[HIGH COURT OF AUSTRALIA.]

AUSTRALIAN IRON AND STEEL LIMITED . APPELLANT; DEFENDANT,

AND

RYAN . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1956-1957.

SYDNEY, 1956, *Nov.* 13, 14; 1957, *May* 3.

Williams, Webb, Fullagar Kitto and Taylor JJ.

Action—Duty imposed by regulation—Breach—Person thereby injured—Validity of regulation—Whether private right of action created—Scaffolding and Lifts Act 1912-1948 (*N.S.W.*) (*No.* 38 *of* 1912—*No.* 38 *of* 1948), *s.* 22 (2) (*g*) (*v*)—*Scaffolding and Lifts Regulations, reg.* 73 (2) (5).

Section 22 (2) of the *Scaffolding and Lifts Act* 1912-1948 (N.S.W.) provides: "Without limiting the generality of the powers conferred by sub-s. one of this section the Governor may make regulations—(g) relating to (v) safeguards and measures to be taken for securing the safety and health of persons engaged in building work, excavation work or compressed air work, or at or in connection with cranes, hoists, lifts, plant, scaffolding or gear." Regulation 73 of the *Scaffolding and Lifts Regulations* provides: "Any person who directly or by his servants or agents carries out any building work shall take all measures that appear necessary or advisable to minimise accident risk and to prevent injury to the health of persons engaged in such building work and for this purpose, without limiting the generality of the foregoing, he shall (*inter alia*) —(2) provide and maintain safe means of access to every place at which any person has to work at any time, . . . (5) keep all stairways, corridors and passageways free from loose materials and debris, building materials, supplies and obstructions of every kind."

Held, (1) that reg. 73 (2) and (5) was within the power conferred by s. 22 (2) (g) (v) of the said Act;

(2) that the regulation was such as to confer private rights upon a person engaged in building work who is injured by its breach.

Decision of the Supreme Court of New South Wales (Full Court): *Ryan* v. *Australian Iron & Steel Ltd.* (1956) S.R. (N.S.W.) 329; 73 W.N. 432, affirmed.

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APPEAL from the Supreme Court of New South Wales.

On 2nd November 1954 Edward John Ryan issued a writ out of the Supreme Court of New South Wales against Australian Iron and Steel Limited claiming damages for injuries sustained by him whilst engaged on building work as an employee of the defendant. The declaration, so far as is here material, alleged as follows :— 2. For that before and at the time of the happening of the grievances hereinafter alleged and at all material times the defendant by itself its servants and agents was carrying out certain building work and employed the plaintiff to work therein and thereupon the defendant failed to provide safe means of access to a place at which the plaintiff had to work whereby the plaintiff was thrown down under a certain mobile crane and was wounded and injured and suffered and will suffer great pain of body and of mind and lost and will lose the wages which he otherwise could and would have earned and incurred and will incur expense for medical hospital and other care and attention and was otherwise greatly damnified. 3. And the plaintiff as aforesaid sues the defendant as aforesaid for that before and at the time of the grievances hereinafter alleged and at all material times the defendant by itself its servants and agents was carrying out certain building work and employed the plaintiff to work therein and thereupon the defendant failed to keep all passage-ways free from debris and obstructions whereby the plaintiff was thrown down under a certain mobile crane and was wounded and injured and suffered and will suffer great pain of body and of mind and lost and will lose the wages which he otherwise could and would have earned and incurred and will incur expense for medical hospital and other care and attention and was otherwise greatly damnified.

To these counts in the declaration the defendant demurred and indicated that the matters of law intended to be argued on the hearing of the demurrer were as follows :—(1) That no breach of statutory duty is alleged. (2) That s. 22 of the *Scaffolding and Lifts Act* does not empower the Governor to create by regulations new obligations the breach whereof would give rise to an action for damages. (3) That the breaches of regulation alleged in the second and third counts do not create civil obligations. (4) That reg. 73 is bad *in toto* for uncertainty.

The plaintiff by his joinder in demurrer claimed that the second and third counts and each of them were good in substance and the demurrer was set down for argument.

The demurrer came on for argument before the Full Court of the Supreme Court (*Roper* C.J. in Eq., *Ferguson* and *Manning* JJ.)

which on 18th June 1956 ordered that judgment on the demurrer be entered for the plaintiff: *Ryan* v. *Australian Iron & Steel Ltd.* (1).

From this decision the defendant by special leave granted on 20th August 1956 appealed to the High Court.

