Protecting Economic Interests through the Nominate Tort Action for Breach of Statutory Duty

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The civil action for Breach of Statutory Duty (BSD) is most often invoked in cases of personal injury, often in the industrial context. But there is a long history of BSD actions being used to protect economic interests, in the form of compensation for pure economic loss, and dealing with damage to specific property. This paper will explore the varying ways in which the BSD action has developed to protect economic interests, taking into account principles relating to specific so-called “statutory torts” as well as the general common law action based on implied Parliamentary intention.

1. Introduction

The nominate tort of “breach of statutory duty” (“BSD”) has long provided civil remedies for statutory breach of legislation aimed at preventing workplace injury and death. But is it a tort that can provide a remedy when a statutory breach causes economic loss?

Yes, authority has long held that economic loss may be recovered by a BSD action, depending of course on whether the other elements of the tort are satisfied. One example of a clear testimony to the availability of the action in such cases can be found in the passing comments of Lord Bridge of Harwich in *Pickering v Liverpool Daily Post and Echo Newspapers Plc* [1991] 2 AC 370 at 420:

> I know of no authority where a statute has been held... to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss. (emphasis added)

Still, there is no doubt that in the area of economic loss the BSD action, as with the negligence action, is not so readily available as it is in relation to bodily harm. In *Richardson v Pitt-Stanley* [1995] QB 123 Russell LJ, in rejecting the claim in question (a claim by an injured worker to recover a damages award to which the worker was entitled, from a company director in breach of a statute), commented that:

> In the past, criminal statutes have created civil liability in the field of personal injury litigation but generally the breach of the statute has resulted in direct physical injury to

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the plaintiff. Not so in this case. The breach of the Act of 1969 in this case does no more than involve the plaintiff in economic loss, namely the inability to recover damages (at 130.)

Similarly, Stuart-Smith LJ said:

In my opinion, the court will more readily construe a statutory provision so as to provide a civil cause of action where the provision relates to the safety and health of a class of persons rather than where they have merely suffered economic loss (at 132.)

Still, even in that case his Lordship acknowledged that this was not an inflexible rule, as the well-known decision of Monk v Warby [1935] 1 KB 75 was clearly an example of a successful BSD claim for economic loss.

The aim of this paper is the modest one of commenting on a number of BSD claims relating to economic loss, noting those which have failed and those which have succeeded, in an attempt at the conclusion of the paper to draw out some general principles, if any can be determined, as to when such claims might have some prospect of success.

2. Overview of the Breach of Statutory Duty action

The courts have begun to accept the list of 6 elements of the tort provided in the 10th edition of Fleming’s The Law of Torts as a convenient summary of the action:

The elements of the civil action for breach of statutory duty ... can be identified as: (a) the intention of Parliament to allow an action; (b) the plaintiff must fall within the ‘limited class’ of the public for whose benefit the statutory provision was enacted; (c) the damage suffered must also fall within the intended scope of the statute; (d) the obligation under the statute was imposed on the defendant; (e) the defendant must have breached the statute; and (f) that breach must have caused actual damage of some sort to the plaintiff .

The question addressed by this paper is mainly limited to the first element of the tort: when can it be concluded that Parliament “intended” to allow a civil action which encompasses “pure economic loss” in relation to breach of a statutory provision?

As the High Court of Australia reaffirmed in passing in Stuart v Kirkland-Veenstra [2009] HCA 15, the test for determining this point was laid down long ago by Kitto J, who said that the question was:

... to be inferred from “a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed [or in this case authorised], the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation.”

However, some brief comments will be offered on some other issues, mainly flowing out the explicit “statutory tort” area, which will be noted first.

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3. “Statutory Torts” – explicit protection of economic interests under statute

An obvious example of Parliamentary intention here is where there is the explicit conferral of a civil action flowing from statutory breach. In this area the first element of the list noted above is present, but there is often no doubt that it is satisfied.

In his excellent overview of the area in the co-authored monograph Statutory Torts, Keith Stanton and his fellow authors comment on a number of areas in UK law where explicit tort actions have been created by statute. The authors take the view that a BSD action “proper” is one where civil liability has to be inferred, classifying actions created by explicit words “statutory torts”. They say, however, that the phrase “breach of statutory duty” can be used to refer to the explicit provisions in a “loose” sense.

As the field of statutory torts in the UK dealing with economic loss is covered so well in the book, especially ch 11 on “Economic Losses”, these will simply be summarised briefly here. The chapter refers to actions Parliament has created in relation to:

- misrepresentation
- financial services
- defective premises
- employment law
- competition law.

The table below sets out the major UK laws discussed in chapter 11 of Stanton et al, and by way of comparison notes where there are similar explicit statutory torts created under Australian law.

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4 K Stanton, P Skidmore, M Harris & J Wright Statutory Torts (Thomson/ Sweet & Maxwell, London, 2003). The “core” of this work is a revised version of Stanton’s earlier monograph, Breach of Statutory Duty in Tort (Sweet & Maxwell, London, 1986), which was the first monograph devoted to the BSD implied tort in the common law world. But the later work adds consideration of a number of explicit statutory tort actions. See also K Stanton, “New forms of the tort of breach of statutory duty”, (2004) 120 L.Q.R. 324-341.

