Most Negative Treatment: Not followed
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1983 CarswellNat 92
Supreme Court of Canada

R. v. Saskatchewan Wheat Pool

1983 CarswellNat 521, 1983 CarswellNat 92, [1983] 1 S.C.R. 205, [1983] 3 W.W.R. 97, [1983] S.C.J. No. 14, 143 D.L.R. (3d) 9, 18 A.C.W.S. (2d) 133, 23 C.C.L.T. 121, 45 N.R. 425, J.E. 83-246

R. IN RIGHT OF CANADA v. SASKATCHEWAN WHEAT POOL

Dickson, Ritchie, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

Heard: February 17, 1982
Judgment: February 8, 1983

Counsel: *H.B. Monk, Q.C., E.I. MacDonald, Q.C.*, and *D. Sagoo*, for appellant.
E.J. Moss, Q.C., and *B. Shourounis*, for respondent.

Subject: Torts; Public
Related Abridgment Classifications
Commercial law
IV Agricultural products
IV.2 Regulation of grain
IV.2.d Offences
IV.2.d.ii Miscellaneous
Headnote
Grain Laws --- Regulation of grain — Offences — Miscellaneous offences
Negligence — Particular types of negligence — Statutory negligence — Civil consequences for statutory breach to be subsumed in law of negligence — Proof of statutory breach may be evidence of negligence — Statutory duty may be standard of reasonable conduct.
Grain laws — Dominion Grain Acts — Storage in elevators — Wheat pool supplying infested grain — Canadian Wheat Board not entitled to damages for cost of fumigation.
Negligence — Strict liability: Rule in Rylands v. Fletcher — Breach of statutory duty — Breach of statutory duty per se not conferring civil right of action.
The Saskatchewan Wheat Pool operated terminal elevators where grain was received, weighed, graded and placed in bins pending shipment. When grain was so received, a receipt was issued to the Canadian Wheat Board entitling the board to delivery of grain of the same grade and quantity. The pool subsequently loaded wheat onto a ship pursuant to receipts surrendered by the board. After the ship had sailed, it was discovered that the wheat was insect-infested. The board directed that the ship be diverted, unloaded and fumigated, and claimed recovery of the cost of the diversion from the pool. The Federal Court trial judge found for the board on the basis that the pool had a litigable duty to the board pursuant to s. 86(*c*) of the Canada Grain Act which prohibits the discharge of infested grain. The pool's appeal to the Federal Court of Appeal was allowed and the board then appealed to the Supreme Court of Canada.
Held:
Appeal dismissed.

Breach of s. 86(*c*) of the Act did not confer upon the board a civil right of action against the pool for damages. The court concluded that: (a) civil consequences for statutory breach should be subsumed in the law of negligence; (b) the notion of a tort of statutory breach should be rejected; (c) proof of statutory breach may be evidence of negligence; (d) the statutory formulation of the duty may afford a standard of reasonable conduct; (e) as negligence was neither pleaded not proven the action must fail.

Table of Authorities

Cases considered:

Atkinson v. Newcastle Waterworks Co., [1877] 2 Ex. D. 441 (C.A.) — *considered*

Black v. Fife Coal Co. Ltd., [1912] A.C. 149 (H.L.) — *considered*

C.P. Air Lines Ltd. v. R., [1979] 1 F.C. 39, 87 D.L.R. (3d) 511, *(*sub nom. *C.P. Airlines Ltd. v. Can.)* 21 N.R. 340 (C.A.) — *referred to*

Couch v. Steel (1854), 3 E. & B. 402, 118 E.R. 1193 — *considered*

Cutler v. Wandsworth Stadium Ltd., [1949] A.C. 398, [1949] 1 All E.R. 544 (H.L.) — *considered*

Doe d. Rochester v. Bridges (1831), 1 B. & Ad. 847, 109 D.L.R. (3d) 1001*considered*

London Passenger Tpt. Bd. v. Upson, [1949] A.C. 155, [1949] 1 All E.R. 60 (H.L) — *considered*

Pasmore v. Oswaldtwistle Urban Council, [1898] A.C. 387 (H.L.) — *referred to*

Queensway Tank Lines Ltd. v. Moise, [1970] 1 O.R. 535, 9 D.L.R. (3d) 30 (C.A.) — *referred to*

Sterling Trusts Corp. v. Postma, [1965] S.C.R. 324, 48 D.L.R. (2d) 423 — *considered*

Statutes considered:

Canada Grain Act, 1970-71-72 (Can.), c. 7, ss. 13(1) [repealed 1980-81-82-83, c. 17, s. 13(2)], 61(1), 86(*c*).

Canadian Wheat Board Act, R.S.C. 1970, c. C-12.

Authorities considered:

Comyn's Digest, F, Action upon Statute by the Party grieved.

Fleming, "More Thoughts on Loss Distribution" (1966), 4 Osgoode Hall L.J. 161.

