St. John's Law Review

Volume 11
Number 2 *Volume 11, April 1937, Number 2*

Article 26

Statute of Limitation--Statutory Cause of Action--Pleading (Schmidt v. Merchants Dispatch Transportation Co., 270 N.Y. 287 (1936))

St. John's Law Review

STATUTE OF LIMITATION—STATUTORY CAUSE OF ACTION—PLEADING.—Plaintiff while employed in defendant's factory inhaled deleterious dust released through defendant's failure to provide the necessary protective apparatus as required by the Labor Law.[1] The dust lodging in plaintiff's lungs, caused plaintiff to contract silicosis more than three years after leaving defendant's employ. Plaintiff then instituted this action alleging negligence, nuisance, breach of contract, fraudulent misrepresentation, and damages for failure to provide the safeguards required by statute.[2] Defendant moved to have all the alleged causes of action other than negligence stricken from the complaint because they consisted of claimed facts and circumstances which were nothing more than specifications of negligence, against which action defendant pleaded the Statute of Limitations.[3] From judgment granting and affirming defendant's motion, plaintiff appealed. *Held,* judgment modified to permit the last alleged cause of action and as modified affirmed. The other alleged causes of action were in effect negligence actions and as such are governed by the three-year Statute of Limitation, and hence were properly dismissed.[4] However, a cause of action created by statute, except an action upon a statute for a penalty or forfeiture where the action is given to a person aggrieved or to that person and the state, has a six-year limitation.[5] *Schmidt* v. *Merchants Dispatch Transportation Co.,* 270 N. Y. 287, 200 N. E. 824 (1936).

The defendant has committed a single wrongful act which has proximately caused a single injury to the plaintiff. This wrongful act is essentially negligence. Therefore any action based upon it is an action in negligence whether pleaded in the form of nuisance, breach of contract, or fraudulent misrepresentation.[6] A three-year limitation runs against this action from the time it accrues. An action accrues at the time the wrongful act proximately caused damage to the plaintiff.[7] The period of limitation, therefore, ran from the time the dust was inhaled and not from the time the disease developed.[8]

---

[1] N. Y. LABOR LAW § 229, (2), (3).

[2] *Ibid.*

[3] N. Y. CIV. PRAC. ACT § 49.

[4] N. Y. CIV. PRAC. ACT § 49; Pine v. Waterbury Clock Co., 245 App. Div. 605, 283 N. Y. Supp. 763 (1st Dept. 1935); Speziale v. National Brass Mfg. Co., 246 App. Div. 678, 284 N. Y. Supp. 104 (4th Dept. 1935).

[5] N. Y. CIV. PRAC. ACT § 48, (2).

[6] Dickenson v. Mayor, 92 N. Y. 584 (1883); McFarlane v. City of Niagara Falls, 247 N. Y. 340, 160 N. E. 391 (1928); Payne v. New York, S. & W. R. R. Co., 201 N. Y. 436, 95 N. E. 19 (1911); POMEROY, CODE REMEDIES (5th ed. 1929) §§ 347, 349, quoted with approval in Hahl v. Sugo, 169 N. Y. 109, 62 N. E. 135 (1901); Sheppard v. Green, 48 S. C. 165, 26 S. E. 224 (1897); Smith v. Smith, 50 S. C. 54, 27 S. E. 545 (1897); Broughel v. Southern N. E. Tel. Co., 72 Conn. 617, 45 Atl. 435 (1900).

[7] Comstock v. Wilson, 257 N. Y. 231, 235, 177 N. E. 431 (1931); Conklin v. Draper, 229 App. Div. 227 (1st Dept. 1930), *aff'd,* 254 N. Y. 620, 173 N. E. 892 (1930); Wiener v. Ellrodt, 268 N. Y. 646, 198 N. E. 537 (1935); Cappuci v. Barone, 266 Mass. 578, 165 N. E. 653 (1919).