Table 1- some examples of statutory torts in UK and Australia

<table>
<thead>
<tr>
<th>Category</th>
<th>UK law⁶</th>
<th>Circumstances of liability</th>
<th>Similar Australian law</th>
<th>Circumstances of liability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Misrepresentation</td>
<td>Misrepresentation Act 1967</td>
<td>Contract formation</td>
<td>Australian Consumer Law s 18</td>
<td>Misleading and deceptive conduct in trade and commerce</td>
</tr>
<tr>
<td>Financial services, Company law</td>
<td>Financial Services and Markets Act 2000 s 150 et al</td>
<td>Protection of investors</td>
<td>Australian Securities and Investments Commission Act 2001 s 12DA⁷</td>
<td>Misleading and deceptive conduct in relation to financial services, companies</td>
</tr>
<tr>
<td>Defective premises</td>
<td>Defective Premises Act 1972, s 1</td>
<td>Remedy where residential premises not built properly</td>
<td>State legislation – eg Home Building Act 1989 (NSW) s 18B</td>
<td>Provides a statutory warranty of quality able to be sued on by later purchasers</td>
</tr>
<tr>
<td>Employment law</td>
<td>Trade Union and Labour Relations (Consolidation) Act 1992, ss 145 &amp; 187</td>
<td>Remedy where union preference provisions used in employment</td>
<td>Fair Work Act 2009 s 346, a “civil remedy” provision</td>
<td>Damages available where discrimination against non-union labour</td>
</tr>
<tr>
<td>Competition law</td>
<td>Liability under European Community law, arts 81, 82; Enterprise Act 2002</td>
<td>Breach of competition law principles</td>
<td>Competition and Consumer Act 2010 (Cth) s 82</td>
<td>Damages available where breach of competition law principles</td>
</tr>
</tbody>
</table>

Stanton et al also note that civil actions for breach of European law (one of which is noted in the Table above, but of which there are other examples) have been classified by the English courts as examples of “breach of statutory duty”- see eg Garden Cottage Foods v Milk Marketing Board [1983] AC 130, discussed in chapter 6 of Statutory Torts. (See also more recently R v Secretary of State for Transport, ex p. Factortame (No.7) [2001] 1 W.L.R. 942.)

In a separate article⁸ Stanton has identified some problems with the way that the new liability under European law has been regarded as attracting the characteristics of the older common law BSD tort. Some statutory torts in the UK also use a form of words that seems designed to “pick up” a number of

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⁶ These are the laws discussed in Stanton et al (2003). They will serve to illustrate the points being made, but it may be that some have been amended or replaced in the last 13 years.

⁷ See also Corporations Act 2001 (Cth) s 1041H, creating civil liability for misleading and deceptive conduct in relation to “a financial product or a financial service”. The High Court discussed aspects of this provision in Selig v Wealthsure Pty Ltd [2015] HCA 18 (13 May 2015).

⁸ Stanton (2004), above n 4.
ancillary features of the BSD tort. The technique is an understandable attempt not to have to rethink from scratch issues such as the rules for causation or remoteness of damage, or which defences are applicable. But Stanton notes the problem with the technique:

The traditional tort has no firm characteristics on which the new tort can be based, and the reference to something which has very few features leaves the new torts unencumbered.9

The issue may be illustrated from the history of litigation involving the major Australian “statutory tort”, the prohibition on misleading and deceptive conduct in trade and commerce. Originally this prohibition was contained in s 52 of the Trade Practices Act 1974 (Cth) (“TPA”). That Act was renamed and restructured to become the Competition and Consumer Act 2010 (Cth) (“CCA”) and the prohibition shifted into Schedule 2, the Australian Consumer Law (“ACL”), as s 18. It currently reads:

18 Misleading or deceptive conduct

(1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

The operative provision that turns this obligation into a civil action is s 236 of the ACL:

236 Actions for damages

(1) If:
(a) a person (the claimant) suffers loss or damage because of the conduct of another person; and
(b) the conduct contravened a provision of Chapter 2 or 3;
the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

Section 18 is contained in Chapter 2 of the ACL.

The provision, under its former guise of s 52 TPA and in its current form, has proved to be a popular consumer action, used by consumers themselves, but also regularly used by commercial entities against competitors (often as a slightly more streamlined substitute for the common law tort of “passing off”).

