SUPREME COURT OF QUEENSLAND

CITATION:	*O'Brien & O'Brien v T F Woollam & Son Pty Ltd* [2001] QSC 217
PARTIES:	**PAUL DANIEL O'BRIEN** (first plaintiff) and **PAMELA MAY O'BRIEN** (second plaintiff) **v** **T F WOOLLAM & SON PTY LTD** **(ACN 009 676 064)** (defendant)
FILE NO/S:	S 5267/2000
DIVISION:	Trial Division
DELIVERED ON:	25 June 2001
DELIVERED AT:	Brisbane
HEARING DATE:	6 April 2001
JUDGE:	Philippides J
ORDER:	**1. The separate questions are answered as follows:** **(a) The defendant's breach of s 30(1)(a) of the *Workplace Health and Safety Act* 1995, if proven, does not create in favour of the plaintiffs a private right of action in breach of statutory duty;** **(b) The defendant's breach of s 31(1)(a)(i) of the *Workplace Health and Safety Act* 1995, if proven, does not create in favour of the plaintiffs a private right of action in breach of statutory duty;** **(c) The defendant's breach of s 31(2) of the *Workplace Health and Safety Act* 1995, if proven, does not create in favour of the plaintiffs a private right of action in breach of statutory duty;** **(d) The defendant's breach of s 31(3) of the *Workplace Health and Safety Act* 1995, if proven, does not create in favour of the plaintiffs a private right of action in breach of statutory duty.**
CATCHWORDS:	EMPLOYMENT LAW – BREACH OF STATUTORY DUTY – whether breaches of s 30(1)(a), s 31(1)(a)(i), s 31(2), and s 31(3) of the *Workplace Health and Safety Act* 1995 give rise to a private cause of action *Construction Safety Act* 1971, s 20(b)(ii), s 21(b)(ii) and s 22(b)

Workplace Health and Safety Act 1989, s 11, s 23(a), s 23(c)
Workplace Health and Safety Act 1995, s 28, s 30(1)(a), s 31(1)(a)(i), s 31(2) and (3)
Uniform Civil Procedure Rules, r 171(2), r 483(1)

Heil v Suncoast Fitness [2000] 2 Qd R 23
O'Connor v S P Bray Ltd (1937) 56 CLR 464
Percy v Central Control Financial Services Pty Ltd [2000] QSC 129 (2 May, 2000)
Percy v Central Control Financial Services Pty Ltd [2001] QCA 226 (8 June, 2001)
Schiliro v Peppercorn Child Care Centres Pty Ltd [2001] 1 Qd R 518
Schulz v Schmauser [2001] Qd R 540
Sherras v Van der Maat & Ors [1989] 1 Qd R 114

COUNSEL: M Grant-Taylor SC for first and second plaintiffs
K Wilson for defendant

SOLICITORS: McNamara & Associates for first and second plaintiffs
Phillips Fox for defendant

PHILIPPIDES J:

The application

[1] This is an application for the following:

1. Pursuant to r 483(1) of the *Uniform Civil Procedure Rules*, that the following questions be subject to a decision by the court separately from other questions arising in the proceeding and before the trial of the proceeding:

"(a) Does the defendant's breach of s 30(1)(a) of the *Workplace Health and Safety Act* 1995, if proven, create in favour of the plaintiffs a private right of action in breach of statutory duty?

(b) Does the defendant's breach of s 31(1)(a)(i) of the *Workplace Health and Safety Act* 1995, if proven, create in favour of the plaintiffs a private right of action in breach of statutory duty?

(c) Does the defendant's breach of s 31(2) of the *Workplace Health and Safety Act* 1995, if proven, create in favour of the plaintiffs a private right of action in breach of statutory duty?

(d) Does the defendant's breach of s 31(3) of the *Workplace Health and Safety Act* 1995, if proven, create in favour of

the plaintiffs a private right of action in breach of statutory duty?"

