question was required for the determination of the case. Accordingly, this case cannot be regarded as an authority upon the question.

It will be convenient in the first place to set out the words of sec. 1 of the Act as enacted in Lord Campbell's Act (9 & 10 Vict. c. 93—1846) and as reproduced in 11 Vict. No. 32—1847 (N.S.W.):—
 "Whereas no action at law is now maintainable against a person who by his wrongful act neglect or default may have caused the death of another person and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him Be it therefore enacted by His Excellency the Governor of New South Wales with the advice and consent of the Legislative Council thereof That whensoever the death of a person shall be caused by a wrongful act neglect or default and the act neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof then and in every such case the

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(1) (1937) 1 K.B. 50.

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person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.”

The recital contained in the section has not been reproduced in the *Compensation to Relatives Act* 1897-1928, but both parties to the appeal have argued the case (in my opinion rightly) upon the assumption that the recital may be considered for the purpose of resolving ambiguity, if any, in the enacting part of the Act (*Crowder v. Stewart* (1); *Attorney-General v. Lamplough* (2)).

The argument for the appellant may be put in the following propositions :—

(1) The words of the Act are fully applicable to cases of tort, but are not applicable to cases of breach of contract.

(2) The Act applies only in cases where no action at law was maintainable against a person who had wrongfully (to use a general term) caused the death of another person. This appears both from the recital and from the enacting words of the section. If in any case such an action at law could have been maintained and damages could have been recovered in respect of the death, the Act has no application to that case.

(3) In the case of breaches of contract causing death, an action at law was maintainable by the legal personal representative of the deceased and damages could be recovered in respect of death. Death was never part of a cause of action in any action of contract, but only possibly an element in assessing damages.

(4) It was otherwise in cases of tort because in such cases the *damnum*, which might include death, was part of the cause of action, and any remedy was excluded both by the rule *actio personalis moritur cum persona* and by the principle declared in *Baker v. Bolton* (3) that at common law it was not a civil wrong to cause the death of a human being and that, if a tort did cause such a death, there was no remedy for any of the personal injuries suffered by the deceased in consequence of the wrongful act.

The respondent, on the other hand, contends :—

(1) The words of the Act, in their natural meaning, apply as well to breaches of contract as to torts.

(2) Even if the Act were limited to torts, certain breaches of contract, including, in particular, breaches of implied warranty upon the sale of goods, were, at the time when the Act was passed, actionable as torts, and the Act therefore gave a remedy (which did not before exist) in the case of such torts.

(1) (1880) 16 Ch. D. 368, at p. 370.

(2) (1878) 3 Ex. D. 214, at p. 227.

(3) (1808) 1 Camp. 493 [170 E.R. 1033].

The recital contained in sec. 1 as originally enacted shows that the Act is dealing with cases in which, after the death of a person, no action was maintainable against the person who had caused the death by a wrongful act, neglect or default. The recital also stated that it was oftentimes right and expedient that the wrongdoer in such a case should be answerable in damages for the injury so caused by him. The Act was accordingly directed to giving damages in cases where otherwise the death of the person injured would have prevented any action being brought and any damages being obtained. Accordingly it was enacted that whensoever the death of a person should be caused by a wrongful act, neglect, or default and that act, neglect, or default was such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then the liability under the Act should attach. That liability is described as liability to an action for damages notwithstanding the death and although the death might have been caused under such circumstances as amounted in law to felony. Sec. 2 stated that the action should be for the benefit of the wife, husband, parent and child of the person whose death had been caused and that the damages should be proportionate to the injury resulting from the death to such persons.

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Thus conditions of the applicability of the Act are :—

- (1) The case must be one where no action at law was maintainable.
- (2) The wrongful act, &c., caused death.
- (3) If death had not ensued the party injured would have been entitled both to maintain an action and to recover damages.

Further, (4) it is immaterial that the death may have been caused under such circumstances as amount in law to felony.