While arguably creating a “statutory tort”, s 236 and its predecessor, s 82 of the TPA, have been held by the High Court of Australia not to automatically be linked to the concepts of causation spelled out at common law. As one commentary puts it:

In assessing damages, principles of common law, relevant to assessing damages in contract or tort, are not directly relevant. Section 236 requires the court to select a measure of damages that conforms to the remedial purpose of the statute and to the justice and equity of the case: Henville v Walker [2001] HCA 52; (2001) 206 CLR 459; 75 ALJR 1410; 182 ALR 37; [2001] ATPR 41-841 (Gleeson CJ). However, damages are confined to the "amount of the loss or damage" and do not include, for instance, punitive damages: Wardley Australia Ltd v Western Australia [1992] HCA 55; (1992) 175 CLR 514; Boland v Yates Property Corporation Pty Ltd [1999] HCA 64; (1999) 74 ALJR 209 (Gaudron J).10

9 Stanton (2004), above n 4, at 330.
10 Millers Australian Competition and Consumer Law Annotated : Competition and Consumer Act 2010 Annotated > Schedule 2 – The Australian Consumer Law > Chapter 5 – Enforcement and...
In commenting on this issue in *Travel Compensation Fund v Robert Tambree (t/as R Tambree & Assocs)* (2005)224 CLR 627 French CJ noted at para [30]:

In recent cases, this Court has pointed out that, in deciding whether loss or damage is “by” misleading or deceptive conduct, and assessing the amount of the loss that is to be so characterised, it is in the purpose of the statute, as related to the circumstances of a particular case, that the answer to the question of causation is to be found.11

In short, where statute creates a tort, it cannot always be assumed that the doctrines applied to other torts at common law will always be applicable. In *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459, for example, a majority of the High Court held that the defence of contributory negligence was not available in the case of a civil action under s 52. (The current Act now contains an explicit provision, s 137B CCA, which allows reduction of an award of damages where the claimant has not shown due care.)12

The need to refer to the specific statutory and other contexts of a statutory tort can also be illustrated more recently in the UK decision of *The Mayor’s Office for Policing and Crime v Mitsui Sumitomo Insurance Co (Europe) Ltd* [2016] UKSC 18 (20 April 2016).

The case arose out of a series of riots in August 2011, which caused extensive damage to property. A London warehouse was robbed and then burnt down. Unusually, as a result of historical circumstances narrated in the Supreme Court decision, a statute imposed civil liability for losses resulting from riots to the local authorities in charge of the policing for the area.

The statute, the *Riot (Damages) Act* 1886, s 2(1), created a liability to pay compensation to “any person who has sustained loss” as a result of a riot. The question at issue was whether “loss” included not just the damage to the building concerned or its contents, but consequential economic loss suffered as a result of interruption of business, etc.

While the term on its own would have been apt to cover consequential loss if viewed as a part of the general law of torts, Lord Hodge (for the court) said that on consideration of the history of the statute it was intended to be a “self-contained statutory scheme” (see [34]) which was not designed to mirror the common law, but had to be read on its own terms. In that context it allowed compensation for physical damage to property, but not for consequential economic loss. This was derived from the history of previous legislation and how it had been read by the courts in the past, including the fact that it already clearly excluded some forms of loss from its scope (personal injury was not covered, for example, or harm to movable property on the street- see [16]). That the provision also explicitly provided for reduction of compensation in light of a broad assessment of the conduct of the claimant (such as whether they had “provoked” the rioters, for example) was

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12 See also former s82(1B) TPA, added in 2004 after the High Court decisions in *Henville* and *I & L Securities* referred to in n 11.
another indication that the liability in question was adjusted differently to the ordinary common law principles.

Lord Hodge at one point characterizes the correct approach as one in which “history rather than legal theory” should prevail—see [13]. His Lordship is in effect saying, in striking language, what he says elsewhere: that the issue is one of interpreting the statute, and that this will involve a consideration of the context against which the statute was enacted, as well as its other provisions. A “legal theory” approach would perhaps be one which sought to show that the word “loss” in tort law usually includes not just immediate physical harm, but the consequences which are causally related to that harm. But in the context of a statutory tort, the statutory context must be given priority.

4. The implied BSD action and economic interests

We turn, then, to cases involving the “implied” BSD action, where Parliament’s intention has not been spelled out explicitly.

Without concluding that an implicit BSD action will always be harder to establish in the case of “pure” economic loss, it may be worth initially noting why such a view may seem plausible. There are various guidelines and “presumptions” as to Parliamentary intention which have been applied over the years to resolve the question raised by the first element of the action. But one of the most useful comes from the comments of Dixon J in the High Court of Australia, in *O’Connor v S P Bray* (1937) 56 CLR 464, in reference to industrial safety laws. There he said:

> Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears. The effect of such a provision is to define specifically what must be done in furtherance of the general duty to protect the safety of those affected by the operations carried on. (at 56 CLR, 478).

In other words, one indication that Parliament may have intended that a civil action should be available for breach of a particular statutory obligation, is that the statute protects a right which is already protected under common law principles.

This principle has been affirmed many times in Australian decisions on the issue of Parliamentary intention in BSD—see, recently, the decision of the Victorian Court of Appeal in *Govic v Boral Australian Gypsum Ltd* [2015] VSCA 130 (5 June 2015) at [122], and *Poyton v Retailworld Resourcing Australia Limited Partnership* [2016] FCA 494 (8 July 2016) at [40].

But of course, as is well known, there is no general, over-arching protection of economic interests at common law.

