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“Private Law and Public Goals: The Continuing Importance of the Action for Breach of Statutory Duty” (Paper presented at the Obligations IV Conference, Singapore, 23-25 July 2008)

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THE GOALS OF PRIVATE LAW: OBLIGATIONS IV CONFERENCE 2008

“Private Law and Public Goals: The Continuing Importance of the Action for Breach of Statutory Duty”¹

Neil Foster

The tort action for Breach of Statutory Duty seems to provide the perfect intersection between the goals of private law and “public” goals as determined by legislation. But the question as to when, in what circumstances, and why, a civil action should be available to a claimant whose statutory rights have been breached continues to be agitated. In one common law jurisdiction, Canada, the action has been effectively abolished by judicial *fiat*. But in others it continues to play an important role, sometimes in matters of seemingly “low status” but great importance to the person concerned (such as injured workers), at other times appearing in surprising contexts dealing with very high profile issues such as the right to consult a lawyer when accused of terrorism, or use of public funds by Government officials.

This paper argues that the tort, far from deserving the accusations of incoherence and unpredictability sometimes levelled at it, has a respectable and coherent history and justification within the common law system of torts. It suggests that there are reasons for doubting whether it should have been abolished in Canada, and offers reasons based on the subsequent history in that jurisdiction of negligence claims based on statutory duties that its abolition has caused a distortion of the law of negligence there. It is argued that whether one approaches the matter from a “loss-based” or “rights-based” approach, the tort is one that in other jurisdictions has continued, and should continue, to operate as an important part of the mechanism of private law for vindicating rights created by the shapers of public values, the legislature.

1. Early History of the Action for Breach of Statutory Duty

While the second *Statute of Westminster* in 1285, c 50 sets out an early basis for a civil action based on statutory breach,² Comyn’s *Digest*, tit “Action upon Statute” F, is a 17th century text source for the availability of an action by an individual who suffers damage caused by the breach of a statute:

[T]hat in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.

In one of the earliest modern cases relying on this principle, Lord Campbell CJ in *Couch v Steel*³ granted a remedy to a seaman who had fallen ill on a journey and suffered damage due to the failure of the ship-owner to maintain a list of medicines required by statute.

The story of the action over the next century was one of fluctuation in the courts’ attitudes, sometimes giving the feel of a series of successive reversals. In *Atkinson v Newcastle and Gateshead Waterworks Company*⁴ the Court of Appeal refused to allow a plaintiff whose house and workshop had burnt down, to sue the Company for breach of a statutory duty to maintain adequate water pressure in its

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² For a general overview see K M Stanton, *Breach of Statutory Duty in Tort*, Modern Legal Studies (1986) at 2, K M Stanton et al, *Statutory Torts* (2003).

³ (1854) 3 E & B 402, 118 ER 1193.

⁴ (1876-1877) LR 2 Ex D 441.

pipes to allow effective fire-fighting. There is no doubt that Lord Cairns LC and Cockburn CJ entertained some doubts about the correctness of *Couch*. But the facts are clearly distinguishable from *Couch*, which is not over-ruled; and interestingly a close reading of the judgment of Brett LJ indicates that, for his part, his Lordship's doubts about *Couch* support rather than undermine a broad statutory duty civil action.

It is worth noticing the facts and reasoning of *Atkinson* more closely. Under the *Waterworks Clauses Act 1847*⁵ the company was obliged to maintain water pressure in its pipes to allow effective fire-fighting. The plaintiff suffered damage when fire broke out and the water pressure was not sufficient. But the 1847 Act was only applicable to the company because it was incorporated by reference into the private Act of Parliament⁶ that established the company. The duty to keep water pressure up was contained in a series of four duties, for two of which (failure to provide water at all to the town council or to a ratepayer) there was a specific penalty provision which gave damages at a set rate to the person suffering the loss. The decision of the court here that there was no actionable duty, then, can be distinguished from *Couch* on these grounds: (1) it seems unlikely that in what amounted to a "contract" with the Parliament it is to be assumed that the company agreed to be the "insurer" of residents whose houses burnt down, or that Parliament expected such an obligation⁷; (2) where there are a series of obligations, two of which give a specific right of recovery to injured parties, it should not be assumed that Parliament had intended the other obligations to also be the source of civil liability; (3) in particular the Act in *Couch* was different to the Act here, that here being "in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works".⁸ Thus the "private" nature of the legislation was seen to be relevant to the question whether Parliament would have expected a high degree of responsibility. Whatever modern views on this subject might be, in *Atkinson* it was assumed that a *lesser* degree of responsibility was likely to have been intended by both "contracting parties".⁹

Brett LJ, while expressing some doubts about the decision in *Couch*, does so from a perspective that favours the existence of private actions. He comments that the rule set out there¹⁰ means that where a penalty for a breach of statute goes to the person injured "the penalty, however small and inadequate a compensation it may be" will preclude an action for damages by the person.¹¹ In other words, it seems that his Lordship would have been more, not less, generous to plaintiffs than *Couch* seems to be. What *Atkinson* clearly establishes, however, as seen in later references to the

⁵ 10 Vict c 17.

⁶ 26 Vict 134.

⁷ Above, n 4 at 445-446.

⁸ Above, n 4 at 448; and see Cockburn CJ - such an Act "is liable to a much more limited and strict interpretation than that which can be put upon one which is applicable to all the subjects of the realm" (449).

⁹ This makes somewhat puzzling the occasional recent reference to the "private" nature of the legislation in *Atkinson* and other similar cases as impliedly counting *in favour* of there being a civil action available in those cases (and hence *against* the continued use of a civil action in more recent, public statutes). The opposite is true: these cases found that there was *no* civil action, because it was assumed that no reasonable entrepreneur would have taken on this obligation, and also that Parliament would not have expected him to. By contrast, as noted in discussing *Dawson* below, when these utility functions came to be taken on by public bodies it was easier for the courts to find that there was an intention to create a civil right.

¹⁰ His Lordship does not cite a precise passage, but presumably the principle he is concerned with lies in the comments of Lord Campbell CJ at 3 El & Bl 412 that "If the performance of a new duty created by Act of Parliament is enforced by a penalty, recoverable by the party grieved by the non-performance, there is no other remedy than that given by the Act, either for the public or the private wrong". Note however that in *Couch* Lord Campbell CJ went on to award damages because the "private" wrong was not in his view covered by the applicable penalty.