It is necessary first to determine whether and in what cases an action at law was maintainable at the time when the Act was passed against a person who, either by a tort or by a breach of contract, caused the death of another person. The Act was intended to deal with *other* cases, i.e. where no such action was maintainable, but where it was right and expedient that a wrongdoer should be answerable in damages.

In the present case it is not necessary to consider questions which may arise where a wrongdoer has died. This judgment is intended to deal only with questions arising by reason of the death of a person where death has been caused by the “wrongful act, neglect, or default” of another person who is still in existence.

Of course, a person who has died cannot bring an action for his own death, simply because he is dead and cannot bring an action for anything, and not by reason of the application of any rule of

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law. The question can arise only in relation to actions by his personal representatives or by third parties who, in some manner, complain of the death as an injury or damage to them.

It is necessary in this connection to consider two rules of law which have been the subject of much controversy. That controversy may be studied in *Holdsworth, History of English Law*, in the passages to which the Court has been referred and also, to some extent, in the leading works upon tort and contract. The first rule is *actio personalis moritur cum persona*—a personal action dies with the person, whether that person be regarded as a possible plaintiff or as a possible defendant. In this case we are concerned with the position of a possible plaintiff, that is the deceased person, who was a party to the obligation sought to be enforced. The rule has no application to proceedings between persons who are both themselves parties to the alleged obligation for the breach of which a remedy is sought, though the death of a third person may be of significance (under the second rule now to be mentioned) in determining whether any remedy is available in such a case.

The second rule is the rule in *Baker v. Bolton* (1) that “in a civil court the death of a human being cannot be complained of as an injury.” *Baker v. Bolton* (1) was a case in which a husband sued the proprietors of a stage coach for damages caused to him by the death of his wife. It was an action of tort (negligence), and Lord *Ellenborough* C.J. laid down the rule which I have stated, adding: “In this case the damages as to the plaintiff’s wife must stop with the period of her existence”. I propose to consider these two rules in relation to both tort and breach of contract.

I. *The rule actio personalis moritur cum persona in relation to tort.*—In *Rose v. Ford* (2) Lord *Atkin* states the rule in the form: “Claims for personal injuries caused by tort by the common law did not survive to the executor.” Similarly Lord *Wright* (3) refers to the rule expressed in the maxim *actio personalis moritur cum persona* as being “the rule preventing the prosecution of a claim in tort for personal injuries where the person who would otherwise be plaintiff or defendant in an action has died.” In *Benham v. Gambling* (4) Viscount *Simon* L.C. said that the actual purport of the maxim *actio personalis* &c. was that “under the common law of England it was the general rule that no executor or administrator could sue, or be sued, for any tort committed against or by the deceased in his lifetime.”

(1) (1808) 1 Camp. 493 [170 E.R. 1033].

(2) (1937) A.C., at p. 833.

(3) (1937) A.C., at p. 841.

(4) (1941) A.C., at p. 160.

But the rule did not entirely exclude damages in tort, even where death had been caused by the wrongful act. It applied only to personal injuries (including death) of the deceased, even in tort. The common law was originally as stated in the maxim, but, before the *Fatal Accidents Act* was passed, exceptions to the maxim had been introduced by the common law and by statute ; for example, detinue or ejectment would lie where the property of a person who had died had come wrongfully into the hands of another person, and a wrongdoer could be made liable in *indebitatus assumpsit* for pecuniary profits resulting to him from his misappropriation. Also, the action of trespass on the case would lie where the tort had damaged the property of a deceased person : See *Finlay v. Chirney* (1), per Bowen L.J. ; *Pollock on Torts*, 14th ed. (1939), p. 53 ; *Phillips v. Homfray* (2) ; as to statutes, see 4 Edw. III. c. 7 ; 25 Edw. III. stat. 5 c. 5 ; 3 & 4 William IV. c. 42.