Sir *Garfield Barwick* Q.C. (with him *C. Langsworth*), for the appellant. In determining whether a private cause of action is given considerations applicable in the case of Acts are quite inapposite to the case of regulations. To see whether a statute gives a cause of action, it is a matter of construing the statute with the idea of imputing an intention to the legislature, which it is quite competent to have. It is otherwise in the case of a regulation made by the Governor; the first question is authority, the second, consideration similar to those in the case of the legislature. [He referred to *Cutler* v. *Wandsworth Stadium Ltd.* (2).] That passage draws attention to the prima facie position that the method of enforcement prescribed by a statute is exclusive, and in the case of delegated legislation the question *in limine* is whether the delegate may prescribe a method of enforcement. If a delegate is authorised to enforce his laws by a penalty, that is the exclusive method of enforcement. There would be no ground for applying to the delegate those ideas by way of exception from the general rule in the case of an Act, because the whole sub-stratum of the exception is that the omnipotent legislature had power to have an additional method of enforcement. [He referred to the *Scaffolding and Lifts Act* 1912, ss. 7, 8, 9, 18 and *O'Connor* v. *S. P. Bray Ltd.* (3).] The observations just cited are concerned solely with a statute and it is important to realise that in *O'Connor's Case* (4) the regulations there were contained in a schedule to the Act itself. [He referred to Act No. 35 of 1942 and Act No. 38 of 1948.] The structure of ss. 7, 8 and 9 and the schedule of regulations in the 1912 Act is replaced by a power to make regulations not inconsistent with the Act. A power to make regulations does not enable the delegate to create causes of action, merely because the statute itself creates causes of action. In any event the Act as amended is not concerned with the creation of causes of action. The general scope of the present regulations shows that they are not intended to create causes of action but are rather a code of desirable conditions to be observed, and provision is made in the person of inspectors and others to see that they are observed. No cause of action arises for failure to observe reg. 73, in the first place because the Act does not authorise the regulation

(1) (1956) S.R. (N.S.W.) 329; 73 W.N. 432.
(2) (1949) A.C. 398, at p. 407.
(3) (1937) 56 C.L.R. 464, at pp. 477, 484.
(4) (1937) 56 C.L.R. 464.

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which created a cause of action as its mode of enforcement. The dominant function of delegation to the Executive to make regulations is to enable them to be made for the purpose of carrying out and giving effect to the Act, and in relation to this Act it cannot be said that the creation of causes of action is a mode of carrying it into effect. Secondly, the regulation itself does not intend to create a cause of action : see regs. 5 and 74 which are strong reasons against the inference of a cause of action. The generality of the opening words of the regulation is strongly against an intention to create a cause of action. There is no room for saying, as the court below said, that whereas the opening words of reg. 73 do not because of their generality and want of certainty intend to create a cause of action, yet the particulars inserted thereafter do. The particulars are tied to the opening general words by the expression " and for this purpose " and the particulars cannot create an intention if the opening words do not. Regulation 73 is itself invalid as not being within s. 22 (2) in that it is uncertain to the point where it is not in law and therefore is unauthorised. [He referred to *Kruse* v. *Johnson* (1) ; *Ex parte Zietsch* ; *Re Craig* (2) ; *King Gee Clothing Co. Pty. Ltd.* v. *The Commonwealth* (3) ; *Parry* v. *Osborn* (4).] By reason of the presence of regs. 5 and 74, reg. 73 is invalid. There is no room in the authority to make regulations so to provide for the dispensation there to be found. The judgment below should be set aside.

J. R. Kerr Q.C. (with him *H. H. Glass*), for the respondent. If upon the examination of a statute as a whole it is found to create duties both public and private, then there will be a common law remedy unless a contrary intention is to be found in the statute. What is to be sought is not an intention to create the remedy but an intention to displace the operation of the common law and to prevent breach of that private duty from having its natural consequence, a cause of action at common law. [He referred to *O'Connor* v. *S. P. Bray Ltd.* (5).] If the Governor has power to create duties of a certain kind he creates them with all their legal incidence unless they are displaced. Here what has been authorised by the statute is the power to create private duties, to create obligations for the benefit of individuals within a class, and once those duties have been created they have efficacy because of the operation of the statute. Once the duty is created, the common law steps in and provides a remedy for breach of that duty. To prevent

(1) (1898) 2 Q.B. 91, at p. 108.
(2) (1944) 44 S.R. (N.S.W.) 360 ; 61 W.N. 211.
(3) (1945) 71 C.L.R. 184, at p. 195.
(4) (1955) V.L.R. 152.
(5) (1937) 56 C.L.R., at pp. 477, 478.