¹¹ Above, n 4 at 449.

decision, is the classic insistence on Parliamentary intention: whether or not an action is available for breach of statute "must, to a great extent, depend on the purview of the legislature in the particular statute, and the language which they have there employed".¹²

Subsequent cases followed the pattern of granting, or denying, relief on varying grounds. Some later commentators, observing the apparent similarity of fact situations in which relief was, or was not, granted, came to suggest that there was no effective rationale; that the matter, in Lord Denning MR's oft-cited phrase, may as well be decided by the toss of a coin.¹³ Consider for example, following *Atkinson*, later decisions on the obligations of a water company. In *Dawson & Co v Bingley Urban District Council*¹⁴ the Court of Appeal were dealing with a case of fire damage to a house where there had been a breach of the *Public Health Act* 1875 by the local authority whose job it was to provide water. The relevant duty was to mark the location of hydrant points on a water line; in this case the mark was inaccurate and, due to the loss of time occasioned to the fire brigade in locating the hydrant, greater damage was caused by fire than would have been occasioned if the mark was correct. Given these facts it is tempting to characterise as irrational the court's decision to find that a breach of this statute was actionable, when a breach of the statute in *Atkinson* was not. In *Read v Croydon Corporation*¹⁵ Stable J in the King's Bench Division held that the duty to provide pure water under s 35 of the *Waterworks Clauses Act* 1875 (precisely the same statute at issue in *Atkinson*) was actionable. But how then to explain the more recent decision of the Court of Appeal in *Capital & Counties PLC v Hampshire County Council*¹⁶ that the duty of a fire authority to ensure the provision of an adequate supply of water was *not* actionable at the suit of someone who lost property in the fire?

But the apparent contradictions in these cases are at least understandable when the specific circumstances of each are considered. Judges, after all, are very conscious of their duty to follow binding precedent, and do not consciously like to depart from it in ways that might be suggested by the "coin-tossing" metaphor. In *Dawson* the court were conscious of *Atkinson*, but focussed strongly on the fact that the body involved was a purely public body, and the statute concerned was not a "legislative bargain" between government and private interests. The court started with the general principles relied on in *Couch v Steel*, and noted that this was not a case of non-feasance, but rather a case where the authority had entered on the performance of its duty and done so carelessly. There was no reason to deny recovery. *Read* is perhaps a harder decision to explain, but again this was a public body rather than a private one, and the provision of contaminated water seems so gross a dereliction of the duty of a water authority that it is not unreasonable that Stable J thought that this provision of the Act could be distinguished from the provision considered in *Atkinson*. Again, on the logic of *Dawson*, the authority had not simply failed to supply something, but had supplied something that was positively harmful.¹⁷

¹² Above, n 4, per Lord Cairns LC at 448.

¹³ In *Ex parte Island Records Ltd* [1978] 1 Ch 122, at 134-135.

¹⁴ [1911] 2 KB 149.

¹⁵ [1938] 4 All ER 631.

¹⁶ [1997] QB 1004.

¹⁷ In fact the judgment deals only briefly with the actionability of the statute, given that Stable J had already found that there was a breach of a common law duty of care on the part of the Corporation. The statutory claim was, however, important in that the plaintiff (the father of a girl who had contracted typhoid from drinking the contaminated water) was claiming what amounted to "economic loss" so that he could recover medical bills, and there may have been some doubt as to whether the father's claim in negligence could be sustained. The daughter's

On the other hand, in *Capital & Counties* the legislative obligation was much more diffuse than the marking of a hydrant point or the supply of pure water. The specific provisions dealt with in *Dawson* and *Read* were not under consideration, and recent guidance from the House of Lords¹⁸ suggested that something which could be characterised as a “regulatory scheme or scheme of social welfare” was not suitable as a foundation for a civil action.

This is not to say that all the reasons offered for distinguishing past authority in all the cases are equally convincing. But it should be more clearly acknowledged that the courts in wrestling with these problems are attempting to fulfill their duty in accordance with the rule of law, rather than simply making decisions in accordance with personal predilection. Here indeed the words of Kitto J in the High Court of Australia decision of *Sovar v Henry Lane Pty Ltd*¹⁹ seem appropriate:

[T]he question whether a contravention of a statutory requirement of the kind in question here is actionable at the suit of a person injured thereby is one of statutory interpretation. The intention that such a private right shall exist is not, as some observations made in the Supreme Court in this case may be thought to suggest, conjured up by judges to give effect to their own ideas of policy and then “imputed” to the legislature. The legitimate endeavour of the courts is to determine what inference really arises, on 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, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation : see *Martin v. Western District of the Australasian Coal and Shale Employees' Federation Workers' Industrial Union of Australia (Mining Department)* (1934) 34 SR (NSW) 593, at p 596, and cases there cited. It is not a question of the actual intention of the legislators, but of the proper inference to be perceived upon a consideration of the document in the light of all its surrounding circumstances. Of course, as reported cases illustrate again and again, decisions given upon enactments which seem fairly comparable will not always be easy to reconcile with one another, for upon questions of inference some lack of uniformity of opinion is to be expected. But that is no justification, it seems to me, for seeing the task as other than a genuine exercise in interpretation.

One theme that developed clearly in the subsequent history of the tort was that it would usually be assumed that Parliament intended a civil remedy where the breach concerned was of what might generally be called “industrial safety” legislation.²⁰ Cases involving this type of legislation have been discussed elsewhere, and will not be considered in detail in this article.²¹

But as time went on the tendency for courts not to find in favour of actionability led to a trend for decisions, even in the industrial safety area, to be narrowly framed. An example may be found in *Biddle v Truvox Engineering Co Ltd*.²² Mr Biddle was injured by some machinery which was unfenced, contrary to s 14 and s 17(1) of the *Factories Act 1937* (UK). He sued his employer Truvox, and the court had no problem in finding Truvox liable for breach of the relevant statutory duties.

claim, interestingly, was rejected on the statutory point (the duty under the statute being only owed to ratepayers), but she succeeded on the common law count.

¹⁸ In *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 731-732 per Lord Browne-Wilkinson.

¹⁹ (1967) 116 CLR 397, at 405.

²⁰ See the oft-cited comments of G Williams, ‘The Effect of Penal Legislation in the Law of Tort’ (1960) 23(3) *Modern Law Review* 233 at 233: “When [penal legislation] concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases it is ignored.”

²¹ See N Foster, “Breach of statutory duty and risk management in occupational health and safety law: New wine in old wineskins?” (2006) 14 *Tort Law Review* 79-104.

²² [1952] 1 KB 101. Referred to in Williams, above n 20, at 254. Williams’ comment at n 69 is: “the decision... does not harmonise with the general attitude adopted in industrial cases”.