Fleming, The Law of Torts, 5th ed. (1977), pp. 123, 124, 125.

Fricke, "The Judicial Nature of the Action upon the Statute" (1960), 76 L.Q.R. 240.

Holmes, The Common Law (1881), p. 50.

Linden, Comment on *Sterling Trusts Corp. v. Postma* (1967), 45 Can. Bar Rev. 121, p. 126.

Morris, "The Relation of Criminal Statutes to Tort Liability" (1932-33), 46 Harvard L. Rev. 453, p. 460.

Prosser, Law of Torts, 4th ed. (1971), pp. 191-92, 200, 201.

Restatement of the Law, Second, Torts 2d (1965), vol. 2, pp. 25, para. 286; 32-33, para. 288A(2); 37, para. 288B.

Salmond on Torts, 17th ed. (1977), p. 243.

Street, Law of Tort, 2nd ed. (1959), p. 273.

Thayer, "Public Wrong and Private Action" (1913-14), 27 Harvard L. Rev. 317, p. 323.

Williams, "The Effect of Penal Legislation in the Law of Tort" (1960), 23 Modern L. Rev. 233, p. 246.

Winfield and Jolowicz, Tort, 11th ed. (1979), pp. 154, 159.

Words and phrases considered:

NEGLIGENCE

Tort law itself has undergone a major transformation in this century with nominate torts being eclipsed by negligence, the closest the common law has come to a general theory of civil responsibility. The concept of duty of care, embodied in the neighbour principle has expanded into areas hitherto untouched by tort law.

STATUTORY BREACH

In sum I conclude that:

1. Civil consequence of breach of statute should be subsumed in the law of negligence.

2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence per se giving rise to absolute liability.

3. Proof of statutory breach, causative of damages, may be evidence of negligence.

4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.

5. In the case at Bar negligence is neither pleaded nor proven. The action must fail.

Appeal from judgment of Federal Court of Appeal, 117 D.L.R. (3d) 70, 34 N.R. 74, allowing appeal, [1980] 1 F.C. 407, [1979] 6 W.W.R. 16, 104 D.L.R. (3d) 392, from judgment awarding damages for breach of statutory duty.

The judgment of the court was delivered by *Dickson J*:

1 This case raises the difficult issue of the relation of a breach of a statutory duty to a civil cause of action. Where "A" has breached a statutory duty causing injury to "B", does "B" have a civil cause of action against "A"? If so, is "A's" liability absolute, in the sense that it exists independently of fault, or is "A" free from liability if the failure to perform the duty is through no fault of his? In these proceedings the Canadian Wheat Board (the board) is seeking to recover damages from the Saskatchewan Wheat Pool (the pool) for delivery of infested grain out of a terminal elevator contrary to s. 86(*c*) of the Canada Grain Act, 1970-71-72 (Can.), c. 7.

I

The Facts

2 The respondent pool is a grain dealer and operates licensed primary country grain elevators in Saskatchewan. It also operates eight licensed terminal elevators at the port of Thunder Bay in Ontario where grain is received from Western Canada for export or shipment further east. There was no evidence adduced as to any contract or agreement between the board and the pool relating to terminal elevators or their operation. There was, however, a "handling agreement" between the board and the pool in respect of the country elevators. Pursuant to the handling agreement, dated 4th September 1975, the pool agreed to act as an agent of the board to accept delivery of, and to carry out the purchase of, grain. The board is an agent of the Crown and is authorized under the Canadian Wheat Board Act, R.S.C. 1970, c. C-12, to buy, sell and market wheat, oats and barley, grown in Western Canada, for marketing in interprovincial and export trade. In designated areas (including Saskatchewan) it is obliged to purchase all wheat produced and offered for sale and delivery. Such grain is placed in storage at a primary elevator; it is not required to be stored separately from other grain. At the request of the board, wheat of the same grade and in the same quantity as that originally purchased is shipped by the pool and other elevator companies from the primary elevators to the terminal elevators of the pool and other licensed terminal elevator operators. Substantially all the grain that comes into the pool's terminal elevators comes from agents of the board. The quantities are large. The grain received by the pool at Thunder Bay varied from 100 railway carloads a day in January to 600 or 700 carloads a day in September. Each carload, upon arrival at the terminal elevator, has a sample taken from it by inspectors employed by the Canadian Grain Commission. These samples are visually scrutinized for insect infestation. Adult rusty beetles can sometimes be detected by visual inspection but not always. A berlase funnel

test is performed to reveal infestation from rusty beetle larvae. This test takes from four to six hours to complete. It is performed only on about 10 per cent of the grain cars entering the terminal elevator. It cannot be conducted on the spot. It is done at the headquarter offices of the Canadian Grain Commission in Thunder Bay. The results are not known for two or three days. By the time the results are known, the grain could be either in the terminal elevator or on a ship.

