7 Statutory Duty and Section 29 of the Factories Act 1961

The section was actually a re-enactment of section 5 of the Factories Act 1959 which became operative on 1st February 1960. It read "There shall so far as is reasonably practicable be provided and maintained safe means of access to every place at which any person has at any time to work and every such place shall so far as is reasonably practicable be made and kept safe for any person working there."

Did section 29 create duties and were the employers in breach of these duties? Having raised the issue in Thompson, Mr Justice Mustill went round it by reviewing the depressing history of apathy and neglect. The Factories Acts had never specifically referred to noise, but he found it hard to see "how a lack of exact knowledge could justify the general lack of concern by those directly concerned and the need to do something about it." But "The only question is whether the defendants should have been sufficiently aware in general terms that solutions existed and should have made use of them, even in the absence of precise knowledge of their value." It was not absolutely clear whether he was referring to the duty under the Common Law or the duty under the Statute. It was submitted that the dicta could have applied equally to either.

Mr Justice Popplewell dealt with attempts to sidestep the liability imposed by statute in *Kellett v BRE*, 1984. An ingenious argument was advanced in *McGuinness v Kirkstall Forge*, 1978, where it was submitted that a working environment was rendered safe by interposing ear muffs between the worker and the environment.

Using a literal interpretation, section 29 was held in *Berry v Stone Manganese and Marine Ltd* [1972], to apply only to the premises and not to the injurious processes carried on within. So long as the buildings were structurally safe, it did not matter for the purpose of the Statute if the activities within the Factory were not!

In *Evans v Sant* [1975], 1 QB 626, it was successfully submitted that section 29 could not apply to operations carried out in the factory but only to the place of work.

In *Woods v Power Gas Corporation* [1969], 8 KIR 834, Lord Justice Winn referred to safety "qua access, qua egress, qua place, qua ground, qua building, qua permanent structure." Lord Widgery qualified this by saying that it did not mean that one should have total disregard for the activities which went on in the place itself. Permanent equipment in the place reflected on the safety of the place. In so far as there were activities which were constant, regular and recurring, they affected the question of whether the place had been made safe.

In *McIntyre v Dolton Co,* Mr Justice O'Connor relied on the Scottish case of *Carragher v Singer* which held that section 29 could apply to noisy activities. It would be wrong to assert that a place of work was safe merely because the ground on which the man was standing was safe. McIntyre's case failed on an unrelated ground in that he failed to prove causation.

The award of damages in Kellett was based on a breach of duty at Common Law on its particular facts: documents demonstrating actual knowledge in 1955 were available. There was no need to establish a deemed date of knowledge. However, the dicta on Breach of Statutory Duty was important because the cases were comprehensively reviewed.

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Section 29 could not be construed narrowly. "To say in relation to a place where the Plaintiff works who is exposed constantly to a noise level of over 90 dbA that that place of work was kept safe for the Plaintiff seems to me an abuse of the English language. Put it in another way, if the question is asked, was it a dangerous place for the plaintiff to work there, the answer can only be yes ... I see no reason why the reasonably practicable steps to keep the Plaintiff's place of work safe should not include the provision of protective clothing such as goggles or spatts or indeed ear plugs." Significantly he did not clearly overrule *McGuinness v Kirkstall Forge* and dealt with the working environment.

"If, as I find, the section applies, the same facts giving rise to the Defendant's breach of their Common Law duty would result in the same finding against the Defendant for breach of their Statutory Duty because they have failed to keep safe so far as reasonably practicable the Plaintiff's place of work." It does then appear that an action based on negligence under the common law involves the same elements as an action based on the employer's breach of statutory duty.