But the employer then tried to join the vendors of the machine as joint tortfeasors, claiming that if sued by the worker they would have been liable to him under s 17(2). That subsection provided that “Any person who sells... for use in a factory in the UK any machine ... which does not comply with the requirements of this section shall be guilty of an offence and liable to a fine not exceeding £100”. Finnemore J held that the provision did not create an actionable liability. His Lordship came to this conclusion because he started with what he said was the presumption that a provision for which a penalty is provided is not actionable. He acknowledged that *Groves v Wimborne*²³ led to a different result in most industrial cases, but in the end followed the analogy of the decision of du Parc LJ (as he then was) in *Badham v Lambs Ltd*²⁴, where a motorist was held not to be able to sue the vendor of a car which had (contrary to statute) a defective braking system. Finnemore J went on to say that “the rival arguments are closely balanced” but held that since there was no authority for holding a vendor civilly liable in these circumstances, he could not be persuaded that Parliament intended such a result.

With respect, the reasoning in the case is very weak. It is not surprising that the decision in *Badham* on roadworthiness of a vehicle should have gone against the plaintiff, as most road-accident cases have gone against plaintiffs since *Phillips v Britannia Hygienic Laundry Co Ltd*.²⁵ But arguably this case - a provision inserted into a statute which had been held to give civil rights to injured workers for the last century - was different. The presumption, surely, was strongly the other way- Parliament intending civil liability unless clearly excluded. Nor, with respect, was his Lordship very convincing when he said that “the sole object of s 17(2) is to prevent unfenced machinery from finding its way into factories”²⁶. The object of the provision was clearly not to deal with “unfenced machinery” as a neutral entity; it was obviously to protect workers. His Lordship may have been partly swayed (although he does not say this) by the fact that this was a contribution action by an employer who was clearly liable- that is, in the end a fight between two insurance companies. Perhaps the result might have been different if the employer had been bankrupt and uninsured and the vendor the only source of funds for the injured worker.

Badham seems actually never to have been followed directly on this point in the UK, although referred to in passing by the Court of Appeal in *Solomons v R Gertzenstein, Ltd*²⁷. It has, however, been followed at first instance in New Zealand, in *Waitapu v R H Tregoweth Ltd*²⁸. It may be that the decision has never been challenged at a higher level because in many such cases there would be a common law duty of care.²⁹ In more recent years specific provisions dealing with defective

²³ [1898] 2 QB 402, the most famous of the “industrial safety” cases, discussed in more detail in Foster, above n 21, at 81-82.

²⁴ [1946] KB 45.

²⁵ [1923] 2 KB 832. In Australia see, for example, *Abela v Giew* (1965) 65 SR (NSW) 485.

²⁶ Above, n 22, at 106.

²⁷ [1954] 2 QB 243. The decision has been cited for aspects other than the point concerning the vendor on some occasions: see *Liptrot v British Railways Board* [1966] 2 QB 353; *Uddin v Associated Portland Cement Manufacturers Ltd* [1965] 2 Q B 15; *Cherry v International Alloys Ltd* [1961] 1 Q B 136.

²⁸ [1975] 2 NZLR 218, at 224-225, per Wilson J. Two other references to the decision in *Martin v Queensland Airlines Pty Ltd* [1956] Qd St R 362 and *Hibberds Foundry Ltd v Hardy* [1953] NZLR 14 do not address this issue of the vendor’s liability.

²⁹ See *Taylor v Rover Co Ltd* [1966] 2 All ER 781 in relation to a tool; and *Wright v Dunlop Rubber Co Ltd* (1972) 13 KIR 255 in relation to chemicals. In Australia see *Anderson v City of Enfield* (1983) 34 SASR 472, and *Hampic Pty Ltd v Adams* [1999] NSWCA 455 (a decision based on the ban on “misleading and deceptive advertising” in s 52 of the *Trade Practices Act* 1974, but which held that a common law negligence claim would also have succeeded).

products may also provide a remedy for the injured worker.³⁰ Be that as it may, it seems anomalous that a provision clearly designed for the protection of workers should be regarded as not actionable.

But it is true to say that in recent years the action for breach of statutory duty has more often been denied than accepted in areas outside the workplace. While for some years courts could state that the starting point when considering a statutory breach was that a person injured by a breach should have a civil remedy³¹, more recently the presumption now usually applied is the opposite one, at least in cases where a penalty is prescribed by the statute: that the criminal penalty alone is deemed to be the main means of enforcement of the statutory right, unless good reasons can be offered for believing otherwise.

The authority for this starting point is often identified as the dictum of Lord Tenterden CJ in *Doe d Bishop of Rochester (Murray) v Bridges*³²:

Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner.

That case was not one involving the question of a civil action for breach of statutory duty; in fact it was a property case involving a lease, and it represents what might be thought of as the worst tendency of the common law courts to rely on the "letter of the law". The then Bishop of Rochester's predecessor had granted a lease to the Earl of Romney which was found "with some reluctance" (as even Lord Tenterden put it) to be voidable, simply on the basis that a formal obligation to pay an amount in lieu of land tax had not been included in the written lease; this despite the fact that the money had in fact been paid for 16 years! Nevertheless, the words of Lord Tenterden continue to form the starting point for the courts today in considering a new claim that a breach of statutory duty is actionable.³³

Over the course of its development since the decisions in *Couch* and *Atkinson* the courts have set out a number of considerations as matters to be taken into account in an action for breach of statutory duty. In effect two groups of criteria are raised in the cases; one set addresses the issue whether Parliament intended to create a civil remedy for breach of the particular statute, the other criteria address the question (if a remedy is possible) whether it is available in the specific case. The textbooks, and in particular the major study by Stanton et al³⁴, deal with these matters in more detail. But for present purposes they can be summarised as follows:

³⁰ See the provisions of the *Consumer Protection Act* 1987 for the UK (discussed in K M Stanton et al, *Statutory Torts* (2003) paras 10.035-10.045); and in Australia the provisions of Part VA of the *Trade Practices Act* 1974 (Cth), which creates a regime of "strict liability" for defective products. *Australian Competition & Consumer Commission v Glendale Chemical Products Pty Ltd* (1998) ATPR ¶41-632 was a case decided under that Part dealing with supply of dangerous chemicals, although it involved domestic rather than workplace use of the chemicals.

³¹ Comments to this effect can be found in *Couch v Steel*, above n 3, per Lord Campbell CJ at 411; *Groves v Lord Wimborne* [1898] 2 QB 402 at 407 per A L Smith LJ; and even in as relatively late a case as *Monk v Warby* [1935] 1 KB 75, where Greer LJ said at 81: "prima facie a person who has been injured by the breach of a statute has a right to recover damages from the person committing it unless it can be established by considering the whole of the Act that no such right was intended to be given."