3 Upon arrival at the terminal elevator, the grain is weighed, graded and binned under the supervision of inspectors of the Canadian Grain Commission and a terminal elevator receipt is issued to the primary elevator operator. The primary elevator operator endorses, if necessary, and delivers this receipt to the board or its agents against payment for the grain.

4 The terminal elevator receipt is a negotiable instrument and passes from hand to hand by endorsement and delivery. It reads in part:

> Received in store in our terminal named above, subject to the order of the above named consignee, Canadian grain of grade and quantity as shown hereon. Like grade and quantity will be delivered to the holder hereof upon surrender of this receipt properly endorsed and upon payment of all lawful charges due to the above named terminal company.

5 The dispute in this case arises from an infestation of rusty grain beetle larvae. On 19th September 1975 the board surrendered to the pool terminal elevator receipts for a quantity of No. 3 Canada Utility Wheat at Thunder Bay and gave directions for the wheat to be loaded onto the vessel Frankcliffe Hall. On 22nd and 23rd September No. 3 Canada Utility Wheat and other wheat was loaded from the pool's terminal elevator 8 into the vessel which sailed on 23rd September 1975. During the loading routine samples were taken from the wheat. This wheat was loaded under the scrutiny of the Canadian Grain Commission's inspectors as well as the scrutiny of the pool's representatives. At the loading no one had any knowledge that the grain was infested with rusty beetle larvae. The exact cause of the infestation was not and could not be known. Visual inspection revealed no infestation. A berlase funnel test, however, conducted at the Grain Commission's headquarters after the ship had sailed, disclosed an infestation of rusty grain beetle larvae in the 273,569 bushels of wheat loaded into holds 5 and 6. This was the first rusty beetle larvae infestation known to occur in a ship. The Canadian Grain Commission ordered the board to fumigate the affected wheat. The board directed the Frankcliffe Hall to be diverted to Kingston for fumigation and was obliged to pay the vessel owner and the elevator operator at Kingston $98,261.55, comprising detention claims, cost of unloading and reloading the grain and fumigation of the grain and holds. It is this amount which the board is now claiming from the Saskatchewan Wheat Pool.

6 The board makes no claim in negligence. It relies entirely on what it alleges to be a statutory breach. It is common ground that the board received grain of the kind, grade and quantity to which it was entitled.

II

The Judicial History

(a) At Trial

7 At trial, Collier J. in the Federal Court [[1980] 1 F.C. 407, [1979] 6 W.W.R. 16 at 23, 104 D.L.R. (3d) 392] gave judgment in favour of the board on the basis that, considering the Canada Grain Act as a whole, s. 86(*c*) of the Act, which prohibits the delivery of infested grain out of a grain elevator, "point[ed] to a litigable duty on the defendants, enforceable by persons injured or aggrieved by a breach of that duty". The judge also found the statutory duty to be absolute and not qualified; evidence of reasonable care on the part of the defendant, although possibly a good answer to a criminal charge, was not sufficient to absolve the pool of civil liability.

(b) On Appeal

8 The pool appealed to the Federal Court of Appeal. The decision at trial was reversed in a unanimous judgment given by Heald J. [117 D.L.R. (3d) 70, 34 N.R. 74]. He referred to s. 13(1) of the Canadian Wheat Board Act, which provides in part that every elevator shall be operated for and on behalf of the board. He found that the Canada Grain

Act was not intended to benefit any particular class of persons; it is a statute to regulate the grain industry and protect the public interest since that industry is an important matter to Canada as a whole; it is legislation imposing general duties and obligations in respect of the production, marketing and quality control of one of Canada's most important primary products; and is in the same category as the legislation considered in *C.P. Air Lines Ltd. v. R.*, [1979] 1 F.C. 39, 87 D.L.R. (3d) 511, (sub nom. *C.P. Airlines Ltd. v. Can.*) 21 N.R. 340 (C.A.). The board could not rely on a breach of the statute in order to found a civil cause of action. The court concluded that the Act did not impose an absolute duty upon operators of elevators, and reached the ultimate finding that the Canada Grain Act does not grant a private right of action to persons who suffer loss resulting from breach of a statutory duty imposed by that Act. Generally, the court disagreed with Collier J.'s conclusions on the intent and object of the Canada Grain Act.

9 The appellant board, in essence, alleges two errors in the Court of Appeal decision. The first is quite trivial and I am in agreement with the respondent that there is no reliance upon s. 13(1) [repealed 1980-81-82-83, c. 17, s. 13(2)] of the Act (which has not yet been proclaimed in force) to support the final decision, although the section is mentioned in the course of the reasons.

10 The second error, should it be such, is fundamental. Did breach of s. 86(*c*) of the Canada Grain Act, delivery of infested grain, confer upon the board a civil right of action against the pool for damages?

III

Statutory Breach Giving Rise to a Civil Cause of Action

(a) General

11 The uncertainty and confusion in the relation between breach of statute and a civil cause of action for damages arising from the breach is of long standing. The commentators have little but harsh words for the unhappy state of affairs, but arriving at a solution, from the disarray of cases, is extraordinarily difficult. It is doubtful that any general principle or rationale can be found in the authorities to resolve all of the issues or even those which are transcendent.