This may be illustrated by the comments of Dawson J in *Esanda Finance Corporation Limited v Peat Marwick Hungerfords (Reg)* (1997) 71 ALJR 448:

> ...mere foreseeability of harm does not, where the only harm is pure economic loss, give rise to a duty of care. The reason for this is that a duty of care imposed by reference to the mere foreseeability of harm in the form of financial loss would extend liability in negligence beyond acceptable bounds. Financial loss occurs as the result of legitimate
commercial competition, and commercial activity would be stifled if the law were to impose a duty to take care to avoid that loss. ... Thus, for a duty of care to arise in cases of pure economic loss, the law requires, in addition to the foreseeability of harm, a special relationship between the parties which is described as a relationship of proximity.

In similar terms Lord Hoffmann commented in *Her Majesty's Commissioners of Customs and Excise v Barclays Bank plc* [2006] UKHL 28:

31...In the case of personal or physical injury, reasonable foreseeability of harm is usually enough, in accordance with the principle in *Donoghue v Stevenson* [1932] AC 562, to generate a duty of care. In the case of economic loss, something more is needed.

Stevens makes a similar "rights-based" point in *Torts and Rights*:

The common law's starting position is that the infliction of economic loss does not per se infringe any right of the claimant.13

So the “right” to be protected in an economic loss claim based on statutory breach will often be one created by Parliament de novo, rather than building on or reinforcing a pre-existing right. That does not mean, as we will see, that there can never be an economic loss BSD claim; it does mean, however, that there seems to be a preference for BSD claims to be allowed where they undergird pre-existing common law rights.

As we will see below, this view is confirmed by the fact that some of the recognised BSD claims relating to economic interests relate to property rights, and hence are supporting rights that are otherwise protected by the common law.

It will be necessary, then, to review in a broad way some of the major cases where an implied BSD right has been rejected, and then to consider those where one has been accepted, to see if there are any other common themes underlying the courts’ decisions.

a) Cases where an implied BSD has been rejected

It may be that *Stevens v Jeacocke* (1848) 11 QB 731 represents the first reported example of an attempt to mount a BSD action for economic loss, which failed.14 The plaintiff and the defendant were fishermen at the St Ives Bay Pillhard Fishery, and an Act of Parliament of 1841 explicitly prescribed that the fishermen should take their turns at various fishing stations, and imposed penalties should one attempt to “cut in early” before the previous boat had completed taking its haul.

The plaintiff complained that on the evening of 24 November 1845 the defendant’s boat cut in before his “shift” was finished and enclosed a large shoal of fish which he was about to catch, described in the pleadings as “to wit one million herrings, &c, the same being fit for human food, and of great value, to wit, &c, then being in the sea within the limits of the said Poll stem.”

The plaintiff’s action, then, was to recover the cost of the fish he had lost. These fish, it should be noted, had not yet quite been enclosed by his nets- as if they had, he would have at that stage have been deemed to be in

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14 See Stanton et al (2003), above n 4 at 2.001, 17.
possession of them, and he could have sued for conversion. His claim was
made, then, on the basis that in taking the fish the defendant had been in
breach of the statute.

The claim failed. At first glance what was said would seem to cut off
most statutory civil claims. The court holds that where statutory penalties are
applicable, then the legislation cannot be enforced in some other way. They
conclude by citing, at 742, words that will be regularly repeated in later
unsuccessful BSD claims:

In Doe dem. the Bishop of Rochester v. Bridges (1 B. & Ad. 847, 859), the Court say:
"Where an Act creates an obligation, and enforces the performance in a specific manner,
we take it to be a general rule that performance cannot be enforced in any other manner."

However, on further examination the decision is actually quite
consistent with later principles developed in this area. The statute, 4 & 5 Vict
c lvii, did not only specify a criminal penalty for breach, but itself made
 provision for some compensation to be provided to fishermen whose “turn”
was interrupted. One provision, s 18, declared that if this happened then all the
fish that the interloping boat captured were to be given to the boat whose
rightful turn it was, along with a forfeit of money. Arguably this particular
 provision was not very workable; in their argument, counsel for the plaintiff
argued (see 739):

the common law remedy for this is ineffectual: the fish would be spoiled before it could
be completed.

Forfeiture of a load of rotting fish some days after the events was
clearly not an attractive remedy! But given that Parliament had made some
attempt to provide for compensation to the person whose rights were being
protected by the law, it seems hard to argue that they would have intended
another civil action to be available. So Stevens turns out to be an application of
a principle often found in later cases, that where a specific civil remedy has
been provided in the statute, there will normally be no room for another in the
shape of a BSD claim.

Coming forward some centuries, the same approach can be found in
Hall v Cable and Wireless plc [2009] EWHC 1793 (Comm). There it was held
that where, in a detailed legislative code governing the share market,
Parliament had explicitly provided that certain provisions were actionable, this
was a good indication that other provisions, not included in that list, were not
actionable:

16 These provisions indicate clearly that Parliament expressly considered which of the
duties or obligations imposed by FMSA would give rise to a cause of action at the suit of
a private person. Parliament did not provide expressly that a breach of the listing rules
would give rise to a cause of action at the suit of a private person. Other remedies and
penalties were provided by sections 382, 384 and 91. That is a clear indication that
Parliament did not intend that a breach of the listing rules would give rise to a cause of
action at the suit of a private person. To hold that Parliament did so intend would
interfere with the scheme and modes of enforcement provided by FMSA.