2. Pursuant to r 171(2) of the *Uniform Civil Procedure Rules*, that so much of paragraph 6 of the defendant's amended defence (amended on 6 March 2001) as alleges as follows:

> "The defendant says that breach of [s 30(1)(a), s 31(1)(a)(i) and s 31(2) and (3) of the *Workplace Health and Safety Act* 1995] does not give rise to a private cause of action for damages in favour of the plaintiffs."

be struck out.

[2] The application arises in the context of the following facts which are not disputed:

(a) the first plaintiff was a self-employed drainage contractor carrying out work at Nerang;
(b) the site where the first plaintiff was injured was an open "workplace" and a "construction workplace" as those terms are defined in the *Workplace Health and Safety Act* 1995 ("the Act");
(c) the defendant was the "person in control" of the workplace within the meaning of s 30 of the Act;
(d) the defendant was "the principal contractor" for the construction workplace within the meaning of s 31 of the Act;
(e) in those circumstances the defendant had certain statutory obligations under s 30 and s 31 of the Act;
(f) the first plaintiff was injured when the bucket of an excavator separated from the machine, fell and struck the first plaintiff;
(g) at the time the excavator was being operated by an employee of the first plaintiff;
(h) the excavator was owned in part by the first plaintiff and he supplied the excavator for use at the site.

[3] The provisions of s 30(1)(a), s 31(1)(a)(i), s 31(2) and s 31(3) of the Act applicable at the relevant time state:

> "**Obligations of Persons in Control of Workplace**
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> s 30(1) A person in control of a workplace has the following obligations –
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> (a) to ensure the risk of disease or injury from a workplace is minimised for persons coming onto the workplace to work; ...
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> **Obligations of Principal Contractors**
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> s 31(1) A principal contractor has the following obligations for a construction workplace –

(a) to ensure the orderly conduct of all work at the construction workplace to the extent necessary-

(i) to ensure workplace health and safety at the workplace ...

(2) In addition, the principal contractor has the obligation mentioned in subsection (3)- if the principal contractor reasonably believes, or should reasonably believe –

(a) an employer at the workplace is not discharging the employer's workplace health and safety obligation; or
(b) a self-employed person at the workplace is not discharging the person's workplace health and safety obligation.

(3) The principal contractor must –

(a) direct the employer or self-employed person to comply with the employer's or self-employed person's workplace health and safety obligation; and
(b) if the employer or self-employed person fails to comply with the direction – direct the employer or self-employed person to stop work until the employer or self-employed person agrees to comply with the obligation".

[4] Mr Grant-Taylor, on behalf of the plaintiffs submitted that a breach of the obligations set out in s 30(1)(a), s 31(1)(a)(i), s 31(2) and (3) of the Act gives rise to a private right of action in a civil forum. In making this submission he relied on the decision of Atkinson J in *Percy v Central Control Financial Services Pty Ltd*[1], where it was held that a breach of s 23(a) and s 23(c) of the now repealed *Workplace Health and Safety Act* 1989 ("the 1989 Act") gave rise to a private cause of action. He submitted that in respect of each of the provisions of the Act in question here, no reason exists not to apply the reasoning of Atkinson J in *Percy*. However, since the application was argued before me, the Court of Appeal has given judgment in an appeal in *Percy*,[2] determining that s 23 of the 1989 Act does not give rise to a private right of action.

[5] Mr Wilson on behalf of the defendant contends that no private right of action is conferred by the relevant provisions of the Act in question here because:

(a) the language of the sections is too general and non-specific as to what must be done to comply with it;
(b) the statute does not reinforce an underlying common law duty of care;

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1 [2000] QSC 129, 2 May, 2000.
2 [2001] QCA 226, 8 June 2001.

(c) the relevant provisions are not restricted to a particular class of persons, for example employees.