³² (1831) 1 B & Ad 847; 109 ER 1001; [1824-1834] All ER Rep 167- at All ER Rep 170.

³³ See, for example, the very influential judgement of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd* [1981] 2 All ER 456 at 461, [1982] AC 173 at 185.

³⁴ K M Stanton et al, *Statutory Torts* (2003), esp ch 2.

(1) On the issue of *whether a civil remedy is available* or not, the courts will consider matters such as: Does the statute itself prescribe a penalty, or not?³⁵ Is the statutory provision designed for the benefit of a limited class of persons, or is meant for the benefit of the public at large?³⁶ Is the obligation concerned a specific and confined obligation, or is it more general and ill-defined?³⁷ Does the provision occur in a statutory context where other obligations are likely to be actionable, or not?³⁸ Has this obligation, or an obligation analogous to this in previous legislation, been already held by the courts to give rise to a civil action?³⁹

(2) On the question of whether the *particular plaintiff* will succeed, one could take the view that this is simply a question of applying the statutory provision to the facts. But specifically the courts tend to address questions such as these: Does the plaintiff fall within the limited class of persons for whose benefit the statute was enacted?⁴⁰ Does the harm which the plaintiff has suffered fall within the area of the harm against which the legislature intended to guard?⁴¹ Has the defendant actually breached the statute? Or someone for whose actions the defendant is liable?⁴² Has the breach of the statute actually caused the harm complained of by the plaintiff?⁴³

³⁵ See, eg, *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 407. As recent commentators have noted, however, this is no longer the unambiguous indication of civil action that it once was: the failure of a modern statute to prescribe a remedy would probably be taken today to suggest that no civil action was intended! See Stanton et al, *Statutory Torts* (2003) at 29. For a recent case where this was one factor that weighed with the court, however, see *Ziemiak v ETPM Deep Sea Ltd* [2003] 2 Lloyd's Rep 214, where at 217-218, paras [15]-[16] Kay LJ noted the appellant's argument that in the circumstances of the case there was no penalty available for the particular breach, and that this was a factor in favour of a civil action being available.

³⁶ See, eg, Lord Diplock's judgement in *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173; but see also the objection to this criterion by Lord Atkin in *Phillips v Britannia Hygienic Laundry Co* [1923] KB 832 at 841.

³⁷ See the argument in favour of this proposition by R A Buckley, 'Liability in Tort for Breach of Statutory Duty' (1984) 100 *Law Quarterly Review* 204 at 221; but see the critique offered in Stanton et al, *Statutory Torts* (2003) at 53.

³⁸ For cases where the non-actionability of other parts of the Act concerned ruled out actionability of the provision in question see *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 2 KB 832, *O'Rourke v Camden London Borough Council* [1997] 3 All ER 23, discussed in Stanton et al, *Statutory Torts* (2003) at 47. But this is by no means an automatic barrier; see, for example, the comments of Dixon J in *O'Connor v S P Bray Ltd* (1937) 56 CLR 464 at 479: "the nature of the specific duty imposed by clause 31(b) makes the general rule [in favour of actionability of industrial safety laws] applicable, and the fact that side by side with it are regulations creating no private right is no sufficient reason for denying a civil remedy for a breach of clause 31(b)".

³⁹ See, for example, the discussion by McMurdo P in *Schulz v Schmauser & Anor* [2000] QCA 17 at para [7], holding that another reason for ruling in favour of the actionability of the particular provision in question was that: "The legislation which was replaced by the Act was of the type that imposed duties comparable to the duties imposed in [a number of earlier cases] and in which statutory duties have been held or assessed to give a private right of action." But again this cannot be decisive- see the discussion in Stanton et al *Statutory Torts* (2003) at 48 noting the Court of Appeal's approach in *Capital & Counties plc v Hampshire County Council* [1997] 2 All ER 865.

⁴⁰ See, for example, *Read*, above n 15, where the plaintiff's daughter was held not to be within the class protected by a provision which was held to be for the benefit of ratepayers.

⁴¹ The classic example of a case where this criterion was not met was *Gorris v Scott* (1874) LR 9 Ex 125, where the plaintiff could not recover for loss of his sheep occasioned by the lack of pens on board the ship from which they were washed overboard; the statute requiring the pens to be used was aimed at public health considerations, not the physical safety of the sheep. For a more recent example of this type of reasoning see *Fytche v Wincanton Logistics plc* [2003] EWCA Civ 874 (upheld on appeal to the House of Lords [2004] UKHL 31; [2004] 4 All E.R. 221), where damage caused by water penetrating a hole in a boat was held to be different from damage caused by crushing, and hence not within the purview of the legislation.

⁴² Here the issue of vicarious liability for breach of statutory duty is raised, as to which the Australian and UK courts seem to take a different view; see the discussion in Foster, above n 21 at 98 nn 82-83; though the comments in n 83 there now need to be supplemented by reference to the decision of the House of Lords in *Majrowski v Guy's and St Thomas' NHS Trust* [2006] UKHL 34, where it is clearly held that for the purposes of UK law an employer is normally vicariously liable for a breach of statutory duty committed by an employee, unless the statute expressly or impliedly excludes such liability- see eg Lord Nicholls at [10], [16]-[17].

⁴³ The causation issue is raised most sharply in those cases where the action of the worker in breach of the statute has been the cause (or a cause) of the harm suffered by the worker- see the discussion in Stanton et al, *Statutory Torts* (2003) paras 9.022-9.024.

2. Arguments for Abolition of the Action

The balancing of these criteria is not always easy, and the difficulty in some cases of determining the issues led in the middle of the 20th century to some scholars suggesting that the action for breach of statutory duty ought to be abolished, or "absorbed" into the law of negligence.

An early and very influential critic of the action was Glanville Williams, although his interesting article (which is often quoted on the difference between industrial and other legislation) offers a refinement of, rather than an argument for the abolition of, the action.⁴⁴

Another influential critic of the tort was John Fleming, whose highly regarded textbook, *The Law of Torts*, contained (at least in its most recent edition) no separate discussion of breach of statutory duty as a tort, instead treating the cases on the issue as part of an overall chapter on "Standard of Care" in the discussion of the tort of negligence.⁴⁵ While the ensuing discussion of 11 pages dealt with the authorities in the area with Fleming's customary thoroughness, and exhaustive citation of both US as well as Commonwealth case law, the tone of the treatment made it quite clear that in his view the tort was not really worthy of separate consideration. The task of finding a statutory intention was a "barefaced fiction", such intention was a "will o' the wisp", and the cases were full of "arbitrary results" and "inflexible application". Fleming's view, as will be seen shortly, was influential in leading to the abolition of the tort in Canada.