Another example where the relevant statutes were found not to be
actionable (oddly enough, involving the same defendant) is the decision of
Morgan J at first instance in the UK in Digicel (St Lucia) Ltd & Ors v Cable &
Wireless Plc [2010] EWHC 774 (Ch).
This was a very complex set of proceedings between mobile phone companies which had been established in various Caribbean countries, alleging that the previous holders of the monopoly in telephone services in those countries had breached statutory duties which were imposed to “not refuse, obstruct, or in any way impede another telecommunications provider from making an interconnection with his or her telecommunications network”—this from s 46 of the relevant St Lucia legislation, noted at [106].

A detailed review of the law on whether or not a statute imposes a civil obligation was given in “Annex H” to the judgment. In the end Morgan J concluded that the relevant obligations were not civilly actionable, given that the duties were imposed in the “public interest” rather than that of the relevant competitors, and also that there were provisions allowing administrative enforcement by the Government regulators—see eg the conclusions on the St Lucia legislation at [159]-[170], an analysis mostly applicable to the legislation of the other countries involved.

The only exception was the law of Barbados, where the relevant statute explicitly provided for a civil remedy—see [349]; but in that case the judge on analyzing the circumstances found that there had been no breach of the statute, so there was in any case no action.

In Dwr Cymru Cyfyngedig (Welsh Water) v Barratt Homes Ltd [2013] EWCA Civ 233 the question was whether a breach of the statutory right of a property developer to connect properties to a sewerage line, could give rise to a civil claim. Actually the BSD claim had been abandoned at an earlier point; but the members of the Court of Appeal considered it anyway, on the basis that if there were no BSD claim, there could be no claim in nuisance.

They ruled that the statutory right did not give rise to a civil action for a variety of reasons. Lloyd Jones LJ agreed with the trial judge that the provision was one intended for the “benefit of the community as a whole” and hence not designed to give a civil remedy to one party—[35].

Pill LJ, it is submitted, acknowledged more clearly that there were various positive factors pointing to the possible existence of a civil right—eg the right would only be enjoyed by a limited class of the public—[109]. But in the end he concluded that, because Parliament had included a number of compensation provisions relating to the exercise of other parts of the Act, it would not be sensible to conclude they intended compensation to be available for breach of the provision in question—[112].

In the Australian decision in MFESB v Yarra City Council & Ors [2015] VSC 773 (24 Dec 2015), dealing with a provision making certain types of pollution illegal, a similar approach was followed:

[200] In my opinion, a careful reading of the Act does not demonstrate an intention that an individual should have a private right of action for breach of s 45(1) of the Act. In substance, I accept the submissions of the defendant in this respect and, in particular, I consider the Act as a whole, especially when read in the context of the Minister’s second reading speech, makes it plain that the Act is intended for the ‘general good’ of the community. Further, the inclusion of the penal provision in s 45(3) and the incorporation of an express right to compensation under s 62A(2) (as opposed to s 45(1), containing

15 For comment on, and critique of, this “limited class” rule in the tort, see Neil J Foster “Reforming the action for Breach of Statutory Duty in the 21st century: reconsidering the “section of the public” rule” Private Law in the 21st Century Conference (Brisbane, 2015) at: http://works.bepress.com/neil_foster/98/.
no such express right) strongly contra-indicate an intention to confer a private right of action on an individual. (emphasis added)

However, in some cases a claim has been denied where arguably it should have been allowed.

In *Trustee of Poulton v Ministry of Justice* [2009] EWHC 2123 (Ch) it was initially held that the duty imposed on a court registrar, where a bankruptcy petition had been lodged, to send a copy of the petition to the Lands Registrar, so that notice would appear on the certificate of title of any property owned by the alleged bankrupt, was a civilly actionable statutory duty.

In this case the notice of the petition had not been sent, and the bankrupt person was hence able to dispose of some land that he owned and “disperse” the funds before the creditors could intervene. After a very careful review of previous cases and legislation, Judge Hazel Marshall QC ruled that the relevant regulation did give rise to a civil action. Factors that supported this view were that

- the obligation was simple and straightforward;
- the legislation provided no other remedy if the duty was not complied with;
- creditors of the bankrupt, who would be affected by a failure to discharge the duty, were a limited and clearly identifiable class;
- a previous decision, *Ministry of Housing v Sharp* [1970] 2 QB 223, while it had failed on the particular facts, had accepted that a duty in a similar case (on the Land Registrar to register encumbrances) was actionable.

However, on appeal in *Trustee In Bankruptcy of Louise St John Poulton v Ministry of Justice* [2010] EWCA Civ 392 the Court of Appeal overturned this ruling and found that the rule did not create a civilly actionable duty.