12 There does seem to be general agreement that the breach of a statutory provision which causes damage to an individual should in some way be pertinent to recovery of compensation for the damage. Two very different forces, however, have been acting in opposite directions. In the United States the civil consequences of breach of statute have been subsumed in the law of negligence. On the other hand, we have witnessed in England the painful emergence of a new nominate tort of statutory breach. This court was given the opportunity to choose between the two positions in *Sterling Trusts Corp. v. Postma*, [1965] S.C.R. 324 at 329, 48 D.L.R. (2d) 423, (per Cartwright J.) but did not find it necessary for the determination of that case to attempt the difficult task:

> There have been differences of opinion as to whether an action for breach of a statutory duty which involves the notion of taking precautions to prevent injury is more accurately described as an action for negligence or in the manner suggested by Lord Wright in *Upson's* case [*London Passenger Tpt. Bd. v. Upson*, [1949] A.C. 155, [1949] 1 All E.R. 60 (H.L.)] at p. 168, in the following words:
>
> > A claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction. It is not a claim in negligence in the strict or ordinary sense ...
>
> I do not find it necessary in this case to attempt to choose between these two views as to how this cause of action should be described.

It is now imperative for this court to choose.

(b) The English Position

13 In 1948 in the case of *London Passenger Tpt. Bd. v. Upson*, supra, in the passage quoted above, cited by Cartwright J., the House of Lords affirmed the existence of a tort of statutory breach distinct from any issue of negligence. The statute prescribes the duty owed to the plaintiff who need only show (i) breach of the statute, and (ii) damage caused by the breach.

14 Legitimacy for this civil action for breach of statute has been sought in the Statute of Westminster II, 1285 (13 Edw. 1), c. 50, which provided for a private remedy by action on the case to those affected by the breach of statutory duties.

15 However, "Old though it may be, the action upon the statute has rarely been the subject of careful scrutiny in English law, and its precise judicial character remains a thing of some obscurity": Fricke, "The Juridical Nature of the Action upon the Statute" (1960), 76 L.Q.R. 240. As the gap widened between "public" and "private" law with the passing centuries, this broad general right of action, enigmatic as it was, became hedged. Where a public law penalty was provided for in the statute a private civil cause of action would not automatically arise. The oft-quoted formulation of this principle was found in *Doe d. Rochester v. Bridges* (1831), 1 B. & Ad. 847, 109 E.R. 1001 at 1006:

> And where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

16 Although taken out of context, the dictum served the purpose of limiting the multiplication of suits of dubious value. "With the vast increase in legislative activity of modern times, if the old rule were still law it might lead to unjust, not to say absurd, results in creating liabilities wider than the legislature can possibly have intended": Winfield and Jolowicz, Tort, 11th ed. (1979), at p. 154. By the end of the nineteenth century, however, the civil action on the statute began to revive as a response to industrial safety legislation. The statement of the doctrine propounded in *Doe d. Rochester v. Bridges* did not enjoy a long period of acceptance. *Couch v. Steel* (1854), 3 E. & B. 402, 118 E.R. 1193, marked the beginning of a new era of construction. Lord Campbell C.J., relying on statements in Comyn's Digest [F, Action upon Statute by the Party grieved], concluded that the injured party has a common law right to maintain an action for special damage arising from the breach of a public duty. *Couch v. Steel* was questioned some twenty years later in *Atkinson v. Newcastle Waterworks Co.*, [1877] 2 Ex. D. 441 (C.A.). Lord Cairns L.C. dealing with the matter apart from authority concluded that the private remedy had been excluded. He expressed "grave doubts" whether the authorities cited by Lord Campbell in *Couch v. Steel* justified the broad general rule there laid down. Lord Cockburn C.J. agreed that the correctness of *Couch v. Steel* was "open to very grave doubts", while Brett L.J. entertained the "strongest doubt" as to the correctness of the broad general rule enunciated in *Couch v. Steel.*

17 As Street puts it [Law of Torts, 2nd ed. (1959), p. 273]:

> The effect of the leading cases in the nineteenth century (which remain important authorities), however, was to make the cause of action rest on proof that the legislature intended that violation of the right or interest conferred by the statute was to be treated as tortious.

18 Fricke pointed out (at p. 260) that that doctrine "leads to many difficulties. In the first place it is not clear what the prima facie rule or presumption should be." Some cases suggest that prima facie an action is given by the statement of a statutory duty, and that it exists unless it can be said to be taken away by any provisions to be found in the Act. Other authorities suggest the prima facie rule is that the specific statement of a certain manner of enforcement excludes any other means of enforcement. Sometimes the courts jump one way, sometimes the other. Fricke concluded (pp. 263-64) that:

> As a matter of pure statutory construction, the law went wrong with the decision in 1854 in *Couch v. Steel*.

