[HALLINAN, C.J., AND ZEKIA, J.]

(January 9, 1954)

FATMA HUSSEIN AND ANOTHER, *Appellants*,

v.

THE ESTATE OF THE DECEASED CHRYSOSTOMOS CHRISTODOULOU THROUGH HIS HEIRS, *Respondents*.

(*Civil Appeal No.* 4046)

Breach of statutory duty—Intention of legislature to give individuals right of action—Application of Civil Wrongs Law, section 15—*Negligence under that Law—Duty of invitor as to unusual danger.*

One Chrysostomos Christodoulou was employed by the 1st appellant to repair the roof of her house. She had a well adjoining the wall of her house and had partly covered in the top of the well by rafters covered over with earth. Chrysostomos Christodoulou while seeking to repair the roof stepped on the earth and rafters which collapsed, as a result of which he received injuries from which he died. His dependants, the respondents, claimed damages for breach of statutory duty and for negligence.

The trial Court held that the appellants were liable on both causes of action.

Upon appeal,

Held: No civil action lay against the appellants for breach of a statutory duty, for it could not be said that the legislative authority had intended when enacting the Wells Law and in particular section 9(2) to give a private individual a right of action for breach of the statute in the circumstances of the present case.

[per HALLINAN, C.J.: Section 15 of the Civil Wrongs Law (under which a right of action survives to a deceased person's dependants) only applies to actions for civil wrongs under that Law and the claim for breach of statutory duty was not brought under that Law. *Vassiliou* v. *Vassiliou*, 16, Cyprus Law Reports, 69, applied].

However, apart from a breach of statutory duty, the appellants had failed in their duty to protect the deceased, their invitee, from an unusual danger, and were liable in negligence under the Civil Wrongs Law.

(*Pritchard* v. *Peto and Others*, 1917, 2 K.B. 175 distinguished).

Appeal dismissed.

Note: Section 15 of the Civil Wrongs Law is now repealed by section 58 and the Schedule of the Administration of Estates Law, 1954 (No. 43/1954) and the effect of death on causes of action is now regulated by section 34 of No. 43/1954.

Appeal by defendants from the judgment of the District Court of Nicosia (Action No. 447/52) in favour of plaintiffs.

P. N. Paschalis with *Ulfet Emin* and *Memduh Ahmet* for the appellants.

G. Cacoyannis for the respondents.

Judgment was delivered by the Chief Justice:

A separate judgment was also delivered by ZEKIA, J.:

HALLINAN, C.J.: This action was brought against the owner of the house and a well and her husband by the heirs of the deceased claiming damages for negligently causing the death of Chrysostomos Christodoulou. The claim was based both on the breach of the statutory duty and on common law negligence. The trial Court found that the plaintiffs had established both causes of action and gave judgment in their favour. From this decision the owner of the well and her husband have appealed.

The 1st appellant engaged the deceased Chrysostomos Christodoulou to repair the roof of her house and while doing so he stepped on the well which adjoined the wall of her house. The well had originally had a wide aperture common to wheel-wells but later the aperture was surrounded by a low parapet and part of the aperture closed by rafters covered over with earth. While the deceased was standing on this place the rafters collapsed and he fell into the well, sustaining injuries from which he died.

The breach of the statutory duty which the respondents alleged is that the deceased was killed through the failure of the appellants to keep their well "at all times adequately covered or fenced so as not to be a source of public danger" contrary to section 9 of the Wells Law (Cap. 312).

Where damages are claimed for a breach of a statutory duty and no express provision is made in the statute giving an individual the right to sue for damages, difficult questions arise as to whether the legislature intended to confer on the individual a right of action against the person who failed to comply with the law. The considerations which must guide the Court in deciding this question are set out in Chapter 21 of Charlesworth's Law of Negligence, 2nd Edition, 436 *et seq.*, and in Chapter 16 of Salmond's Law of Torts, 10th Edition, 505, *et seq.* The trial Court after considering the authorities, including *Monk* v. *Warbey*, 1935, 1 K.B. 75, and *Philips* v. *Britannia Hygienic Laundry Co.*, 1923, 2 K.B. 841 and *Groves* v. *Lord Wimbourne* 1898 2 Q.B. 402, came to the following conclusion:

> "We are satisfied that as the law stands at present the cause of action exists in the case of persons who have suffered damage by reason of breach of section 9 (2) of the Wells Law (Cap. 312) as amended".