With respect, the appeal decision is not very convincing. One reason for not finding the duty actionable was that it was not relevant that there was no other sanction for breach of the rule, because in general “on the part of relevant court officers and staff, the obligation would be performed as a matter of course”—[84]. But it is arguable that this very fact is a good reason for holding that, in cases where there is a mistake, there should be some remedy for someone who was injured by the (admittedly rare) failure. If the failures are rare, the financial burden of allowing an action will not be large. It is also odd that the Court of Appeal here seems to cast some doubt on the authority of *Ministry of Housing v Sharp*, calling it “difficult” despite the fact (as they note) that this decision was reaffirmed recently by the House of Lords (see para [100]).

In *Sebry v Companies House the Registrar of Companies* [2015] EWHC 115 (QB) a claim in BSD was coupled with a claim for negligence causing economic loss, where a mistake in the companies register office led a company to be wrongly listed as insolvent, when it was in fact still in good financial condition. This wrong listing then caused a sudden withdrawal of investment and customers, which caused it then to be actually made insolvent.

Edis J resolved the case, and found in favour of the plaintiff, on the basis of the negligence claim, and said he did not plan to go in detail into the...
possible BSD action. But he did indicate a view that the BSD claim could not succeed:

[106]...the 2006 Act is a statute which regulates the keeping of the Register and imposes duties on the Registrar for that purpose. The Register publishes information which is available to the whole world, because it is available on the internet. Whereas the common law of negligence has control mechanisms designed to restrict the class of person who can claim damages for economic loss, the imposition of a statutory duty which gave rise to a claim for damages at the suit of anyone who suffered economic loss by reason of any act or omission which was a breach of the statutory duties imposed would create a very wide duty indeed. I can see nothing in the Act to justify a finding that this was the intention of Parliament.

With respect, it can be argued that Edis J was far too quick to dismiss the claim (in effect, as he said, he did not seriously address it because of his view on the negligence point.) While at [106] he said that a duty that was found to be for the benefit of all the users of the register would be far too wide, this ignores the fact that a key element of the BSD tort is to consider “for whose benefit” the duty was created. Since in his reasoning on the negligence claim he was happy to restrict the duty of care as owed to the specific company whose information was wrongly recorded, it seems that it would have been possible to analyse the statutory duty in that way too.

Why might there not, for example, be an actionable statutory duty owed to the actual company whose details are carelessly entered? The more important question is whether there is such a duty spelled out in the statute. Section 1080(5) of the Companies Act 2006 quoted at para [73] seems to provide a suitable mandatory obligation: the register “must be such that information relating to a company is associated with that company”. That seems a plausible and suitably limited “duty”, and it would be quite feasible to find that the overall structure of the Act imposed that duty in the particular interest of the company whose details are recorded.

Indeed, in effect that is what the judge found in his conclusion on negligence: see para [112] fourth dot point:

the imposition of a duty would tend to reinforce the statute by requiring Companies House to do exactly what it is already required to do by statute. The information relating to a company must be complete, accurate and easily retrievable.

It seems, with respect, that the BSD claim was indeed arguable. Indeed, in a jurisdiction (like Australia) where a similar negligence claim might fail due to a reluctance to extend the duty of care on account of “coherence” factors, a BSD claim might be necessary to provide a suitable remedy.16 That is, one could argue, if concerned with not interfering with the regime established by the statute, that a broad overlay of a possible negligence claim would potentially undermine a balance set up by the Parliament. But if the claim being made relates directly to a duty imposed by Parliament itself, then it seems entirely unobjectionable.

It might also be added that, if, as suggested above, a BSD claim is more likely to succeed where it builds on a similar common law right, the right being protected in the litigation here was really a reputational right, not

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very far removed (if at all) from a right that might have been protected under the law of defamation.

A statement that a firm is bankrupt (which is effectively what was said here) will be defamatory. In Australia the decision of the High Court in *Aktas v Westpac Banking Corp Ltd* [2010] HCA 25 deals with a related situation, a bank wrongly asserting that cheques would not be paid. There is no general “social interest” in allowing slapdash entry of information about companies that could have been avoided by ordinary carefulness and the following of written procedures. The majority of the High Court in *Aktas* held that Westpac had no qualified privilege to issue false statements about insolvency, and while the situations are not identical, it is arguable that a similar result would follow here.

Whether the fact that a defamation claim was arguable would also, in Australia for reasons of “coherence” noted above, mean that a claim in negligence would probably be rejected. This provides all the more reasons why a statutory civil claim should be allowed.

A recent decision of the UK Supreme Court denying a claim for economic loss caused by statutory breach is *Campbell v Gordon (Scotland)* [2016] UKSC 38 (6 July 2016). The Court was divided 3-2.

Mr Campbell was injured at work. His company was not properly insured to cover the damages award, and went bankrupt without making payment. Mr Gordon was the director of the company. The company had committed a breach of a statute in being relevantly uninsured. Under s 5 the legislation provided that where the company was guilty, then:

where an offence under this section committed by a corporation has been committed with the consent or connivance of, or facilitated by any neglect on the part of, any director, manager, secretary or other officer of the corporation, he, as well as the corporation shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Mr Campbell was suing Mr Gordon as civilly liable for the failure to insure, based on his criminal liability for the company’s failure. (The claim, then, while based in a personal injury, was a claim for economic loss in not being able to enforce a judgment.) An almost identical claim had been made in an English case in *Richardson v Pitt-Stanley* [1995] ICR 303, where the claim failed by a 2-1 decision in the Court of Appeal. At that time the majority held that the relevant legislation was passed in the interest of the company, and hence could not be relied on by the worker. There was a blistering dissent by Sir John Megaw.