> If one is concerned with the intrinsic question of interpreting the legislative will as reflected within the four corners of a document which makes express provision of a fine, but makes no mention of any civil remedy, one is compelled to the conclusion that a civil remedy was not intended.

Presence or absence of public law penalties was not determinative of the existence of a civil cause of action; all depended upon "the intention of the legislature" [*Atkinson v. Newcastle Waterworks Co.*, supra, at p. 448, per Lord Cairns L.C.]:

> But I must venture, with great respect to the learned judges who decided that case [*Couch v. Steel*] and particularly to Lord Campbell, to express grave doubts whether the authorities cited by Lord Campbell justify the broad general proposition that appears to have been there laid down, — that, whenever a statutory duty is created, any person, who can shew that he has sustained injuries from the non-performance of that duty, can bring an action for damages against the person on whom the duty is imposed. I cannot but think that that must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed, and more especially when, as here, the Act with which the Court have to deal is not an Act of public and general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works.

19 To the "scope and language" of the Act, Lord Macnaghten added "considerations of policy and convenience": *Pasmore v. Oswaldtwistle Urban Council*, [1898] A.C. 387 at 397-98 (H.L.). Thus, policy and convenience dictated that borough councils remiss in their statutory duties be protected from ruinous suits at the instance of irate ratepayers while employers, in breach of industrial safety legislation, be liable to their injured workmen [*Black v. Fife Coal Co. Ltd.*, [1912] A.C. 149 at 165-66 (H.L.), per Lord Kinnear]:

> There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson v. Newcastle Waterworks Co.* and by Lord Herschell in *Cowley v. Newmarket Loc. Bd.*, [1892] A.C. 345 (H.L.), solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make the 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. Therefore, I think it is quite impossible to hold that the penalty clause detracts in any way from the prima facie right of the persons for whose benefit the statutory enactment has been passed to enforce civil liability.

Writing in 1960 ["The Effect of Penal Legislation in the Law of Tort", 23 Modern L. Rev. 233] Glanville Williams stated that:

> The present position of penal legislation in the civil law ... may be oversimplified into two generalisations. When it concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases it is ignored. There are exceptions both ways, but, broadly speaking, that is how the law appears from the current decisions.

20 This fragmentation of approach has given rise to some theoretical, and some not-so-theoretical, difficulties. The pretence of seeking what has been called a "will o' the wisp", a non-existent intention of Parliament to create a civil cause of action, has been harshly criticized. It is capricious and arbitrary, "judicial legislation" at its very worst [Winfield and Jolowicz p. 159]:

> Not only does it involve an unnecessary fiction, but it may lead to decisions being made on the basis of insignificant details of phraseology instead of matters of substance. If the question whether a person injured by breach of a statutory obligation is to have a right of action for damages is in truth a question to be decided by the court, let it be acknowledged as such and some useful principles of law developed.

It is a "bare faced fiction" at odds with accepted canons of statutory interpretation [Fleming, The Law of Torts, 5th ed. (1977), p. 123]: "the legislature's silence on the question of civil liability rather points to the conclusion that it either did not have it in mind or deliberately omitted to provide for it." Glanville Williams is now of the opinion that the "irresolute course" of the judicial decisions "reflect no credit on our jurisprudence" and, with respect, I agree. He writes [p. 246]:

> The failure of the judges to develop a governing attitude means that it is almost impossible to predict, outside the decided authorities, when the courts will regard a civil duty as impliedly created. In effect the judge can do what he likes, and then select one of the conflicting principles stated by his predecessors in order to justify his decision.

Prosser is of the same opinion [Law of Torts, 4th ed. (1971), pp. 191-92]:

> Much ingenuity has been expended in the effort to explain why criminal legislation should result in a rule for civil liability ... Many courts have, however, purported to 'find' in the statute a supposed 'implied,' 'constructive,' or 'presumed' intent to provide for tort liability. In the ordinary case this is pure fiction, concocted for the purpose. The obvious conclusion can only be that when the legislators said nothing about it, they either did not have the civil suit in mind at all, or deliberately omitted to provide for it ...
>
> Perhaps the most satisfactory explanation is that the courts are seeking, by something in the nature of judicial legislation, to further the ultimate policy for the protection of individuals which they find underlying the statute, and which they believe the legislature must have had in mind. The statutory standard of conduct is simply adopted voluntarily, out of deference and respect for the legislature.

21 The door to a civil cause of action arising from breach of statute had swung closed at the beginning of the nineteenth century with the proliferation of written legislation and swung open again, for reasons of policy and convenience, to accommodate the rising incidence of industrial accidents at the end of the nineteenth century. But the proposition that every statutory breach gave rise to a private right of action was still untenable, as it is today. The courts looked for a screening mechanism which would determine the cases to which an action should be limited.