this situation arising, it is necessary to find a power given to the Governor to prevent the operation of the common law. No power has here been given to the Governor to prevent the normal consequences of the creation of private duties, namely the existence of a cause of action at common law. It is not relevant to the determination of the question whether or not civil rights exist, to know how the criminal penalty is fixed—whether it is in the Act or in the regulation. [He referred to *Couch* v. *Steel* (1); *Atkinson* v. *Newcastle & Gateshead Waterworks Co.* (2); *Cowley* v. *Newmarket Local Board* (3); *Butler* (*or Black*) v. *Fife Coal Co. Ltd.* (4); *London Passenger Transport Board* v. *Upson* (5).] Throughout these cases there is a general common law principle that the common law remedy will always be available unless a contrary intention is to be found in the statute itself. That being the principle, two tasks are undertaken at the level of the statute, the first to ascertain whether the statute creates only public duties or duties which are both public and private. Having ascertained that private as well as public duties are created, a common law remedy for breach exists unless the statute indicates a contrary intention. Authority such as that already cited shows that where safety measures are involved, the imposition of a penalty is not to be regarded as a contrary intention. [He referred to *Potts* v. *Reid* (6).] The act of the Governor is subjected to the same interpretation as is that of the legislature. There is nothing on the face of the present regulations to indicate that the Governor did not intend to create civil rights, and it is necessary to find such an indication. It is profitless to look at the wide sweep of regulations to find some which clearly could or do not create civil rights and then to say because of the presence of such regulations no civil rights could have been intended. The individual regulation must be examined and effect given to its normal consequences. Even if the opening words of reg. 73 are somewhat general in terms the obligations in sub-regs. (2) and (5) are clear and specific and can be enforced with precision. Such obligations are not rendered vague or uncertain by the introductory words. The appeal should be dismissed.

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

(1) (1854) 3 El. & Bl. 402, at pp. 411, 412 [118 E.R. 1193, at pp. 1196, 1197].
(2) (1877) 2 Exch. D. 441, at pp. 448, 449.
(3) (1892) A.C. 345, at pp. 351, 352.
(4) (1912) A.C. 149, at p. 165.
(5) (1949) A.C. 155, at p. 167.
(6) (1943) A.C. 1, at pp. 10, 11.

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1957, May 3.

The following written judgments were delivered :—

WILLIAMS J. This is an appeal by leave from an order of the Full Supreme Court of New South Wales that judgment in demurrer be entered for the plaintiff. The order was made in an action in which the plaintiff, Ryan, intended to sue the defendant company, the present appellant, for damages in respect of injuries alleged to have been caused by the failure of the defendant to perform the duties imposed upon it by sub-regs. (2) and (5) of reg. 73 of the regulations made under the *Scaffolding and Lifts Act* 1912-1948 (N.S.W.). The demurrer came on for hearing before *Roper* C.J. in Eq., *Ferguson* and *Manning* JJ. and it soon became apparent, as in the case of *Long* v. *Darling Island Stevedoring and Lighterage Company Ltd.* (1), that the two counts in the declaration were, as was the one count in that case, quite inadequate to allege the causes of action on which the plaintiff intended to rely. Their Honours in their joint reasons for judgment referred to the serious deficiency of the demurrer book to raise the real questions of law at issue between the parties and to an agreement by counsel that the counts should be read as properly alleging breaches of these sub-regulations (2). But, as in *Long's Case* (3), no amendments were actually made to the pleadings to cure this deficiency. One can agree whole-heartedly except for its moderation with the statement in the joint reasons that in the event of an appeal it is preferable that the appellate tribunal should have regard to the pleadings to see what were the issues decided, rather than to the fallible recollection of counsel.