[6] Recently in *Schiliro v Peppercorn Child Care Centres Pty Ltd* ("*Schiliro*"),[3] the Court of Appeal held that a breach of s 28 of the Act, which imposed an obligation on employers to ensure the workplace health and safety of its employees at work, gave rise to a civil cause of action.[4] However, the question whether s 30(1)(a), s 31(1)(a)(i), s 31(2) and (3) of the Act give rise to a civil cause of action has not been authoritatively determined.

The Criteria Applicable in Determining whether a Civil Cause of Action Arises

[7] The provisions of the Act in question here prescribe obligations in the interest of the safety of persons at the workplace in circumstances where the legislature has not expressed any clear intention as to whether it intended to create civil causes of action. In *Schiliro*, the Court of Appeal[5] noted that in such cases, the approach to be adopted in determining whether civil causes of action arise in respect of such provisions is one of construction of the statute as enunciated by Dixon J (as he then was) in *O'Connor v S P Bray Ltd*. [6]

[8] In *Schulz v Schmauser*[7] and *Schiliro*, the Court of Appeal considered the factors relevant in determining whether provisions such as those in issue here give rise to a private right of action. These factors are summarised by Atkinson J in *Percy*[8] as follows:

"1. The historical legislative context[9]

If the legislation replaces legislation which gave rise to a private cause of action without any intention expressed by the legislature to abolish such a cause of action,[10] this may lead more readily to the inference that the legislation was intended to give rise to a private cause of action. It is significant if a civil cause of action is specifically excluded in similar legislation in other jurisdictions, but is not excluded in the legislation under consideration.[11]

2. Benefit of a particular class of the public[12]

There must be some limitation on the group to whom the duty is owed.[13]

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3 [2001] 1 Qd R 518.
4 *Schiliro* supra at [49]
5 *Schiliro* supra at [12]. See also *Schulz v Schmauser* [2001] 1 Qd R 540 at [7]
6 (1937) 56 CLR 464 at 477-478. See also Kitto J in *Australian Iron and Steel Ltd v Ryan* (1957) 97 CLR 89 at 98
7 [2001] 1 Qd R 540.
8 [2000] QSC 129 at [24]. That summary of the law was not the subject of appeal and was referred to without disapproval by Davies JA: See *Percy* [2001] QCA 226 at [12]
9 *Schiliro* supra at [23].
10 *Schulz* supra per McMurdo P at [6] – [9]; *Schiliro* supra at [13].
11 *Schulz* supra per McMurdo P at [11]; *Schiliro* supra at [14], [26].
12 *Schulz* supra per McMurdo P at [10]; *Schiliro* supra at [12], [28]; *Heil v Suncoast Fitness* [2000] 2 Qd R 23 at [10], [12] .
13 *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832 at 840; *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 424; *Heil* supra at [13].

3. Legislation for employee safety

Rights of action based on a statutory duty to employees are in a special category.[14] Legislation directed at employee safety is generally considered as giving rise to a correlative private right unless the scope of the legislation suggests otherwise.[15] The legislation may be restricted to a specific place such as a workplace.[16]

4. Specificity

Generally expressed statutory duties can give rise to a cause of action.[17] Usually however the right to a private cause of action will be more readily implied where there is a duty to take a specific precaution for the safety of others, not just a duty to act safely.[18] Generality of expression is a relevant factor, although not decisive.[19]

5. Duty of care

If the statute refers to a duty of care, it is likely to be interpreted as being intended to reinforce or supplement the common law duty of care.[20] The duty found under statute is not exactly the same as under the common law.[21] Negligence need not be established.[22] However, there should be a causal connection between an act or omission on the part of the tortfeasor and the injury.[23] The language may suggest limitations on liability, such as practicability.[24] The use of the language of duty will suggest the section creates a civil cause of action.[25]"

Does s 30(1)(a) of the Act Create a Private Right of Action for Breach of Statutory Duty?