22 Various presumptions or guidelines sprang up. "Thus, it has often been tediously repeated that the crucial test is whether the duty created by the statute is owed primarily to the State, and only incidentally to the individual, or vice versa": Fleming, at p. 125. A duty to all the public (ratepayers, for example) does not give rise to a private cause of action whereas a duty to an individual (an injured worker, for example) may. The purpose of the statute must be the protection of a certain "class" of individuals of whom the plaintiff is one and the injury suffered must be of a kind which it was the object of the legislation to prevent. Both requirements have, in the past, been fairly narrowly construed and fairly heavily criticized.

23 Although "[i]t is doubtful, indeed, if any general principle can be found to explain all the cases on the subject" (Salmond on Torts, 17th ed. (1977), at p. 243), several justifications are given for the tort of statutory breach. It provides fixed standards of negligence and replaces the judgment of amateurs (the jury) with that of professionals in highly technical areas. In effect, it provides for absolute liability in fields where this has been found desirable, such as industrial safety. Laudable as these effects are, the state of the law remains extremely unsatisfactory. Professor Fleming has castigated the British courts [p. 133]:

> ... their inveterate practice of appealing to the oracle of a presumed legislative intent has served them well in hiding from public scrutiny not only their own unexpressed prejudices but also their startling lack of resourcefulness, compared with that of American courts, in so handling the doctrine that it may serve as a useful adjunct in negligence litigation without becoming tyrannical. At bottom, their failure to come to terms with it is primarily due to the fact that their frame of reference does not seem to admit of any *media via* between, on the one hand, the most literal application of the statutory mandate whose terms rarely make express allowance for unavoidable inability to conform or some other equally compelling excuse and, on the other hand, refusing to ascribe any force to it at all other than, perhaps, as mere evidence of negligence.

(c) The American Position

24 Professor Fleming prefers the American approach which has assimilated civil responsibility for statutory breach into the general law of negligence [p. 124]:

> Intellectually more acceptable, because less arcane, is the prevailing American theory which frankly disclaims that the civil action is in any true sense a creature of the statute, for the simple enough reason that the statute just does not contemplate, much less provide, a civil remedy. Any recovery of damages for injury due to its violation must, therefore, rest on common law principles. But though the penal statute does not create civil liability, the court may think it proper to *adopt* the legislative formulation of a specific standard in place of the unformulated standard of reasonable conduct, in much the same manner as when it rules peremtorily (sic) that certain acts or omissions constitute negligence as a matter of law.

There are, however, differing views of the effect of this assimilation: at one end of the spectrum, breach of a statutory duty may constitute negligence per se or, at the other, it may merely be evidence of negligence. This distinction finds its roots in the seminal 1913 article by Professor Thayer ["Public Wrong and Private Action" (1913-14), 27 Harvard L. Rev. 317 at p. 323]:

> Unless the court were prepared to go to this length it would be bound to say that if the breach of the ordinance did in fact contribute to the injury as a cause the defendant is liable as a matter of law; but this is treating it as 'negligence *Per se*' to use the ordinary phraseology, and not merely 'evidence of negligence'.
>
> The doctrine that a breach of the law is 'evidence of negligence' is in truth perplexing and difficult of comprehension. It stands as a sort of compromise midway between two extremer views: (1) that a breach of law cannot be treated as prudent conduct; (2) that the ordinance was passed *alio intuito* and does not touch civil relations.

25 Professor Thayer's thesis was essentially that prudent men do not break the law. He thus applied the criminal standard of care, breach of which would give rise to penal consequences under the statute, to the civil action.

26 The majority view in the United States has been that statutory breach constitutes negligence per se — in certain circumstances [Prosser, p. 200]:

> Once the statute is determined to be applicable — which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation — the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence, and that the court must so direct the jury. The standard of conduct is taken over by the court from that fixed by the legislature, and 'jurors have no dispensing power by which to relax it,' except in so far as the court may recognize the possibility of a valid excuse for disobedience of the law. This usually is expressed by saying that the unexcused violation is negligence 'per se,' or in itself. The effect of such a rule is to stamp the defendant's conduct as negligence, with all of the effects of common law negligence, but with no greater effect.

This approach has been adopted by the Restatement of the Law, Second, Torts 2d (1965), vol. 2, p. 37, para. 288B:

> (1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.
>
> (2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct.

It is important to note two qualifications to the finding of negligence per se: (1) the violation must not be an "excused violation" and (2) the enactment must be one which is adopted by the court as defining the standard of conduct of a reasonable man. An excused violation is not negligence and occurs where [pp. 32-33, para. 288A (2)]:

(a) the violation is reasonable because of the nature of the actor's incapacity;

(b) he neither knows nor should know of the occasion for compliance;

(c) he is unable after reasonable diligence or care to comply;

(d) he is confronted by an emergency not due to his own misconduct;

(e) compliance would involve a greater risk of harm to the actor or to others.