In Australia a more recent sustained argument for abolishing the tort is to be found in Davis' essay in a *Festschrift* for Fleming.⁴⁶ Summarising the Supreme Court of Canada's abolition of the action (noted below), Davis also cites comments of the High Court of Australia in *Byrne and Frew v Australian Airlines Ltd*, where McHugh & Gummow J commented negatively on the criterion of "Parliamentary intention":

In Australia, the proposition that the courts give effect to "the intention of the legislature" tends to disguise the compromises between contradictory positions which may be involved in obtaining the passage of legislation, particularly through a bicameral and federal legislature. To plumb the intent of the particular body which enacted the law in question may be an illusory quest... The task of the court... is to give effect to the will of the legislature but as it has been expressed in the law and by ascertaining the meaning of the terms of the law.⁴⁷

Davis offers five arguments in favour of the abolition of the action by judicial decision (by analogy with the "rationalisation" of the common law of torts undertaken by the High Court in cases such as *Burnie Port Authority v General Jones Pty Ltd*,⁴⁸ abolishing the action in *Rylands v Fletcher*, and *Australian Safeway Stores Pty Ltd v Zaluzna*,⁴⁹ abolishing the previous special rules governing occupiers' liability.)

⁴⁴ Williams, above n 20. The article in effect argues for the "integration" of the tort into the law of negligence by deeming the standard set by a statute to be the definition of the "standard of care" required at common law. William's comments about the desirability of the statutory action arising in circumstances where there is a duty of care already arising outside the statute (see eg pp 252, 256) interestingly reflect (though the article does not seem to cite) some comments of Dixon J in *O'Connor v S P Bray Ltd* (1936) 56 CLR 464, 478.

⁴⁵ Comment here is based on *The Law of Torts* (9th ed, North Ryde: LBC Information Services, 1998). Even Davis, who supports Fleming's opinion of the tort, "cavils" a little at this decision to exclude the tort as a separate topic of discussion in a textbook designed to describe the Australian law of torts- see J L R Davis, "Farewell to the Action for Breach of Statutory Duty?" in N J Mullany & A M Linden (eds) *Torts Tomorrow: A Tribute to John Fleming* (North Ryde: LBC Information Services, 1998), 69-83, at 69.

⁴⁶ Davis, above, n 45.

⁴⁷ (1995) 185 CLR 410, at 459.

⁴⁸ (1994) 179 CLR 520.

⁴⁹ (1987) 162 CLR 479.

Some brief comments may be offered on Davis' arguments.

(a) No rational or coherent basis

Davis concludes after a review of some academic justifications that have been offered for the tort that none fully explain the cases. One may respond that the cases could conceivably have a number of different justifications without necessarily being "irrational". In particular one justification is skipped over very quickly- that since statutes represent the "democratic will" of the people, then there can be "judicial creation of rights of action in circumstances similar to those dealt with in the statute".⁵⁰

Something like this justification, although more carefully framed, seems to be quite rational. Rather than using the slightly emotive term "judicial creation" one could refer to "judicial recognition" of a right corresponding precisely to (rather than merely "similar" to) a right given by the democratically elected Parliament. At this point it becomes hard to complain that this is irrational. Of course the rationale may not emerge in every case applying the broad principle- but some such justification seems clearly to lie behind the creation of the tort.

Of course an essential feature of the tort will be that, where it is available, the precise circumstances in which a right will arise will be as variable as the statutes enacted by Parliament. Davis' comment that "each statutory provision is different from every other" misses the point that the action is as flexible as the various statutes.

The complaint that there is no "aid in any presumption of statutory interpretation" is undermined by the detailed criteria noted above, and indeed by the general statement of Dixon J in *O'Connor v S P Bray Ltd*⁵¹ Davis immediately goes on to quote. True, the presumption that a pre-existing common law right may be supplemented by a specific statutory provision is not universally true (as Davis correctly points out, citing the general refusal to allow an action in relation to traffic regulations), but it does at least provide a solid starting point.

(b) A Legacy of Confusion

Many of the points Davis makes in the next section of his argument are undermined when the cases he refers to are carefully examined (instead of being read through the sweeping dismissal of them by the later "coin-tossing" words of Lord Denning MR in *Island Records* noted previously.)⁵² Davis tries to contrast the "private undertaking" cases and the "public duty" cases, and claims that wider language than was necessary was used in the latter. But he does not really make clear why, since there were only ever a very limited number of the former group, and almost all modern cases fall into the latter, that there is a problem here.

His analysis of the interaction between *Atkinson*, *Couch* and *Groves v Wimborne* is curious.⁵³ In particular his discussion gives the odd impression that he did not bother to read the original report of *Couch v Steel*, since he refers to what Lord Campbell in that case had "apparently" put forward, and in a footnote to "whatever Lord Campbell had said". But it is tolerably clear (as noted above) what Brett LJ thought that Lord Campbell was saying, and why he disagreed with the implied limits to the action that he saw in those words. Nor does *Groves v Wimborne* involve any

⁵⁰ Davis, above n 45, at 73, citing E M Fricke, "The Juridical Nature of the Action upon the Statute" (1960) 76 LQR 240.

⁵¹ (1937) 56 CLR 464 at 478.

⁵² Above, n 13.

⁵³ For *Atkinson* see above n 4 and surrounding text; for *Couch* see above n 3; for *Groves* above n 23.

departure from the principles expressed in the previous cases. Of course there are comments in *Atkinson* which criticise the decision in *Couch*, but that does not mean that there is anything particularly unusual in a differently constituted court in *Groves* not accepting those critiques in a case which was quite different. In short, Davis' fairly blunt (and self-confessedly "cynical") comment that "decisions on this tort since the latter half of [the 19th] century would provide authority for any proposition which one might care to advance" is not proved by a superficial and inaccurate analysis of three decisions.

(c) Inconsistent Policy

This section of Davis' argument is perhaps the least persuasive. He reviews the history of decisions of the courts as to whether the defences of voluntary assumption of risk, common employment, and contributory negligence apply to the action for breach of statutory duty. His review reveals that the courts (and Parliaments at different times) have taken different views of the application of the defences. But it is unclear how this different treatment of the tort by lawmakers makes the tort inherently incoherent, even if it may be a good argument for rationalisation of some of the statutes.