Thus the effect of the maxim *actio personalis* in relation to actions of tort was that the personal representatives of the deceased victim of a tort had no remedy in respect of the pain and suffering, or the death of the deceased, though, by common law exceptions and by statute they had certain rights to recover damages caused to his property by a tort, even though he had died. There was, obviously and admittedly, room for Lord Campbell's Act to operate by giving a remedy of some kind to some persons in relation to damages which were not damages to the estate of the deceased.

II. *The rule actio personalis moritur cum persona in relation to breach of contract.*—The rule applied in the earliest days in the case of all obligations, whether arising by tort or contract : See per Bowen L.J. in *Finlay v. Chirney* (3), distinguishing between the older English law and the law of recent times. See also *Street, Foundations of Legal Liability*, (1906), vol. III., c. vi. On the other hand, in *Williams on Executors*, 11th ed. (1921), vol. I., p. 619, it is stated that the rule of the common law that *actio personalis moritur cum persona* “seems never to have been applied by the old authorities to causes of action on contracts.” Whatever the true historical position may be, it is at least now clear that, as stated in *Williams on Executors*, 11th ed. (1921), vol. I., p. 619, the maxim does not apply (and for some centuries has not applied) to prevent the survival of causes of action on contracts, so that “the personal representative may sue, by the common law, not only for all debts due to the deceased by specialty or otherwise, but for all covenants and indeed all contracts with the testator *broken in his lifetime*.” This

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(1) (1888) 20 Q.B.D., at p. 504.

(2) (1883) 24 Ch. D. 439.

(3) (1888) 20 Q.B.D., at p. 503.

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proposition is stated in the most general terms in *Thursby v. Plant* (1)—See also *Benham v. Gambling* (2): the maxim *actio personalis* “is, of course, not true, generally speaking, of causes of action arising out of contract.”

It does not follow, however, that, in cases where death was caused by a breach of contract, the remedy in damages was not affected by the fact of death. The event of death in itself could hardly conceivably be a breach of contract so as to be a cause of action. But a breach of contract might cause the death of a person, and in such a case the question would arise whether any damages following from the death could be recovered. It was held that only limited damages were recoverable: See *Williams on Executors*, 11th ed. (1921), vol. 1, p. 618:—“If the executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may well sustain an action, at common law, to recover such damage, although the action is in some sort founded on a tort.” *Knights v. Quarles* (3) is an example of such an action. This was an action of assumpsit by the representatives of a deceased person against an attorney for negligence in investigating a title. It was argued that the action, though in form *ex contractu*, was in substance *ex delicto*: but the court held that “the whole transaction rested in contract” and, there being an allegation of damage to the personal estate of the deceased, overruled a demurrer to the declaration. In this case, however, no question arose of a breach of contract causing death.

In the case of personal injuries to a deceased person resulting from an act constituting a breach of contract, there was a limitation upon the damages recoverable. Damages were not recoverable in respect of personal injuries such as personal suffering or death, but only in respect of injury to the personal estate of the deceased. In *Chamberlain v. Williamson* (4), Lord *Ellenborough* said: “Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate” (5). The action was one of assumpsit (breach of promise of marriage), and the observation quoted was made in relation to all implied promises to a deceased person, where the damage consisted in personal suffering as distinct from damage to the property of the deceased. This proposition was applied to all cases of breach of

(1) (1669) 1 Wms. & Saund. 237, at p. 240 [85 E.R. 268, at p. 270].

(2) (1941) A.C., at p. 160.

(3) (1820) 2 Brod. & B. 102 [129 E.R. 896].

(4) (1814) 2 M. & S. 408 [105 E.R. 433].

(5) (1814) 2 M. & S., at p. 415 [105 E.R., at p. 436].

contract causing only personal injuries, as distinct from damage to the estate: See *Williams on Executors*, 11th ed. (1921), vol. 1, pp. 619, 620.

Thus there were cases of breach of contract causing personal injury in which there was no remedy in damages for certain damages which in fact flowed from the breach where death had resulted. There was accordingly in these cases scope for remedial action by legislation.