The American courts have not broken away from a consideration of the purpose or intent of the legislature; the Restatement of the Law, Torts 2d, sets out the circumstances in which the court may adopt a legislative enactment as embodying the standard of care applicable in the circumstances [p. 25, para. 286]:

286. When Standard of Conduct Defined by Legislation or Regulation Will be Adopted The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest the particular hazard from which the harm results.

27 The so-called "minority view" in the United States considers breach of a statute to be merely evidence of negligence. There are, however, varying degrees of evidence. Statutory breach may be considered totally irrelevant, merely relevant, or prima facie evidence of negligence having the effect of reversing the onus of proof.

California has arrived at what appears to be precisely the same result by holding that the violation creates a presumption of negligence, which may be rebutted by a showing of an adequate excuse but calls for a binding instruction in the absence of such evidence. A considerable minority have held that a violation is only evidence of negligence, which the jury may accept or reject as it sees fit. Some of the courts which follow the majority rule as to statutes have held that the breach of ordinances, or traffic laws, or the regulations of administrative bodies, even though the latter are authorized by statute, is only evidence for the jury. Such cases seem to indicate a considerable distrust of the arbitrary character of the provision, and a desire to leave some leeway for cases where its violation may not be necessarily unreasonable. Even in such jurisdictions, however, it is recognized that there are cases in which, merely as a matter of evidence, reasonable men could not fail to agree that the violation is negligence. [Prosser, at p. 201.]

28 The major criticism of the negligence per se approach has been the inflexible application of the legislature's criminal standard of conduct to a civil case. I agree with this criticism. The defendant in a civil case does not benefit from the technical defences or protection offered by the criminal law; the civil consequences may easily outweigh any penal consequences attaching to the breach of statute; and finally the purposes served by the imposition of criminal as opposed to civil liability are radically different. The compensatory aspect of tort liability has won out over the deterrent and punitive aspect; the perceptible evolution in the use of civil liability as a mechanism of loss shifting to that of loss distribution has only accentuated this change. And so "[t]he doctrine of negligence *per se* is, therefore, not fitted for relentless use, nor is it so used": Morris, "The Relation of Criminal Statutes to Tort Liability" (1932-33), 46 Harvard L. Rev. 453 at p. 460. Thus the guidelines in the Restatement of the Law, Torts 2d.

(d) The Canadian Position

29 Professor Linden has said that the "Canadian courts appear to oscillate between the English and American positions without even recognizing this fact": (Comment, *Sterling Trusts Corp. v. Postma* (1967), 45 Can. Bar Rev. 121 at p. 126). The most widely used approach, however, has been that stated in *Sterling Trusts Corp. v. Postma*: The breach of a statutory provision is "*prima facie* evidence of negligence". There is some difficulty in the terminology used. "*Prima facie* evidence of negligence" in the *Sterling Trusts* case is used seemingly interchangeably with the expression "*prima facie* liable". In a later case in the Ontario Court of Appeal, *Queensway Tank Lines Ltd. v. Moise*, [1970] 1 O.R. 535, 9 D.L.R. (3d) 30 (C.A.), MacKay J.A. assumes prima facie evidence of negligence to be a presumption of negligence with a concomitant shift in the onus of proof to the defendant.

30 The use of breach of statute as evidence of negligence as opposed to recognition of a nominate tort of statutory breach is, as Professor Fleming has put it, more intellectually acceptable. It avoids, to a certain extent, the fictitious hunt for legislative intent to create a civil cause of action which has been so criticized in England. It also avoids the inflexible application of the legislature's criminal standard of conduct to a civil case. Glanville Williams is of the opinion, with which I am in agreement, that where there is no duty of care at common law, breach of nonindustrial penal legislation should not affect civil liability unless the statute provides for it. As I have indicated above, industrial legislation historically has enjoyed special consideration. Recognition of the doctrine of absolute liability under some industrial statutes does not justify extension of such doctrine to other fields, particularly when one considers the jejune reasoning supporting the juristic invention.

31 Regarding statutory breach as part of the law of negligence is also more consonant with other developments which have taken place in the law. More and more the legislator is heeding the admonition of Parcq L.J. given many years ago in *Cutler v. Wandsworth Stadium Ltd.*, [1949] A.C. 398, [1949] 1 All E.R. 544 at 549 (H.L.):

> To a person unversed in the science, or art, of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be. There are, no doubt, reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned.

Statutes are increasingly speaking plainly to civil responsibility: consumer protection acts, rental acts, business corporations acts, securities acts. Individual compensation has become an active concern of the legislator.

32 In addition, the role of tort liability in compensation and allocation of loss is of less and less importance [Fleming, "More Thoughts on Loss Distribution" (1966), 4 Osgoode Hall L.J. 161]:

> ... Instead of tort liability being the sole source of potential compensation (as it was throughout most of our history) it is now but one of several such sources, and (at that) carrying an ever diminishing share of the economic burden of compensating the injured.