Charlesworth at page 443 states that among the considerations which determine whether an action lies for breach of a statutory duty is the question whether the person bringing the action is one whom the statute desires to protect.

If one peruses the Wells Law as a whole it would appear that the legislative authority was concerned to prevent the

infringement of water rights, to ensure the purity of water supplies for domestic use, and to prevent wells from being "a source of public danger". The expression "public danger" I think means a danger to passers-by, to members of the public using a well to draw water, or to children (and perhaps animals) who happen to be in the vicinity of a well. I do not think the statute was intended to protect a person who, in order to effect repairs to an adjoining house, uses the well as a platform for his operations. Moreover, the owner of a well may comply with section 9(2) either by covering the well or fencing it. If it was the intention of the legislative authority that wells must be covered so that people can stand on them it would not have provided that a fence without a cover is sufficient. The evidence as to whether the parapet was high enough to comply with the statute is somewhat inconclusive; but whether it was high or low, the deceased would undoubtedly have mounted it in order to use the well-cover as a platform. The well owner might have complied with the statute, yet the accident would still have happened. In other words, the statute could not (and was not) intended to protect persons using the well as the deceased used it. I do not say that an individual might not suffer harm as the result of a breach of section 9(2) which might entitle him to damages for breach of the statutory duty; but I do not think that the legislative authority intended the statute to protect workmen who stand on wells for the purpose of repairing an adjoining building.

Counsel for the appellant also submitted that an action for breach of a statutory duty cannot be maintained by the heirs of a deceased person; at common law a right of action which the deceased had for a breach of statutory duty would die with him, and the only modification of the common law which applies in Cyprus is contained in section 15 of the Civil Wrongs Law (Cap. 9), which provides that: "the right of action in respect of any civil wrong shall be extinguished" by death except in the circumstances provided in that section. It has been held in the case of *Vassiliou* v. *Vassiliou* 16, Cyprus Law Reports, 69, that the expression "civil wrong" in the Civil Wrongs Law applies to civil wrongs created by that law; a claim based on the breach of a statutory duty is not a civil wrong within the meaning of the Civil Wrongs Law. It follows that an action for breach of a statutory duty does not survive the death of the person injured by such breach.

In my opinion this submission by counsel for the appellants is good law. For this reason, therefore, and because the deceased while standing on the well to repair the roof, was not a person doing an act which it was the intention of the statute to protect, the respondents' claim for damages for breach of statutory duty should fail; the decision of the trial Court on this part of the claim is incorrect.

However, the trial Court also found that the appellants had a duty to prevent the deceased (their invitee) from

suffering harm on account of any unusual danger; that the rotten condition of the rafters covering the well was an unusual danger and that the injuries sustained by the deceased were the result of the appellants' failure to discharge their duties as invitors. With this finding I entirely agree.

Counsel for the appellants has argued many points on this part of the claim, but I do not consider it necessary to discuss these in detail. It is sufficient to say that the evidence was insufficient to establish that the deceased knew or ought to have known of the unusual danger to which he was exposed by the appellants. On the other hand there was sufficient evidence for the trial Court to find that the appellants ought to have known of this danger. Mr. Paschalis for the appellants relied on the case of *Pritchard* v. *Peto and Others*, 1917, 2 K.B. 175. In that case the plaintiff while visiting the defendant's premises as an invitee was injured by the fall of a part of the cornice over the front of the house, and it was held that the plaintiff had not shown that the defendant was aware or ought to have been aware of the decay of the cornice. It is, however, not difficult to distinguish that case from the present one. A cornice is part of the permanent structure, and Mrs. Peto had repaired the house three or four years before the accident; the house was admitted to be in good repair. In the present case the covering of the well with rafters and earth could never be considered as more than a temporary structure which should have been frequently inspected by the appellants. This they had failed to do. This accident was the result of the appellants' failure to take reasonable care that the temporary covering of the well was kept in repair.

Since in my view the decision of the trial Court that the appellants were liable for negligence apart from any statutory duty, is correct, this appeal must be dismissed with costs.