III. *The rule in Baker v. Bolton* (1) *in relation to tort*.—The rule in *Baker v. Bolton* (1) must now be taken to be thoroughly established (*Admiralty Commissioners v. S.S. Amerika* (2)), notwithstanding the criticisms which are to be found in *Holdsworth, History of English Law*, 4th ed. (1935), vol. III., pp. 336, 676.

The rule as stated by Lord *Ellenborough* was that “in a civil court the death of a human being cannot be complained of as an injury” (1). Lord *Atkin* stated the rule in *Rose v. Ford* (3), in the following form: “The law did not recognize the death of a person as giving a claim for damages.” As Lord *Atkin* pointed out, this rule has no application to the death of a supposed plaintiff. In cases of tort the maxim *actio personalis* prevented his personal representatives from suing in such a case. The rule in *Baker v. Bolton* (1) applies to prevent an action by A against B for damages for the death of C, caused by the tortious act of B. In other words, the rule dealt (so far as the subject of tort is concerned) with the question of the right of a third party to recover compensation for loss incurred by him as the result of the death of a person killed by the defendant’s tortious act: See *Pollock on Torts*, 14th ed. (1939), p. 53.

Actions of tort in general (there are exceptions in the case of injury to proprietary rights) are based upon a breach of duty, plus damage. There must be both *injuria* and *damnum*. For example, mere negligence is never a cause of action; it must also cause damage in order to found an action of tort. This is the basis of the decision in *Jackson v. Watson & Sons* (4). In that case *Vaughan Williams* L.J., referring to *Osborn v. Gillett* (5), said: “*Pigott* B., who delivered the first judgment, says: ‘The ruling was, that the death of any human being could not be complained of as an injury—i.e., as an actionable injury’ (6). He cannot mean here that death was the cause of action, for it seems to me that he must mean that the death of any human being cannot be included or complained of as an

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(1) (1808) 1 Camp. 493 [170 E.R. 1033].

(2) (1917) A.C. 38.

(3) (1937) A.C., at p. 833.

(4) (1909) 2 K.B. 193.

(5) (1873) L.R. 8 Ex. 88.

(6) (1873) L.R. 8 Ex., at p. 92.

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element of damage" (1). Where a tortfeasor by his wrongful act causes the death of a person and that death causes damage to a third person, the third person has no cause of action where the tort against the deceased person was not a tort against the third person, because in such a case the third person cannot establish any breach of duty to himself. But even if in some particular case there should be a breach of duty for which a remedy would ordinarily be obtainable in an action of tort, the rule in *Baker v. Bolton* (2) prevented recovery of damages flowing from the death.

Accordingly, consideration of the application of the rule in *Baker v. Bolton* (2) to cases of tort shows plainly that there was room for remedial action by way of legislation by giving a right of action for the benefit of some persons who had suffered damage from the death of another person caused by an act which was wrongful in relation to that person, but not wrongful in relation to other persons. Admittedly the Act deals with such cases.

IV. *The rule in Baker v. Bolton* (2) in relation to breach of contract.—I repeat that the death of a man can hardly in itself be a breach of contract (though, of course, it may be a condition upon which obligations arise under a contract, for example, in a contract of life insurance). There could, therefore, be no cause of action in contract for the death of a person as a breach of contract.

It would seem, at first sight, that the rule in *Baker v. Bolton* (2) would prevent a claim for any damages which arose from the death of a person brought about by a breach of contract. But the contrary has been held in the case of *Jackson v. Watson & Sons* (3), which has been favourably mentioned in *Rose v. Ford* (4). In *Jackson v. Watson & Sons* (3) an action was brought for a breach of warranty that tinned salmon sold by the defendants to the plaintiff was unfit for human consumption. The plaintiff included a claim for damages for the loss of services of his wife, who had died in consequence of eating the salmon. It was held that the death was not an essential part of the cause of action, but only an element in ascertaining damages, and that *Baker v. Bolton* (2) did not prevent damages being recoverable for the loss of the services of the wife. It is pointed out in the judgments (5) that in an action for breach of contract it is unnecessary to prove damage, and that the plaintiff is entitled to nominal damages if he establishes a breach of contractual duty. (The case is, as already stated, different (with exceptions not material to the questions now arising) in tort.) It was held that the plaintiff

(1) (1909) 2 K.B., at pp. 198, 199.