33 Tort law itself has undergone a major transformation in this century with nominate torts being eclipsed by negligence, the closest the common law has come to a general theory of civil responsibility. The concept of duty of care, embodied in the neighbour principle, has expanded into areas hitherto untouched by tort law.

34 One of the main reasons for shifting a loss to a defendant is that he has been at fault, that he has done some act which should be discouraged. There is then good reason for taking money from the defendant as well as reason for giving it to the plaintiff who has suffered from the fault of the defendant. But there seems little in the way of defensible policy for holding a defendant who breached a statutory duty unwittingly to be negligent and obligated to pay even though not at fault. The legislature has imposed a penalty on a strictly admonitory basis and there seems little justification to

add civil liability when such liability would tend to produce liability without fault. The legislature has determined the proper penalty for the defendant's wrong but if tort admonition of liability without fault is to be added, the financial consequences will be measured, not by the amount of the penalty, but by the amount of money which is required to compensate the plaintiff. Minimum fault may subject the defendant to heavy liability. Inconsequential violations should not subject the violator to any civil liability at all but should be left to the criminal courts for enforcement of a fine.

35 In this case the board contends that the duty imposed by the Act is absolute, that is to say, the pool is liable, even in absence of fault, and all that is requisite to prove a breach of duty is to show that the requirements of the statute have not, in fact, been complied with; it is not necessary to show how the failure to comply arose or that the pool was guilty of any failure to take reasonable care to comply.

36 The tendency of the law of recent times is to ameliorate the rigours of absolute rules and absolute duty in the sense indicated, as contrary to natural justice. "[S]ound policy lets losses lie where they fall except where a special reason can be shown for interference": Holmes, The Common Law (1881), p. 50. In the case at bar the evidence is that substantially all of the grain entering the terminal of the pool at Thunder Bay came from agents of the board. The imposition of heavy financial burden as in this case without fault on the part of the pool does not incline one to interfere. It is better that the loss lies where it falls, upon the board.

37 For all of the above reasons I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.

38 It must not be forgotten that the other elements of tortious responsibility equally apply to situations involving statutory breach, i.e. principles of causation and damages. To be relevant at all, the statutory breach must have caused the damage of which the plaintiff complains. Should this be so, the violation of the statute should be evidence of negligence on the part of the defendant.

IV

This Case

39 Assuming that Parliament is competent constitutionally to provide that anyone injured by a breach of the Canada Grain Act shall have a remedy by civil action, the fact is that Parliament has not done so. Parliament has said that an offender shall suffer certain specified penalties for his statutory breach. We must refrain from conjecture as to Parliament's unexpressed intent. The most we can do in determining whether the breach shall have any other legal consequences is to examine what is expressed. In professing to construe the Act in order to conclude whether Parliament intended a private right of action, we are likely to engage in a process which Glanville Williams aptly described as "looking for what is not there", p. 244. The Canada Grain Act does not contain any express provision for damages for the holder of a terminal elevator receipt who receives infested grain out of an elevator.

40 The obligation of a terminal operator under s. 61(1) of the Canada Grain Act is to deliver to the holder of an elevator receipt for grain issued by the operator the identical grain or grain of the same kind, grade and quantity as the grain referred to in the surrendered receipt, as the receipt requires. That obligation was discharged.

41 Breach of s. 86(*c*) of the Canada Grain Act in discharging infested grain into the Frankcliffe Hall does not give rise, in and of itself, to an independent tortious action. The board has proceeded as if it does. Statutory breach, and not negligence, is pleaded. The case has been presented exclusively on the basis of breach of statutory duty. The board has not proved what Lord Atkin referred to as statutory negligence, i.e. an intentional or negligent failure to comply with a statutory duty. There is no evidence at trial of any negligence or failure to take care on the part of the pool. The pool has demonstrated that it operated its terminal up to the accepted standards of the trade; it made regular checks of its terminals for infested grain; it tested samples of wheat both upon admission to and upon discharge from its terminal elevator.

Samples were taken on discharge of the wheat from the terminal elevator into the Frankcliffe Hall by both the pool's employees and the Grain Commission inspectors. Visual inspection of the samples showed no defect. Berlase funnel tests conducted at the Grain Commission headquarters disclosed the infestation but the results could not be made available before the Frankcliffe Hall had sailed. The inspection procedures followed were those determined by the Canada Grain Commission (s. 12(1)(*a*) of the Canada Grain Act) and the pool and the commission worked in cooperation. The pool successfully demonstrated that the loss was not the result of any negligence on its part.

42 In sum I conclude that:

1. Civil consequences of breach of statute should be subsumed in the law of negligence.

2. The notion of a nominate tort of statutory breach giving a right to recovery merely on proof of breach and damages should be rejected, as should the view that unexcused breach constitutes negligence per se giving rise to absolute liability.

3. Proof of statutory breach, causative of damages, may be evidence of negligence.

4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.

5. In the case at bar negligence is neither pleaded nor proven. The action must fail.

43 I would dismiss the appeal with costs.

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