[9] Section 30 of the Act concerns the "obligations of persons in control of workplaces" and replaces s 11 of the 1989 Act. Section 30(1)(a) of the Act echoes the provisions in s 11(1)(a) of the 1989 Act. The provisions of s 11 of the 1989 Act were discussed in *Heil v Suncoast Fitness*.[26] In *Percy*, Atkinson J held that s 11 of the 1989 Act did not give rise to a private cause of action. That aspect of Atkinson

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14 *Heil* supra at [14].
15 *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 52; *Schulz* supra per McMurdo P at [11]; *Schiliro* supra at [23].
16 Cf *Heil* supra at [16].
17 *Schulz* supra per Pincus JA at [32] – [34]; cf per Douglas J at [41] – [42].
18 *Heil* supra at [10], [12]; *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 478, 478; *John Pfeiffer Pty Ltd v Canny* (1981) 148 CLR 218 at 243; *Byrne v Australian Airlines Ltd* supra at 424.
19 *Schiliro* supra at [20] – [23].
20 *Schulz* supra per Pincus JA at [25]; *Schiliro* supra at [15] – [16].
21 *Schulz* supra per Pincus JA at [31].
22 *Schiliro* supra at [18].
23 *Schulz* supra per Pincus JA at [25].
24 *Schulz* supra per Pincus JA at [26] – [27]; *Schiliro* supra at [18], [23].
25 *Schiliro* supra at [23].
26 [2000] 2 Qd R 23

J's decision was not the subject of appeal and was approved by Davies JA[27]. Accordingly, s 30 of the Act does not replace legislation which gave rise to a private cause of action, and I accept Mr Wilson's submission that there is no historical imperative for the view that s 30 of the Act confers a private right of action.

[10] Furthermore, although the obligation in s 30(1)(a) of the Act is owed to "persons coming onto the workplace to work", such persons encompass a very wide class of person and extends well beyond those who are employees of the person in control of the workplace. In addition, the obligation in s 30(1)(a) of the Act is expressed in general terms as one of ensuring that the risk of disease or injury is minimised, rather than as an obligation to take specific precautions. That is, the language is expressed in terms of minimising risk rather than preventing injury. In those circumstances, s 30(1)(a) of the Act does not give rise to a private right of action.

Do s 31(1)(a)(i), s 31(2) and s 31(3) of the Act Create a Private Right of Action for Breach of Statutory Duty?

[11] Mr Wilson contended that there was also no historical imperative for conferring a private right of action in the circumstances provided for in s 31 of the Act.

[12] Section 31 of the Act, which concerns the obligations of principal contractors, replaced s 23 of the 1989 Act, which in turn replaced legislation which included the *Construction Safety Act* 1971. Sub-sections 20(b)(ii), 21(b)(ii) and 22(b) of the *Construction Safety Act* 1971 have been held to provide a statutory cause of action against a principal contractor in respect of an employee injured on a work site: *Sherras v Van der Maat & Ors.*[28]

[13] However, in *Percy*[29] McMurdo P, in finding that a consideration of the 1989 Act as a whole and its historical legislative context did not support a conclusion that s 23(a) and s 23(c) of the 1989 Act were intended to confer a private right of action, noted:[30]

> "Section 9 of the [1989 Act] and s 28 of the [1995 Act] continued to provide a statutory cause of action for employees who were injured in the workplace in certain circumstances: see *Schiliro v Peppercorn Child Care Centres Pty Ltd* and *Schulz v Schmauser.* The respondent/plaintiff in this case was not an employee but a self-employed plumber; s 9 *Workplace Health & Safety Act* 1989 therefore had no application to his case".