ZEKIA, J.: The deceased, a mason, was engaged on the day of the accident by appellants to repair the roof of the kitchen, property of appellant No. 1. The west wall of the said kitchen was about 6-7 feet high and the well into which the said mason fell had a mouth extending to that wall. The mouth of the well was 5 sq. ft. A greater portion of it on the side of the said wall was covered with earth and plaster supported by rafters placed across the mouth of the well. An open space of 1½ sq. ft. was left open in order to draw water through it in a bucket by means of a wooden pulley supported on poles. It appears that the deceased, in order to carry out the necessary repairs on the roof, got on the cover of the well next to the west wall of the kitchen. The well in question had a parapet of about 1½ ft. high and the deceased by getting on the covered top of the well could reach part of the roof of the kitchen and carry out the repairs undertaken by him. While he was standing on the said cover and examining the tiles or handling a beam for placing

it on the roof in question part of the well cover supporting him collapsed and he fell into the well which was 40 feet deep and sustained injuries from which he died three weeks later.

The trial Court considered the relation between the deceased and the appellants and correctly found it to be that of an occupier and invitee and on the facts of the case concluded that the former were negligent in not discharging their duty towards the mason, the invitee. The trial Court in alternative also found that appellants were liable to pay damages to the executor or to the heirs of the deceased person because the damage suffered was also the result of a breach of a statutory duty, appellants having failed to comply with section 9 (2) of the Wells Law (Cap. 312), by not fencing in or adequately covering the well as required by law.

Sections 47, 53 and 54 of the Civil Wrongs Law are relevant to this case. Section 47 (1) reads:

"Negligence consists of—

(*a*) doing some act which in the circumstances a reasonable prudent person would not do or failing to do some act which in the circumstances such a person would do .... Provided that compensation therefore shall only be recovered by any person to whom the person guilty of negligence owed a duty, in the circumstances, not to be negligent".

"A duty not to be negligent shall exist in the following cases, that is to say:—

(*a*).....

(*b*) the occupier of any immovable property shall owe such a duty to all persons who are, and to the owner of any property which is lawfully in or upon or so near to such immovable property as in the usual course of things to be affected by the negligence".

Second proviso following this sub-section reads:

"Provided also that the occupier of any immovable property shall owe no such duty in respect of the condition of or of the maintenance or repair of such immovable property to any bare licensee who is, or the property of whom, is, in or upon such immovable property save only to warn such bare licensee of any concealed danger or hidden peril in or upon such immovable property of which such occupier knew or must be presumed to have known. For the purposes of this section 'bare licensee' means any person who lawfully comes upon any immovable property otherwise than—

(*i*) in connection with any business in which the occupier of the property is interested".

Reading the sub-paragraphs of section 47 one would readily admit that the duties cast on an occupier towards an invitee are not in extent or nature less than the duties owed by an occupier to an invitee under the Common Law of England. So that part of the law formulated in the leading case *Indermaur* v. *Dames* was properly considered and applied. The second proviso just cited taken together with the earlier part of the section, by implication makes it clear that the occupier of premises has got a duty to render reasonably safe his premises for an invitee who is there for business and acts within the ambit of his invitation. He having taken reasonable care and acting within the compass of his invitation the invitee is entitled to assume that the premises are kept reasonably safe for him by being kept properly maintained and repaired for the purpose of performing the work undertaken by him.

The trial Court has found that the deceased had to step on the cover of the well in order to repair the west side of the kitchen roof. There it seems to me the trial Court has gone a bit too far. It does not appear from the evidence that the roof of the kitchen was only accessible by mounting on the cover of the well or that for the repair of the west part of the roof such act was indispensable. But it could be said that it was more convenient for the mason to make use of that part of the cover of the well next to the wall in order to repair the part of the roof of the kitchen in question. However, I do not think this would affect the result of the case because there is evidence, that of Christos Eliophotou and Panayiotis Chrysostomou in particular, which indicates that deceased was making proper use of the cover of the well in question, and this evidence being consistent with other facts of the case it appears to me to be sufficient to hold appellants liable for the damage they have been adjudged to pay. Appellant No. 1 caused, in some way or other, the mason to make use of the cover of the well in order to perform the work he had in hand. There was also evidence before the Court to find that portion of the cover which collapsed was being used or allowed to have been used as part of the yard or as part of the passage in the yard of the appellants. According to the evidence of Eliophotou, Inspector of Labour, the following information was passed to him by appellant No. 1; I read from his deposition:

> "I asked Fatma how the accident happened and she gave me all the information required. She told me that the man was employed there as a mason. This well she explained to me was covered with earth and wooden beams underneath. They used to walk properly over it and from time to time it was shaken but they did not think that it was really dangerous".