At the earlier stage of *Campbell*, [2015] CSIH 11 (3 Feb 2015), the claim failed by 2-1 again, but at least the Court of Session Inner House agreed with Sir John Megaw that the purpose of the law was to protect injured workers, who might lose the benefit of a tort claim due to lack of insurance.

But the claim still failed at that stage, and in the Supreme Court it failed again according to the majority (Lord Carnwath for himself and Lords Mance and Reed.) The majority focused on the form in which the obligation was expressed. There was no actual “duty” directly imposed on a director,

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17 Presumably in the UK, while *Spring v Guardian Assurance* [1995] 2 AC 296 is good law, this would not of itself count against the negligence claim being available.

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there was simply “deemed” criminal liability in case the company breached the Act. Hence it could not be said that Parliament had intended to impose a civilly actionable duty (see eg [6] where this is summarised).

Some important things are worth noting about the majority decision, though. There was some argument that what was regarded as a “presumption” referred to by Lord Diplock in *Lonrho v Shell (No 2)* [1982] A.C. 173, where his Lordship said that where an obligation is imposed “for the benefit or protection of a particular class of individuals” it will usually be actionable, should be rejected. But Lord Carnwath in *Campbell* at [12] declined to rule on this point. He simply held that in a case where the form of the statute does not impose a duty, there could be no civil action. Lord Diplock’s approach was left in place for the moment, and supported by Lord Toulson at paras [37]-[38] in the minority.

In particular Lord Carnwath accepted, on the authority of the “Pink Panther” case of *Rickless v United Artists* referred to below, that it will not be an automatic bar to civil liability that a provision is framed simply in terms of a criminal offence, without further imposing an explicit “duty”. In other words, his Lordship seemed to accept that the following two formulations might both create a civil liability:

- X shall do Y; and
- X shall not do Z, penalty $Q (which clearly imposes a direct obligation on X.)

But what his Lordship saw as not creating an actionable duty was the form “A Pty Ltd shall not do Z, and if they do B is deemed to be also guilty of the same offence”. It is the lack of “direct responsibility” for the behaviour that was fatal to the claim here.

For the minority (and it is submitted this is the better approach) this is a “formalistic” approach that ignores the substance of the obligation- see Lord Toulson at [27]. The effect of the provision in question was exactly the same as if it had said “It shall be illegal for the director” to allow the company to be uninsured, followed by the same penalty. The court should have looked at the form, not the substance, and held that the director did indeed have a duty, and the worker deprived of the benefit of compensation should have been able to enforce his “correlative right” (to use the helpful phrase quoted by both majority and minority from *Black v Fife Coal Co Ltd* 1912 SC (HL) 33; [1912] AC 149 at AC 165-166 – see paras [8], [34]). Lady Hale agreed.

Indeed, Lord Toulson made a subsidiary argument, that even if a “formalistic” approach were to be adopted, then since s 5 required the court to “deem” the director to be guilty of the primary offence, then the court should also have deemed him to have breached the duty imposed by the legislation- see [31].

Lord Carnwath brought in at the end of his judgment an additional reason to deny BSD liability here, from para [19]. This was that apparently provisions using these words and imposing deemed liability on company officers werewidely used in other legislation – maybe 900 examples.

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18 A similar phrase was later used by Kitto J in *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, at 404, noting that where Parliament’s intention is found to exist, “every person whose individual interests are thus protected is intended to have a personal right to due observance” of the statutory prohibition or duty.
His Lordship never said so explicitly, but the implication seemed to be a sort of “floodgates” argument- that if s 5 here created civil liability, so would all the others.

With respect, this is not so. Every BSD claim where not supported by prior precedent requires separate consideration of the legislation, and all these Acts will be different and require their own interpretation. It is also odd that he seems to suggest that all the combined resources of counsel for the parties and the court’s researchers “have not disclosed any reported authority in which its (se, “this formula’s”) significance and meaning has been considered”. Odd because s 37 of the Health and Safety at Work etc Act 1974 (UK) contains such a formula, and its interpretation was considered in the Scottish decisions of Armour v J Skeen (Procurator Fiscal, Glasgow) [1977] IRLR 310, and Wotherspoon v HM Advocate [1978] JC 74, and in England in R v P [2007] EWCA Crim 1937. To be clear, none of these cases involved the question of civil liability for breach of s 37, but they do discuss the interpretation of a provision using the words “consent, connive” etc. So this last argument is particularly unconvincing.

b) Cases where an implied BSD for economic loss has been accepted

In contrast to the cases noted above where an implicit BSD claim has been rejected in relation to economic loss (and of course there are others not referred to), there are other cases where it has been successful.