(2) (1808) 1 Camp. 493 [170 E.R. 1033].

(3) (1909) 2 K.B. 193.

(4) (1937) A.C., at pp. 851, 854.

(5) (1909) 2 K.B., at pp. 199, 203, 207.

had a right of action, founded upon the breach of contract, and not upon the death of his wife, and that the principle of *Baker v. Bolton* (1) did not apply to prevent him recovering damages caused by her death.

But *Jackson v. Watson & Sons* (2) was a case of a living person suing a living person in respect of damages resulting from the breach of a contract made between the plaintiff and the defendant where the breach of contract caused the death of a third person. The case does not deal with the position which arises where the death of a person is caused by a breach of a contract with that person and where the death brings about loss to others—as in the case before the Court upon this appeal. The legal personal representatives of the deceased had no right of action in such a case for reasons which have been stated, unless the breach of contract caused damage to the estate of the deceased. The rule *actio personalis* did not apply to prevent the executors altogether from suing for damages in such a case, but it limited the damages to damage to the estate. There was obviously no right of action in other persons, such as the husband or wife of the deceased, who might suffer damage by the death, but who, even with the limitation or explanation of the rule in *Baker v. Bolton* (1) given in *Jackson v. Watson & Sons* (2), could not bring any action, for the simple reason that they were not parties to the contract which the deceased person had made with the defendant.

The law with respect to a claim by the representatives of a deceased person in relation to his death, whether brought about by a tort, or by a breach of contract, is summarized in the following passage, which I quote from *Quirk v. Thomas* (3):—“If the *persona mortua* be the claimant, his executor cannot obtain any benefit for his estate by acquiring damages which would have been given only as compensation to the living man for injury to his body or to his character. And this rule applies equally whether the claim arises in respect of some tortious injury or in respect of a breach of contract, such as that of a railway company to carry carefully or of a surgeon to perform an operation skilfully. But if the tort or the breach of contract occasion damage to the dead man’s property the executor can recover damages, limited to compensation for this special loss.”

Accordingly, in the case of death resulting from breach of contract, the application of the rule in *Baker v. Bolton* (1) was such as to leave room for remedial action by way of legislation.

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(1) (1808) 1 Camp. 493 [170 E.R. 1033].

(2) (1909) 2 K.B. 193.

(3) (1916) 1 K.B., at p. 530.

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The above analysis shows, in my opinion, that there were cases of breach of a contract made with a deceased person in which no action was maintainable for damages in relation to his personal injuries such as pain and suffering or in relation to his death. This obviously and admittedly has always been the position in the case of tort. The reality and the extent of loss suffered by relatives of a deceased man would be the same whether the act, neglect, or default which caused his death was a tort or a breach of contract. Thus there is no *a priori* reason why Lord Campbell's Act should not be equally applicable in both cases.

Lord Campbell's Act deals only with the case of death, not with personal injuries not resulting in death, or with damages for such personal injury, such as pain and suffering, even where death resulted. It created an entirely new cause of action in the representatives of a deceased person. The action was for the benefit of specified dependants who had suffered pecuniary loss by his death, but who could not complain that the defendant had committed a tort as against them, or that he had broken any contract with them. It was a condition of the right of action that the deceased would have had a right of action, if death had not ensued, to recover damages in respect of the wrongful act, neglect, or default which was the cause of the death. But the right of action given to his executors is quite distinct from any right of action that the deceased would have had. It is a purely statutory creation for the purpose of filling what was regarded as a gap in the law (*Blake v. Midland Railway Co.* (1)).