Their Honours said that the substantial question raised by the demurrer was whether the sub-regulations in question or either of them confer civil remedies on persons injured by the breach thereof without the necessity of proving negligence. Their Honours then proceeded to discuss a number of questions which have been discussed by us in *Long's Case* (4) and that discussion need not be repeated. Regulation 73 of the *Scaffolding and Lifts Regulations* is the first regulation in Pt. V—a Part which is intituled " Safeguards and measures to be taken for securing the safety and health of persons engaged in building work ". The regulation provides that " Any person who directly or by his servants or agents carries out any building work shall take all measures that appear necessary

(1) (1956) S.R. (N.S.W.) 387; 73 W.N. 570.
(2) (1956) S.R. (N.S.W.) 329, at pp. 330-332; 73 W.N. 432, at pp. 432-434.
(3) (1956) S.R. (N.S.W.) 387; 73 W.N. 570.
(4) (1957) 97 C.L.R. 36.

or advisable to minimise accident risk and to prevent injury to the health of persons engaged in such building work and for this purpose, without limiting the generality of the foregoing, he shall (*inter alia*)—(2) provide and maintain safe means of access to every place at which any person has to work at any time; (5) keep all stairways, corridors and passageways free from loose materials and debris, building materials, supplies and obstructions of every kind." It can be said of these two sub-paragraphs (and it is with these sub-paragraphs only that we are concerned) that each of them creates duties of the kind that are likely to create a civil right in favour of persons liable to suffer injury if they are not performed correlative to the extent of the duty for the breach of which the persons who fail to perform them can be prosecuted. But the same objections were raised to the existence of such a correlative right in a regulation as were raised to its existence in reg. 31 of the *Navigation* (*Loading and Unloading*) *Regulations* in *Long's Case* (1). These objections were all disposed of by the Supreme Court adversely to the defendant and have been similarly disposed of by this Court in *Long's Case* (2). They may be summed up as contentions that the two sub-regulations gave the plaintiff no civil rights of action because the *Scaffolding and Lifts Act* under which they were made did not empower the Governor-General to make regulations which could be enforced otherwise than by penalties not exceeding fifty pounds for any breach thereof.

The power to make regulations is contained in s. 22 of that Act. It authorises the Governor in Council to make regulations relating to "(g) (iv) the manner of carrying out building work, excavation work or compressed air work; (v) safeguards and measures to be taken for securing the safety and health of persons engaged in building work, excavation work or compressed air work, or at or in connection with cranes, hoists, lifts, plant, scaffolding or gear." Section 22 also provides that "(4) A regulation may impose a penalty not exceeding fifty pounds for any breach thereof." The two sub-regulations under challenge fall well within the ambit of these regulation-making powers. They are regulations which impose duties intended to safeguard the safety of persons engaged in building work and they are regulations which require specific precautions to be taken which if not observed may cause such persons to suffer injury. Unlike reg. 31 of the *Navigation* (*Loading and Unloading*) *Regulations* they are imposed on the employer

(1) (1956) S.R. (N.S.W.) 387; 73 W.N. 570.

(2) (1957) 97 C.L.R. 36.

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personally and he is therefore under a duty to see that they are observed not only by himself but also by his servants and agents and even by independent contractors. The contention that regulations such as these duly made under a delegated power should not be construed so as to create the correlative civil right which they would create if a statute was passed to the same effect has already been discussed and disposed of in *Long's Case* (1). The general opening words of reg. 73 were criticised as being too vague and uncertain to be a valid exercise of the power to make regulations conferred on the Governor in Council and even if valid too vague and uncertain to create any definite civil right of action. We are not concerned with the validity or effect of these general words. We are only concerned with two specific sub-regulations the language of which is not imprecise. They are in themselves separate and independent exercises of the regulation-making power and well within its terms. They are just as precise as many of the regulations made under Imperial statutes which have been held to create a civil cause of action. Their Honours of the Supreme Court were right in deciding all the questions of law in favour of the plaintiff and the appeal should be dismissed.

WEBB J. I would dismiss this appeal for the reasons given by *Williams* J.

FULLAGAR J. For reasons which appear in the course of what I have said in *Darling Island Stevedoring & Lighterage Co. Ltd.* v. *Long* (1) I am of the opinion that this appeal should be dismissed.

KITTO J. Sub-regulations (2) and (5) of reg. 73 made under the *Scaffolding and Lifts Act* 1912-1948 (N.S.W.) provide that any person who, directly or by his servants or agents, carries out any building work shall provide and maintain safe means of access to every place at which any person has to work at any time, and shall keep all stairways, corridors and passageways free from loose materials and debris, building materials, supplies and obstructions of every kind.

The decision of the Supreme Court of New South Wales (2) which is the subject of this appeal is that an action will lie for damages for injuries caused to a person engaged in building work by infringements of these provisions.

(1) (1957) 97 C.L.R. 36.

(2) (1956) S.R. (N.S.W.) 329; 73 W.N. 432.