The “Pink Panther litigation” was one high profile successful claim. Rickless v United Artists Corporation [1988] QB 40 held that a statute making it an offence to use portions of films without consent of the actors involved, gave rise to civil liability. The family of the actor Peter Sellers was able to recover substantial damages where previously discarded clips of his were put together to make a film for which they had explicitly refused permission. The court seems to have been particularly concerned that there was an obvious “gap” in the legislation, which had not provided for compensation for breach of an obligation of this sort. It may be noted that the right being protected was very similar to other rights given under copyright legislation.

In somewhat similar circumstances of “gap filling”, the court in Tobacco Exports BV v Trojan Trading Co Pty Ltd [2010] VSC 572 concluded that there was arguably an actionable breach of statutory duty where a provision of the Trade Marks Act 1995 (Cth) made it a criminal offence to “deface or obliterate” a trade mark in the course of selling goods (under s 148 of the Act), but did not explicitly provide a civil remedy for a trader who had suffered commercial loss because a rival sold goods with the trade mark covered up.

In Piling v Prynew; Nemeth v Prynew [2008] NSWSC 118 the Supreme Court of NSW held (following previous similar decisions in NSW) that s 78F of the Environmental Planning and Assessment Regulation 1994 (NSW) created an actionable civil duty to underpin and support a neighbouring property, where construction work was being undertaken which exposed the neighbouring foundations. An earlier decision in Anderson v Mackellar County Council (1968) 69 SR (NSW) 444 had come to same conclusion under a previous regulatory regime. Again, note that the rights in
question were very closely connected with a “classic” common law right, the right to enjoyment of one’s real property.

In NSW there were also for some years a number of decisions holding that the provisions of the legislation governing the management of “strata schemes” (allocation of property rights in separate units in a block of apartments) created civil obligations. This meant that if a property owner suffered damage as a result of a failure of the “body corporate” to properly maintain the premises, they might recover damages—see Seiwa Pty Ltd v Owners Strata Plan 35042 [2006] NSWSC 1157 (citing a number of previous decisions to similar effect). This was then a “strict liability” regime, with no need on the part of the unit owner to prove carelessness on the part of the body corporate, so long as the legislation is breached—cf Brereton J at [21].

The strict liability of the owners corporation was reaffirmed in Trevallyn-Jones v Owners Strata Plan No 50358 [2009] NSWSC 694 (23 July 2009), eg at [156]. However, a more restrictive reading of the equivalent legislation seems to have been given in the Western Australian decision of Drexel London (a Firm) v Gove (Blackman) [2009] WASCA 181 (21 October 2009).

And then in The Owners Strata Plan 50276 v Thoo [2013] NSWCA 270 (22 August 2013) the NSW Court of Appeal reviewed a number of these earlier decisions and concluded, in the end, that s 62 of the Act did not give rise to a civil action for breach of statutory duty—see Tobias JA at [222]. The main reason offered was that there were a number of other provisions for dispute resolution under the legislation, some of which would lead to an award for compensation, and hence there was no need to find an additional civil action. It will be recalled that this resembles the reasoning offered in a number of the UK cases finding no BSD liability in economic loss cases.

One high profile decision upholding a BSD claim in relation to economic loss was Kirvek Management and Consulting Services Ltd v Attorney General of Trinidad and Tobago [2002] 1 W.L.R. 2792, a Privy Council appeal from the West Indies. Legislation required that money paid into court pending the outcome of litigation should attract interest while being held. Court officers were, however, paying the money to the Treasury for its use, and no interest was being paid. The Privy Council ordered payment of damages based on the breach of the statute. If previous successful claims have often been related to common law rights, it might be suggested that there was something resembling a trust or equitable obligation here, which enforcement of the statute provided support for.

5. Conclusion- are there general principles underlying cases where implicit BSD can be used in economic loss cases?

This paper has really been a preliminary review of some of the major issues in the area. It may be suggested that there are two broad sets of implications.

One is in relation to the explicit statutory tort actions dealing with economic loss. These are much more common than is sometimes supposed, and also, however, much less uniform in their operation than would be hoped. One thing that is clear is that it cannot be automatically assumed that the “ancillary” rules that have become familiar in other common law tort actions

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will be able to be translated into the operation of statutory torts. Issues of causation, remoteness, and appropriate defences (as well as others not touched on here, such as apportionment between tortfeasors or limitations periods) will need to be carefully considered in light of the purposes of the particular statute. Even the breadth of an apparently general word like “loss”, as demonstrated by the *Sumitomo* case, will need to be interpreted against its particular statutory history.

Second, while it may be harder to persuade a court that an implicit BSD action should be available in cases of economic loss, it is not impossible. There are precedents where such actions have succeeded. A claim, as we have seen, may often fail if the legislation concerned itself already provides for other forms of civil action. On the other hand, one feature of a claim which may point to a greater chance of success is where the statutory right given either acts in aid of, or is similar to and arguably connected with, a “traditional” common law right, or even (possibly) an equitable right. Claims of this sort, and especially where it seems a statutory scheme aimed to benefit a particular class of claimant has been left with “gaps” which may make the conferred rights less valuable or unenforceable, are the ones where a court is most likely to agree that an economic loss BSD claim is available.