The least one could say is that the invitee the mason was not making improper use of the covered portion of the well for the purpose he was invited. If the occupier uses or

permits to be used the cover of a well as part of the yard or as a passage in the yard, then it was a duty cast on him either to take reasonable steps to prevent damage from the unusual danger thus created by turning into part of the yard or passage a cover of the well which was in a dangerous condition. It was unusual because it presented danger which as authorities put it was not usually to be found in carrying out the task or fulfilling the function which the invitee had in hand. In the circumstances of this case knowledge on the part of the invitee that he was standing on the cover of the well in the absence of any warning as to the dangerous structure of the cover did not amount to a full appreciation of the danger on his part. Bearing in mind the situation and the use the cover of the well was put, he could reasonably assume that he was safe to do his work on that cover. It was incumbent on the invitors in such a case whether they complied with the provisions of the Wells Law or not to render the space covered reasonably safe for passers-by or for persons making proper use of it.

On the other hand, it seems to me extremely doubtful whether respondents were entitled to any remedy due to the breach of the provisions of the Wells Law. The marginal note to section 9 of the Wells Law repealed and replaced by section 4 of the Law 19 of 51 reads: "Permit the holder to ensure that the well is not a source of public danger".

Indeed the object of this part of the law is to prevent damage to any member of the public or to his property by falling into a well rather from the side of its mouth which is not adequately covered or fenced in by sufficiently high parapet. It seems to me that the intention is primarily to protect the unwary and not a person or class of persons who, knowing there is a well, deliberately mounts on the top of it or passes over it in his vehicle relying on the soundness of the cover. If a person steps on the cover of the well knowing that he is stepping on such cover and if there are no special circumstances rendering his access a proper one I should regard him as a trespasser, even if an invitee for the rest of the area, for the space occupied by such cover of the well. It would be, in my opinion, untenable to contend that the relevant provisions in the Wells Law were intended to protect people or class of people to which deceased belonged for carrying out their work and that they should have personal right to remedy. I would also feel myself very reluctant to regard the inherent danger of getting on the top cover of the well as an unusual or concealed danger. Of course there might be cases where the cover of the well might have been constructed in such a way as to amount to a trap. An occupier might even have to account to a trespasser in laying a trap, such as for instance, of placing an unsound cover on the top of the well at the level of the ground and leaving the place unfenced and putting no notice near it. If a passer-by falls into it then his injury is directly due to

a breach of a statutory duty. Again if a well is covered inadequately in such a way that a person walking in the darkness steps on it and damage is thereby caused to him the damage might be regarded as being the direct result of a breach of a statutory duty. But when a person in broad daylight gets on the top of the well without any particular reason, relying that the cover was made sufficiently safe for him to do so and falls into it and loses his life, and if his case against the occupier turns only on the ground of the breach of the statutory duty, I would hesitate a lot in finding him entitled to any remedy, even if the Common Law right to a remedy in breach of statutory duties was available. I am inclined to think that, unless there are special circumstances accompanying the case, a person who steps on the cover of the well must be taken to risk a usual danger rather than an unusual danger. But the facts in this case are of peculiar nature. The situation of the well and the use to which its cover was put constituted in the circumstances an unusual danger for the persons who lawfully used that part of appellants' yard. Having found that respondents' case for an alternative claim based on the breach of statutory duty cannot be supported, I felt it is unnecessary to consider the further point raised, namely, whether Common Law right for a remedy due to breach of statutory duties is available in this Colony.

In view of the fact that the covered top of the well was being used for the purpose mentioned, appellants were obviously at fault in not keeping that cover reasonably safe for the persons who lawfully use it. Although they could escape liability by giving adequate warning to the invitee of the unusual danger besetting him which danger had they acted reasonably they would have been able to discover and by taking reasonable steps they could have averted, this appellants failed to do.

I agree in the circumstances that the appeal should be dismissed with costs.