(d) Legislatures reducing the application of the tort

Davis correctly notes that in the area where the tort has its clearest application, industrial injuries, Parliaments around Australia have either removed the action for common law damages, or limited such damages. But the lapse of time since Davis' article has revealed that this is by no means a uniform trend. In Victoria, for example, where at the time Davis wrote common law damages for workplace injuries had been removed, the passage of time has now seen actions for damages for at least some of those injuries restored.⁵⁴

In any case, the fact that Parliament has chosen at a specific time or for particular policy reasons to limit the availability of a tort action is by no means a persuasive argument that the courts ought to abolish the tort action in areas other than those regulated by Parliament. The interaction between Parliament and the courts here is no doubt complex, but one could equally validly argue that since Parliament has limited the operation of the tort in a particular area, it is happy for it to have a continuing effect in other areas.

Davis' other example here is instructive. He notes that in NSW an action for breach of statutory duty was successful in relation to a person undertaking building works and undermining an adjacent property.⁵⁵ As he notes, subsequent decisions supported the availability of a breach of statutory duty action in situations governed by legislation replacing that dealt with in the initial case.⁵⁶ But Davis confidently predicted in 1998 that under the then-recently-introduced *Local Government Act 1993* (NSW), which contained specific "sanctions" for breach of the relevant regulations, there would be no need for a right of action to be implied.

Of course, even if this were the case it would (as noted above) not detract from the utility of the action prior to the new legislation. But as it turns out the introduction of the legislation has not been found to have removed the need for a civil breach of statutory duty action concerning the undermining of a neighbour's land. The

⁵⁴ Under s 134AB(2) of the *Accident Compensation Act 1985* (Vic) common law damages may be recovered where a "serious injury" as defined occurs after 20 October 1999.

⁵⁵ *Anderson v MacKellar County Council* (1968) 69 SR(NSW) 444.

⁵⁶ *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738; *Pantalone v Alaouie* (1989) 18 NSWLR 119.

legislative context has changed again since Davis' article, and little point would be served here by expounding it in detail. Suffice it to say that in the recent decision of *Piling Contractors (Qld) Pty Ltd v Prynew Pty Ltd, Nemeth v Prynew Pty Ltd*,⁵⁷ Macready AssJ found that the current legislation, which requires one of the "prescribed conditions" to be imposed on developers to be one that requires a person causing an excavation to be made to protect neighbouring buildings from damage by appropriate support,⁵⁸ makes a breach of such a condition a breach of the relevant Act,⁵⁹ and that breach (following the precedent of the decisions noted previously) is actionable in the tort of breach of statutory duty.⁶⁰ While certain provisions of the legislation gave a civil remedy of sorts (in terms of the ability to apply for an injunction to prevent work occurring in breach of the Act, or to reinstate land to a former condition), these provisions did not explicitly allow a private right for damages, and this was seen as allowing (rather than precluding) an action in the tort of breach of statutory duty.⁶¹

While it takes us away from Davis' arguments, it is worth noting here the interesting interaction between the tort of breach of statutory duty, and other torts. Traditionally the law of nuisance allowed recovery for damage to land in its unimproved state caused by a neighbour's removal of support, but not for damage insofar as it related to a structure on the land.⁶² It was against this background that the decision in *Anderson v MacKellar* found that a breach of the statutory prohibition against undermining land was actionable, without the limits imposed by the law of nuisance. Jacobs JA, who ruled in favour of civil actionability in that case, noted that by extending tort recovery under the statute the law would be overcoming what could be seen as an undesirable common law rule, and that this could be seen as possibly "the reason for the legislative intention to confer rights in respect of support of buildings on those lands".⁶³

The fact that this anomalous rule in the law of nuisance has now been legislatively removed in NSW was not seen to be a reason by the Court in *Piling* to remove the action for statutory breach; especially so, perhaps, given that it seems likely that the statutory amendment seems to have created further anomalies.⁶⁴ The action for breach of statutory duty remains as a "back-up" implementing Parliament's implicit intention to give rights to those whose properties are threatened by their neighbour's actions of undermining.

(e) Contrary to the Current Trend of the Law

To return to Davis' critique, his final point is that the action for breach of statutory duty, insofar as it often results in strict liability, is contrary to a "recent trend" of higher Commonwealth courts to prefer "fault-based" liability. He cites

⁵⁷ [2008] NSWSC 118 (26 Feb 2008).

⁵⁸ See cl 78F of the *Environmental Planning and Assessment Regulations* 1994 (NSW).

⁵⁹ Through a combination of s 76A(1) and 122 of the *Environmental Planning and Assessment Act* 1979 (NSW); see *Piling*, above n 57 at [73]-[75].

⁶⁰ See *Piling*, above n 57 at [78]-[94].

⁶¹ See the discussion of ss 123, 124 of the *Environmental Planning and Assessment Act* 1979 (NSW) in *Piling*, above n 57 at [87]-[88].

⁶² See *Dalton v Henry Angus & Co* (1880-81) LR 6 App Cas 740, discussed (along with the later authorities) in *Piling*, above n 57 at [40]-[43].

⁶³ *Anderson v MacKellar*, above n 55, at 448 ff (as noted in *Piling*, above n 57 at [93].

⁶⁴ The decision in *Piling*, above n 57, discussed the legislative change made by s 177 of the *Conveyancing Act* 1919, but noted that at least in one respect the new remedy (now stated to be in negligence rather than nuisance) fell short of adequately replacing the previous common law, in that the vagaries of the legislative process meant that the statutory "duty of care" did not seem to cover situations where there was an "omission" which led to a withdrawal of support for land, as opposed to a positive act- see the discussion at [57]-[63].