[8] *Ibid.*

But the defendant has also breached a statutory duty which may have two different results: (A) If the statute was enacted for the benefit of a particular class of persons, a breach of it is deemed negligence *per se*,[9] the effect of which is to *create* a cause of action for a member of a class injured by such breach;[10] this cause of action based on statute, is separate and distinct from the tort action of negligence;[11] (B) if the statute is a general police regulation, rather than for the benefit of a particular class of persons, and is punishable solely as a public offence, proof of its breach would act merely as a specification of negligence.[12]

As to which result the breach of a statute leads, depends upon the language and intent of the statute.[13] Actions brought under the Workmen's Compensation Law were held to be actions *created* by statute and therefore governed by the six-year period of limitation.[14] In a suit under the Workmen's Compensation Law the defenses of assumption of risk and the negligence of fellow-servants were taken away from the employer;[15] in addition new duties were imposed such as requiring the maintenance of specified safeguards, the total effect of which was the creation of a liability on the employer where heretofore there was none and thereby a cause of action was created.[16]

By a similar analysis it can be said that the Legislature has thus created a cause of action for a breach of Section 229 of the Labor Law. There is now a liability on the employer where previously none existed, for the employer may not use *any* device which would be sufficient under the common-law duty of care owed to the servant, but it

---

[9] Racine v. Morris, 201 N. Y. 240, 94 N. E. 864 (1911); Watkins v. Naval Colliery Corp., L. R. App. Cas. 693 (1912); 27 Halsbury's Laws of England 192.

[10] Texas & Pac. Ry. Co. v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482 (1916); Ward v. Erie Ry. Co., 230 N. Y. 230, 232, 139 N. E. 886 (1921); DeMilt v. Hart, 235 N. Y. 464, 139 N. E. 575 (1923); Ross v. D. L. & W. R. R., 231 N. Y. 335, 132 N. E. 108 (1921); Kelly v. N. Y. State Rys., 207 N. Y. 342, 100 N. E. 1115 (1913).

[11] Martin v. Herzog, 228 N. Y. 164, 126 N. E. 814 (1920); DeCaprio v. N. Y. Cen., 231 N. Y. 94, 131 N. E. 746 (1921); Kelly v. N. Y. State Rys., 207 N. Y. 342, 100 N. E. 1115 (1913); Abounader v. Strohmeyer, 217 App. Div. 43, 215 N. Y. Supp. 702 (4th Dept. 1926).

[12] Kelly v. N. Y. State Rys., 207 N. Y. 342, 100 N. E. 1115 (1913); Union Pac. Ry. Co. v. McDonold, 152 U. S. 262, 283, 14 Sup. Ct. 619 (1893); Hays v. Michigan Cen. Ry. Co., 111 U. S. 228, 239, 4 Sup. Ct. 369 (1853); Fluker v. Ziegele Brewing Co., 201 N. Y. 40, 93 N. E. 1112 (1911).

[13] Taylor v. L. S. & M. S. Ry. Co., 45 Mich. 74, 7 N. W. 728 (1881).

[14] Jeffrey v. Miller, Inc., 222 N. Y. 135, 118 N. E. 522 (1917); Detmar v. Nussbaum, 149 Misc. 469, 267 N. Y. Supp. 732 (1933), *aff'd*, 241 App. Div. 720, 269 N. Y. Supp. 1006 (1st Dept. 1934).

[15] Caddy v. Interborough R. T. Co., 195 N. Y. 415, 88 N. E. 747 (1909); Pinsdorf v. Kellogg & Co., 108 App. Div. 209, 95 N. Y. Supp. 617 (1st Dept. 1905); Barrencotto v. Cocker Saw Co., 266 N. Y. 139, 194 N. E. 61 (1934); Gmaele v. Rosenberg, 178 N. Y. 147, 70 N. E. 411 (1904).

[16] Shepard v. Taylor Pub. Co., 234 N. Y. 465, 138 N. E. 409 (1923).

is mandatory that he use a *specific* device of adequate capacity.[17] It also does away with the two defenses formerly mentioned as available to the employer under common law, which in themselves would have barred a recovery if the employer could have used them.[18]

General police regulations insofar as they do not benefit a particular class of persons do not create new liabilities toward persons injured by their breach, and therefore do not give a cause of action.[19] The breach of Section 229 of the Labor Law gives a cause of action separate and distinct from that of negligence. The six-year period of limitation applies.[20]

L. J.

---

[17] Arnold v. National Starch Co., 194 N. Y. 42, 86 N. E. 815 (1909); Willy v. Mulledy, 18 N. Y. 310 (1879).

[18] Bohlen, *The Common Law Right of Action for Occupational Diseases in Pennsylvania* (1915) 63 U. OF PA. L. REV. 183; Barrencotto v. Cocker Saw Co., 266 N. Y. 139, 194 N. E. 61 (1934).

[19] Koerster v. Rochester Candy Works, 194 N. Y. 92, 87 N. E. 77 (1909); Fluker v. Ziegele Brewing Co., 201 N. Y. 40, 93 N. E. 1112 (1911).

[20] Gropp v. Great Atl. & Pac. Tea Co., 205 N. Y. 617, 98 N. E. 1103 (1912).