For the reasons which I have stated, the contention of the appellant that there was really no room for the operation of Lord Campbell's Act in cases of breach of contract because the law had already provided a remedy in such cases, so that it could not be said that an action was not maintainable for damages in those cases, is a contention which should not be accepted. The mischief for which the Act was intended to provide a remedy appears from the recital of the Act: See *Craies on Statute Law*, 4th ed. (1936), pp. 41 *et seq.* Where the legislature has stated the mischief for which the common law did not provide, consideration of the nature and extent of that mischief is relevant to the interpretation of the Act (rule 2 in *Heydon's Case* (2)). In my opinion breaches of contract are within the mischief with which the Act was intended to deal. This view is not displaced by, but is consistent with, the law as

(1) (1852) 18 Q.B. 93, at p. 110 [118 E.R. 35, at p. 41].

(2) (1584) 3 Co. Rep. 7a [76 E.R. 637].

stated in *Jackson v. Watson & Sons* (1), upon which the appellant relied.

The respondent has quoted authorities to show that, at least up to the date of the passing of Lord Campbell's Act in 1846, actions such as the present (for breach of implied warranty), which would now be regarded as entirely contractual actions, could be brought as actions of tort. Upon this contention an argument has been founded to the effect that, as Lord Campbell's Act admittedly provided a remedy in cases of the tortious causation of death, therefore the Act should be construed as providing a remedy in cases of the contractual, but also tortious, description mentioned. I am unable to attach weight to this argument. Even if accepted, it shows no more than that in some cases of breach of warranty a plaintiff might have declared either in tort or in assumpsit. It does not show that, if a plaintiff chooses to declare as upon a contract, his action is not to be regarded as an action based on contract for the purposes of the application of an Act assumed (for the purposes of this argument) to be dealing only with cases of tort, except perhaps in the exceptional case of a breach of promise of marriage, which is treated upon a special basis as containing an element of tort: see *Finlay v. Chirney* (2). It is, however, unnecessary to examine this question in detail, as the reasons which I have stated lead to the conclusion that, if the language of the Act is capable of being applied to actions based upon breach of contract, it should be so applied.

In my opinion the language of the Act is capable of being applied to the case of death resulting from breach of contract. The words are very general. "Wrongful act" is a term which in a perfectly natural meaning can be applied to breaches of contract as well as to torts. There is the authority of the House of Lords for saying that a breach of contract is a legal wrong (*South Wales Miners' Federation v. Glamorgan Coal Co. Ltd.* (3)). So also a breach of contract may fall within the heading of neglect or default, as where a party either fails, that is neglects, to perform a contractual duty, or makes default in performing it, either by completely failing to perform it, or by performing it in an insufficient or imperfect manner. The Act is upon its face a remedial measure, and, as the Chief Justice of New South Wales said in his judgment, quoting from *In re Coal Economising Gas Co. (Gover's Case)* (4), should be so construed "as to give the most complete remedy which the phraseology will permit."

For these reasons, I am of opinion that the judgment of the Supreme Court was right. The appeal should be dismissed.

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(1) (1909) 2 K.B. 193.

(2) (1888) 20 Q.B.D., at pp. 498, 504.

(3) (1905) A.C. 239, at p. 253.

(4) (1875) 1 Ch. D. 182, at p. 198.

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RICH J. As I agree substantially with the judgment of *Jordan* C.J. I can state my opinion very shortly.

Before the Supreme Court two questions were argued, but before us Mr. *Menzies* very properly declined to argue them, so that the question raised by the present appeal lies in a very small compass and turns upon the proper construction of the provisions of Lord Campbell's Act (9 & 10 Vict. c. 93) as embodied in the New South Wales *Compensation to Relatives Act* 1897-1928.