Burnie Port Authority's overturning of *Rylands v Fletcher*, the decision in *Northern Territory of Australia v Mengel*⁶⁵ to declare that *Beauresort Shire Council v Smith*⁶⁶ was wrongly decided, and the House of Lords' ruling in *Cambridge Water Co v Eastern Counties Leather plc* declaring that *Rylands* liability is limited by a negligence-related remoteness rule.⁶⁷

Reasons could be offered for suggesting why some of these decisions themselves represented a wrong turning.⁶⁸ But given that they are authoritative, it is not apparent that they represent a solid "trend" of any sort now that their longer-term impact can be assessed a decade after Davis' article. Australian courts continue to wrestle with defining in precisely what circumstances the *Burnie Port Authority* rule designed to replace *Rylands* should really operate- what is a "dangerous substance or dangerous activity"?⁶⁹ The fact that the *Burnie* rule is said to create a "non-delegable duty" alone should alert us to the improbability that "fault-based liability" is now to be the defining standard of tort law- for of course whatever the circumstances creating a non-delegable duty, its result is to impose on the principal who is said to owe the duty, liability for the wrongs of an independent contractor - a liability which in no sense depends on the "fault" of the principal, but rather on the relationship between the principal and the victim of harm caused by the contractor.⁷⁰

In a similar vein one may note that the High Court of Australia has continued to refine, and in some cases to expand, the "strict" liability created by the vicarious liability of an employer for the torts of an employee (holding in *NSW v Lepore*⁷¹ that at least in some circumstances there can be vicarious liability for intentional torts), and to uphold by more clearly defining the doctrine of "non-delegable duty" in *Leichhardt Municipal Council v Montgomery*.⁷²

Davis treats some comments of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 as if they erected some difficulty in the way of recognising the tort of breach of statutory duty. Lord Diplock noted that there was a "general rule" that statutes did not create a civil action, but identified as one of the clear exceptions to that rule the following:

Where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation...⁷³

Yet his Lordship's words seem to simply echo the stated elements of the tort of breach of statutory duty from the middle of the 19th century, not to create some new hurdle which must be overcome before the tort can operate.

It is true, as Davis notes, that one could read the passing comment of the High Court in *Northern Territory of Australia v Mengel*, drawing a link between the action

⁶⁵ (1995) 185 CLR 307.

⁶⁶ (1966) 120 CLR 145.

⁶⁷ [1994] 2 AC 264 at 304.

⁶⁸ See J Murphy, "The Merits of *Rylands v Fletcher*" (2004) 24 *Oxford Journal of Legal Studies* 643-669, esp 660ff for a powerful critique of *Burnie*.

⁶⁹ See A Corkhill, " 'Dangerous' substances and activities in the context of a non-delegable duty of care" (2007) 15 *Torts Law Journal* 233-262. For a recent decision relying on the notion of a "dangerous" activity see *Hall v Adventure Training Systems Pty Ltd* [2007] NSWSC 817.

⁷⁰ An irony also noted by Murphy, above n 68 at 661, n 104, also citing G T Schwartz, "Rylands v Fletcher, Negligence and Strict Liability" in P Cane & J Stapleton (eds) *Essays in Celebration of John Fleming* (Oxford: Clarendon Press, 1998) 214.

⁷¹ (2003) 212 CLR 511.

⁷² (2007) 230 CLR 22; [2007] HCA 6.

⁷³ [1982] AC at 185.

for breach of statutory duty and the action in *Beautesert Shire Council v Smith*, as indicating that, having “disposed of” the latter, the Court were preparing to do the same to the statutory duty action.⁷⁴ But in context that is not what was being said. The statutory duty was mentioned by way of *contrast* to the *Beautesert* tort, having the element of Parliamentary intention (which the other tort did not), and its own set of specific rules. Given that the *Beautesert* tort had rarely, if ever, been applied since its first formulation in 1962, whereas actions for breach of statutory duty had been a staple of Australian courts at all levels since Federation⁷⁵ (and of course in the UK since long before then), it would have been surprising indeed if the High Court had equated them.

In short, while Davis probably puts the case for abolition at its highest, it is submitted that his arguments are not persuasive, and insofar as they attempt to identify a “trend” in the common law, have not been fulfilled.

However, what about the decision of the Supreme Court of Canada? Attention must be directed to this as a reasoned choice by the highest court in a common law country to remove the tort from the common law arsenal.

3. Abolition in Canada and its Consequences

In *The Queen v Saskatchewan Wheat Pool*⁷⁶ the Supreme Court of Canada followed the hints offered by some of the academic commentators noted above and ruled that the tort of breach of statutory duty should be abolished in Canada. In this section I want to ask two questions about this: (a) Are the reasons offered by the Supreme Court of Canada in for abolishing the tort action convincing? (b) Does the apparent reluctance to embrace this abolition by later courts, revealed by Professor Klar’s discussion in a recent paper,⁷⁷ mean that the need for the tort is still apparent, even in a jurisdiction where it cannot openly be used?

(a) The Decision in *Saskatchewan Wheat Pool*

The action involved a claim for recovery of damages by the Canadian Government for economic loss caused by contamination of a wheat shipment which had been loaded on a ship by the Wheat Pool. Not, perhaps, a very promising action in which to mount a new claim for breach of statutory duty – indeed, it seems quite likely that the Supreme Court would have been entirely justified in rejecting the claim based on the well-established elements of the action, as was done by the Federal Court of Appeal. Dickson J in the Supreme Court notes that the action was denied by the Federal Court on the basis that the duty concerned (not to load contaminated grain from a silo) was not intended to benefit any particular class of persons, being a duty owed, in effect, in the public interest to the community at large.⁷⁸ It is also tempting to ask why, since it was well known that testing for contamination would not give conclusive results before the departure of the ship containing the consignment, the Canadian Wheat Board had not negotiated some contractual liability clause in case just this sort of event occurred.

In a decision, then, which could easily have been based on the existing law, the Supreme Court chose to re-write the law of torts by abolishing an action which,

⁷⁴ See Davis, above n 44 at 82.

⁷⁵ As noted in Foster, above n 21, at 84 ff, Australian High Court decisions affirming the general principles in *Groves v Wimborne*, for example, can be found starting as early as 1906.

⁷⁶ [1983] 1 SCR 205.

⁷⁷ L Klar, “Breach of Statute and Tort Law” in J W Neyers, E Chamberlain & S G A Pitel (eds) *Emerging Issues in Tort Law* (Oxford: Hart, 2007) 31-61.

⁷⁸ See [1983] 1 SCR at 210, referring to the earlier Federal Court judgment at [1981] 2 FC 212.

while at one stage described by Dickson J as a "*new* nominate tort of statutory breach" (emphasis added)⁷⁹, is acknowledged later (as we have seen already) to have had its roots extending as far back as 1285 and to have been relied on by plaintiffs throughout the 19th and 20th centuries.

With the greatest of respect, the Court's decision to abolish the tort seems at one level to have been primarily based on epithets thrown by the commentators, rather than to have been driven by a detailed analysis of the course of previous judicial decisions. There seems little attempt to clearly articulate the legal policy that had driven those decisions, and why that policy (and hence the law) should now be changed. Writers such as Glanville Williams and John Fleming are extensively quoted. The tone underlying the judgement is that the law is irrational, too complex, and (while this is not stated openly) "out of date". Hence the need to "rationalise" the law of torts by removing this tort.