[14] Likewise, Davies JA rejected the view that the historical legislative context of s 23 of the 1989 Act suggested that a private right of action was intended, stating:[31]

> "Her Honour held that s 23(a) and s 23(c) were in similar terms to earlier construction safety legislation which had been construed as

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27 P*ercy* [2001] QCA 226 at [7]
28 [1989] 1 Qd R 114.
29 [2001] QCA 226
30 *Percy* [2001] QCA 226 at [2]
31 *Percy* [2001] QCA 226 at [13]

> conferring a private right of action. She referred in particular to s 20(a) of the *Construction Safety Act* 1971 which obliged a constructor to ensure that the provisions of the Act were complied with or, as the case may be, were not contravened on the site. However that provision had to be construed in the context of s 20 as a whole which appeared to impose obligations on a constructor to do certain specific things for the safety of employees on a work site. Section 23 is, in my view, not so restricted. Paragraph (b) is the clearest indication of this. But there is nothing in par (c), which also imposes a primary obligation, which restricts the duty to one owed to employees or any other class of persons. On the contrary, reg 12(e) refers to the provision of protection for members of the public and none of the other paragraphs of that regulation appear to be for the benefit of any particular class of persons."

[15] Further, as the Explanatory Notes to cl 31 of the *Workplace Health and Safety Bill* 1995 indicate, s 31 of the Act expands the obligations of a principal contractor beyond that under the previous legislation.[32]

[16] It therefore follows that a consideration of the historical legislative context of s 31 of the Act does not support the inference that it was intended to create a private cause of action.

[17] In addition, as Mr Wilson submitted, the obligation in s 31(1)(a)(i) of the Act is not for the benefit of a particular class of the public, but could extend to a member of the public who comes onto the construction workplace. He further submitted that, while s 31 of the Act is cast in the language of duty, it imposes an obligation well beyond any common law duty of care; that is, to ensure that others at the workplace comply with their obligations, and that if the section were to be construed as conferring a private right of action, this would have the potential to cut across contractual rights, for example of indemnity, in favour of the principal contractor.

[18] In this regard it is relevant to note the following statement by Davies JA in *Percy* in relation to s 23 of the 1989 Act:[33]

> "The learned primary judge also thought that the section was cast in the language of duty and was in similar terms to s 9 of the Act. But s 9, unlike s 23, imposes a duty on an employer for the health and safety at work of his or her employees. Section 23 cannot, I think, be construed as imposing a duty limited to a duty to employees.
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> Paragraph (a) of s 23 appears on its face to be a provision penalising principal contractors who fail to ensure, except where practicable, that those whom he or she engages and that person's employees comply with or do not contravene the provisions of the Act. In other words it is a provision making a principal contractor vicariously liable for a failure to comply with, or a contravention of,

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32 *Explanatory Notes to the Workplace Health and Safety Bill* 1995 at 330.

33 *Percy* [2001] QCA 226 at [14] to [16]

> provisions of the Act by another; it imposes liability for breaches of others but does not impose any new primary obligations.
>
> For different reasons therefore neither of these provisions, in my opinion, confers a private right of action. Paragraph (a) does not because it is not a provision which on its face imposes any primary liability but imposes a secondary vicarious liability for the acts or omissions of another. And para (c) does not because, though it confers a primary liability, it is one which cannot be said to be for the benefit of any specific class. For those reasons, in my opinion the learned primary judge erred in concluding that, by s 23(a) and s 23(c) the legislature intended to add an action for breach of statutory duty to the common law duty of care for the safety of employees."

[19] In my opinion, s 31(1)(a)(i), s 31(2) and s 31(3) of the Act do not replace legislation which gave rise to a private right of action. Furthermore, s 31(1)(a)(i) of the Act is not a provision which can be said to be for the benefit of any specific class. As regards s 31(2) and s 31(3) of the Act, these provisions are essentially concerned with the vicarious liability of the principal contractor, and only impose a new obligation to make "directions". In those circumstances, s 31(a)(i), s 31(2) and s 31(3) of the Act do not give rise to a private cause of action.

Conclusion

[20] I am of the opinion that each of the separate questions should be answered in the negative. Accordingly, there is no warrant for striking out that part of paragraph 6 of the defendant's amended defence (amended on 6 March 2001) which alleges that breaches of s 30(1)(a), s 31(1)(a)(i) and s 31(2) and s 31(3) of the *Workplace Health and Safety Act* 1995 do not give rise to a private cause of action for damages in favour of the plaintiffs.

[21] I shall hear the parties as to costs.