I do not think that much if any help towards the solution of the question is to be gained by exploring the dusty recesses of black-letter law to see how far assumpsit and case (in its ordinary sense) were once associated, or by speculating whether in the minds of legislators in the year of grace 1846 the action of assumpsit still had a delictual smack about it. The question is one of construction and it is not, I think, necessary to appeal to legal history. Without in any way detracting from the industry of counsel in their researches, I am not unmindful of "the dangers of hastily acquiring" (historical) "knowledge for a special occasion" (Sir *William Holdsworth, History of English Law*, 4th ed. (1935), vol. 3, p. 336). Lord Campbell's Act was a remedial Act. From its preamble it was evidently designed to meet and remedy a class of case of special hardship caused by the operation of the rule *actio personalis moritur cum persona* in preventing the recovery of damages for injury arising from death. The rule had this effect whether death had been caused by tort or breach of contract. The language of the statute, which by its express terms is designed to remedy this defect of the common law, is large enough to embrace death arising from either type of default. In *Doe d. Dacre v. Dacre* (1) *Eyre* C.J. said: "I do not know a larger or looser word than 'default' . . . In its largest and most general sense it seems to mean, failing." It is a relative term and takes its colour from the context. For instance, in the case of an absolute sale of goods the failure on the part of a vendor to perform what he had to perform constitutes default (*In re Woods and Lewis' Contract* (2)). "Default" means not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction (*In re Bayley-Worthington and Cohen's Contract* (3)). Similarly, in *Grein v. Imperial Airways Ltd.* (4), *Greene* M.R. says: "The word 'default' is a word of wide signification and in its ordinary use does, I think, include a breach of contract." This dictum, together with

(1) (1798) 1 B. & P. 250, at p. 258
[126 E.R. 887, at pp. 891, 892.]

(2) (1898) 1 Ch. 433, at p. 435.

(3) (1909) 1 Ch. 648, at p. 658.

(4) (1937) 1 K.B., at p. 88.

that cited by *Jordan C.J.* from the judgment of *Grove J.* in *Bradshaw v. Lancashire and Yorkshire Railway Co.* (1), are significant indications of the trend of present day opinion on this subject. The declaration in the last-mentioned case was framed in contract in an action by an executrix against the railway company for breach of a contract to carry the testator safely, whereby his estate sustained pecuniary loss, the testator having ultimately died as the result of the accident.

In these circumstances it would, in my opinion, be contrary to principle and to authority to treat the fact that, in other contexts, some, but by no means all, of the phraseology used might be regarded as more appropriate to tort than to contract, as sufficient to indicate an intention on the part of the legislature to limit the beneficial operation of the statute to part only of the field in which it is intended to operate.

For these reasons I am of opinion that the appeal should be dismissed with costs.

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McTIERNAN J. I agree that the appeal should be dismissed.

The question for decision is whether this action is authorized by the *Compensation to Relatives Act* 1897-1928 (N.S.W.), or, more particularly, whether each count in the declaration that went to the jury discloses matter in respect of which the appellant is liable to an action brought for the benefit of the deceased's parents.

The first count was based on sec. 19 (1) of the *Sale of Goods Act* 1923-1937 of New South Wales. It alleged a breach of the condition implied by that sub-section, that is, that the electric light globe was reasonably fit for the particular purpose for which it was required, and a breach of the condition whereby the deceased man was killed in the course of using the globe for that purpose. The second count alleged a breach of a warranty in the same terms as the above-mentioned condition and the same fatal consequences. The fourth count is based on sec. 19 (2) of the *Sale of Goods Act* 1923. It alleged a breach of a warranty that the globe was of merchantable quality, resulting in the same fatality. The counts for breach of warranty might have been framed in tort: See *Bullen and Leake's Precedents of Pleading*, 3rd ed. (1868), p. 333. Secs. 3 and 4 of the above-mentioned Act, under which the action purports to be brought, are derived from Lord Campbell's Act 1846.

The breach alleged in each count would have been actionable by the deceased if it had caused injury, not fatal injury. It was decided that at common law no action could be brought by the executor or administrator to recover damages for the injury done to

(1) (1875) L.R. 10 C.P., at p. 192.