Regulation 73 is found in Pt. V of the *Regulations* (*Rules and Regulations*, 1950, p. 164), the general heading of the Part being "Safeguards and measures to be taken for securing the safety and health of persons engaged in building work". These words are taken from s. 22 (2) (g) (v) of the Act, which authorises the making of regulations relating to such safeguards and measures. A contention on the part of the appellant was that the express provisions of sub-regs. (2) and (5) were not within the power thus conferred, having regard especially to a degree of uncertainty which was attributed to them in the context in which they appear. I am unable, however, to see any reason to doubt their validity. I adopt what has been said on this point in the judgment of the Supreme Court.

It is clear enough, I think, that if the provisions of sub-regs. (2) and (5) of reg. 73 had appeared in the Act itself the law would have treated them, even though the Act had provided a penalty for breach, as implying that private rights to their due observance should exist, and would accordingly have given damages to "persons engaged in building work" who should be injured by their non-observance. The contrary could hardly be maintained in view of what was said by *Dixon*, *Evatt* and *McTiernan* JJ. in *O'Connor* v. *S. P. Bray Ltd.* (1). *Mutatis mutandis*, some words of Lord *Kinnear* in *Black* v. *Fife Coal Co. Ltd.* (2) which were approved by Lord *Simonds* and Lord *Normand* in *Cutler* v. *Wandsworth Stadium Ltd.* (3) would have been exactly in point: "Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention" (4).

The provisions, however, are not contained in the Act. They are only in a regulation. The Act provides in s. 22 (4) that a regulation may impose a penalty not exceeding £50 for any breach thereof, and the regulations in fact provide for a penalty for any breach of their provisions: reg. 164. The major premiss of the appellant's argument seems to be that before it can be held that a breach of a regulation entitles a person injured thereby to recover damages two steps must be taken: first there must be found

(1) (1937) 56 C.L.R. 464.
(2) (1912) A.C. 149.
(3) (1949) A.C. 398, at pp. 407-408, 413.
(4) (1912) A.C., at p. 165.

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expressed or implied by the language of the regulation an intention on the part of the Executive to give to the persons for whose protection the provisions are made a right to recover damages for injuries resulting from breach; and secondly it must be found that the regulation-making power authorises the Executive to make regulations manifesting such an intention. The minor premiss is that upon a consideration of the regulation and the Act here in question these steps cannot be taken—indeed, that neither of them can be taken. It was along such lines that the Full Court of New South Wales appears to have considered a similar problem in *Haylan* v. *Purcell* (1).

The major premiss, however, is based upon the false assumption that the existence of a private right to the observance of specific requirements of a law depends upon there being discovered by a process of verbal interpretation a disclosure of a positive intention to create such a right. That the assumption cannot be supported may be seen from many cases, including those which have been cited, showing that in respect of a provision contained in an Act an implication that private rights are created does not necessarily, or even generally, depend upon discerning in the words used a manifestation of an actual intention on the part of the draftsman to create such rights. It depends, of course, on "a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted": per Lord *Simonds* in *Cutler* v. *Wandsworth Stadium Ltd.* (2); but, as is indicated by the words of Lord *Kinnear* which I have quoted, it is generally in a consideration of what the provision does, in the nature and purpose of the provision, that the law finds its warrant for making the implication. Thus Lord *Reid* in *Grant* v. *National Coal Board* (3) said: "The question whether an employer is liable to an employee for injuries caused to him by breach of a statutory duty depends on whether there can be implied from the terms of the statute imposing the duty an enactment that the employer shall be so liable. In general that is implied from the enactment of a duty in the interest of the safety of employees" (4). Then what of a regulation such as we have here to consider? The hypothesis must be, and it is the case here, that the express provisions of the regulation are within the regulation-making power. Their operation, then, is authorised. But if so, it must follow that any implication which such an operation warrants is authorised also. In the last analysis, it is upon

(1) (1948) 49 S.R. (N.S.W.) 1; 65 W.N. 228.
(2) (1949) A.C., at p. 407.
(3) (1956) A.C. 649.
(4) (1956) A.C., at p. 659.

the true construction of the statutory provision which authorises the regulations and gives them the force of law that the conclusion depends that a private right to compliance with the regulations exists.

In my opinion the conclusion reached by the Supreme Court was right, and the appeal should be dismissed.

TAYLOR J. In my opinion this appeal should be dismissed. I agree entirely with the reasons of the Full Court and have no wish to add to them.

Appeal dismissed with costs.

Solicitors for the appellant, *Dawson, Waldron, Edwards & Nicholls.*
Solicitors for the respondent, *J. R. McClelland & Co.*

R. A. H.