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the deceased by causing his death, nor could any action be brought by any relative or any other person having an interest in the life of the deceased to recover compensation for the pecuniary loss which he sustained by the death (*Baker v. Bolton* (1); *Admiralty Commissioners v. S.S. Amerika* (2))—see also *Osborn v. Gillett* (3); *Clark v. London General Omnibus Co. Ltd.* (4); *Flint v. Lovell* (5); *Rose v. Ford* (6)—Cf. *Jackson v. Watson & Sons* (7). In the present case the deceased's parents, for whose benefit this action is brought, would under common law suffer the disadvantages which according to Lord Sumner's statement in the case of the *S.S. Amerika* (8) Lord Campbell's Act was passed to remove. After reading the terms of secs. 3 and 4 of the *Compensation to Relatives Act* 1897-1928 it is clear that all the conditions are present in this case which are necessary for the application of each section if the words "wrongful act, neglect, or default" include a breach of contract resulting in death.

In *Bradshaw v. Lancashire and Yorkshire Railway Co.* (9) the Court decided that Lord Campbell's Act did not abrogate the rule of common law that where a person, who was injured by an accident resulting from a breach of contract, after an interval died his executor might recover in an action for breach of contract the damage to his personal estate arising in his life from the breach. An instance of such a claim is noticed in the case of *Knights v. Quarles* (10). In reaching their decision in the case of *Bradshaw v. Lancashire and Yorkshire Railway Co.* (9) the judges affirmed the proposition for which the present respondent contends. Grove J. asked this question: "Does the fact that, in this case, besides the injury to the estate, the testator's death has likewise resulted from the breach of contract, make any difference, or does the fact, that provision has been made in such cases for compensation in respect of the death to certain relatives by Lord Campbell's Act, take away any right of action that the executrix would have had apart from the Act? It does not seem to me that the Act has that effect, either expressly or by necessary implication" (11). Denman J. said: "The action is for a breach of contract occurring in the life-time of the testator, but which ultimately caused his death. And it was urged that the case fell within Lord Campbell's Act, that the only action that could be brought was under that Act, and that these damages could not be recovered as damages

(1) (1808) 1 Camp. 493 [170 E.R. 1033].

(2) (1917) A.C. 38.

(3) (1873) L.R. 8 Ex. 88.

(4) (1906) 2 K.B. 648.

(5) (1935) 1 K.B. 354, at pp. 367, 368.

(6) (1937) A.C. 826.

(7) (1909) 2 K.B. 193.

(8) (1917) A.C., at p. 51.

(9) (1875) L.R. 10 C.P. 189.

(10) (1820) 2 Brod. & B. 102 [129 E.R. 896].

(11) (1875) L.R. 10 C.P., at p. 192.

to the estate. This appears, no doubt, to be the first case of similar damages being sued for in an action like the present, but there is considerable authority for holding as we do" (1). There is no subsequent authority denying the proposition which both *Grove* and *Denman* JJ. seem to have conceded, that Lord Campbell's Act applies where death results from breach of contract. There are dicta supporting it (*Grein v. Imperial Airways Ltd.* (2))—See also *Henwood v. Municipal Tramways Trust (S.A.)* (3), where *Latham* C.J. noticed the inclination manifested by the Court of Appeal in that case. The authorities which Mr. *Barwick* cited show that the words "default" and "wrongful default" are not in their ordinary meaning just equivalents for "tort" and the word "wrongdoer" for tortfeasor. "Default" and "wrongful default" include a breach of contract, and "wrongdoer" a person guilty of a breach of contract.

In my opinion all the conditions necessary to entitle the respondent to maintain the action under the *Compensation to Relatives Act* 1897-1928 are present. There is a wrongful default causing death which is such that if the deceased had not been fatally injured he would have been entitled to maintain an action and recover damages in respect of such default.

Appeal dismissed with costs.

Solicitors for the appellant, *Ernest Cohen & Linton.*
Solicitor for the respondent, *R. J. L. Hickson.*

J. B.

(1) (1875) L.R. 10 C.P., at p. 194. (2) (1937) 1 K.B., at pp. 70, 88.
(3) (1938) 60 C.L.R., at p. 444.

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