Along with the other perceived problems of the action, the fact that it often gives rise to strict liability is seen as a major issue. Strict liability, of course, is not an essential element of breach of statutory duty- if a statute requires "reasonable care", then that is the standard that will be adopted in the civil action.⁸⁰ But since it has not been uncommon for industrial safety legislation to be framed in strict or absolute terms, the tort is often presented as if it were intrinsically a tort of strict liability.

The judgment also assumes that "loss distribution" is a major (perhaps the major) legal policy imperative involved in tort law. The main reason for shifting a loss is said to be that fault is involved.⁸¹ Other policy issues which might be said to authorise some version of strict liability (especially those canvassed in the later decision of the Supreme Court itself in *Bazley v Curry*⁸² concerning "enterprise risk") are effectively ignored. One might ask, if a defendant has caused harm to a plaintiff, and the defendant in doing so was indeed in breach of a statutory provision, where is the justice to the plaintiff in saying that he or she must bear the loss, rather than the person who is admittedly a wrongdoer?

But (in 1983 at least) it was said that "the tendency of the law of recent times is to ameliorate the rigors of absolute rules and absolute duty... as contrary to natural justice".⁸³ So the nominate tort of breach of statutory duty is to no longer be recognised.

There is a caveat in the judgement, however, which seems to have escaped notice in much later comment.⁸⁴ This is the fairly ambiguous remark (said to be in agreement with Glanville Williams, although of course Williams was making a *descriptive* comment about what the law was in 1960, rather than giving a *prescriptive* ruling on what the law should be) that "where there is no duty of care at common law, breach of non-industrial penal legislation should not affect civil liability unless the statute provides for it... [I]ndustrial legislation historically has enjoyed special

⁷⁹ [1983] 1 SCR at 211.

⁸⁰ As noted in R Stevens, *Torts and Rights* (Oxford: OUP, 2007) at 114: "Where the right arises from a statutory duty imposed upon another, the standard of duty imposed is one of statutory construction". For but one example of the courts' discussion of this see *Doval v Anka Builders Pty Ltd* (1992) 28 NSWLR 1, where the NSW Court of Appeal divided on whether the obligation to "make provision to ensure and maintain lighting" was an absolute one or only breached where there was failure of reasonable care.

⁸¹ [1983] 1 SCR at 224.

⁸² (1999) 174 DLR (4th) 45.

⁸³ [1983] 1 SCR at 225.

⁸⁴ Although noted by Klar, above n 77 at 33, n 9. See also C Forell, "Statutes and Torts: Comparing the United States to Australia, Canada and England" (2000) 36 *Willamette Law Rev* 865-897, at 891, noting the exception.

consideration. Recognition of the doctrine of absolute liability under some industrial statutes does not justify extension of such doctrine to other fields..."⁸⁵

The remark seems to be intended to "carve out" a special area of continued operation for the tort in the case of industrial legislation. Of itself this is a telling exception. After all, as previously noted, almost all commentators recognise that the vast bulk of cases where breach of statutory duty has historically been applied lie in the area of industrial safety legislation. If this is a true exception it seems that the exception would almost eat up the rule.

The fact that the judgement sees a need to make this exception may also be said to cast doubt on the overall rationale for the abolition in the first place. While the judgement is replete with scornful references to the task of finding the intention of Parliament ("pretence", "will o' the wisp", "non-existent intention", "capricious", "arbitrary", "judicial legislation", "bare faced fiction")⁸⁶, it must surely be acknowledged that, given the long history of finding such an intention in workplace safety laws, by the time the Court in *Saskatchewan Wheat Pool* decided to remove the action, many statutes and regulations had been drafted on the assumption that such a civil action existed unless specifically removed.⁸⁷ In this area at least, Parliament's intention was not hard to find.

Yet like the dog that barked in the night, the notable thing about this caveat is that it seems not to have been relied on in subsequent litigation. The scope for the continuing operation of the tort has no doubt been greatly reduced by the abolition of common law actions by employees against employers in favour of statutory workers compensation.⁸⁸ Yet one might have expected to see some civil actions by independent contractors.

One case that mentions *Saskatchewan Wheat Pool* in connection with a workplace injury is *Hildebrandt v W F Botkin Construction Ltd*, a decision of Barclay J in the Saskatchewan Court of Queen's Bench.⁸⁹ The employee's injury was held to be caused by a failure of the employer to observe s. 156(1)(a) of the *Occupational Health and Safety Regulations*, [1996], R.R.S. c. O-1[.1], Reg. 1. But while there was some discussion by the Court of the basis for liability, in the end liability had been conceded (see para [9]), so the comments were, strictly speaking, *obiter*. Barclay J referred to *Saskatchewan Wheat Pool* for the proposition that there was no longer a nominate tort of breach of statutory duty, while not citing the caveat noted above concerning industrial safety legislation (clearly applicable to this case.) The provision of the regulations that had been breached was used, not as the basis for a tort action, but as evidence that an appropriate standard of care in negligence had been breached.

Perhaps Canadian practitioners have referred to *Saskatchewan Wheat Pool* quickly and assumed that it amounts to an abolition of breach of statutory duty claims for workplace injury claims as well. This cannot be the case, of course- for the "exception" was laid down by the Supreme Court and could only be removed with the authority of that Court.⁹⁰

⁸⁵ [1983] 1 SCR at 223.

⁸⁶ [1983] 1 SCR at 215-216.

⁸⁷ See, in other jurisdictions, the comments of Kay LJ in England in *Ziemniak v EPTM Deep Sea Ltd* [2003] 2 Lloyd's Rep 214; [2003] EWCA Civ 636 at [48]; and Gaudron J in the High Court of Australia in *Slivak v Lurgi* [2001] HCA 6 at [49]: "As a general rule, legislation which imposes duties with respect to the safety of others is construed as conferring a right of civil action unless a contrary intention appears".

⁸⁸ See Klar, above n 77 at 36, n 23 for the Canadian situation – "most of these types of accidents [ie "industrial" accidents] have been removed from tort law in favour of workers compensation schemes."

⁸⁹ [1998] 7 WWR 418; noted in Klar, *Tort Law* (3rd ed, 2003) p 325 n 135.

⁹⁰ See for another example of a case where perhaps the exception would have applied, *Rudd v Hamiota Feed Lot* [2006] MJ No 36 (Man Q B) noted in Klar, above n 77 at 37. Menzies J at [36] notes the apparently clear duty

I have offered some grounds for concluding that the reasons offered in *Saskatchewan Wheat Pool* for abolishing the tort of breach of statutory duty are not compelling. Certainly the action continues to be available (not only in the industrial safety area) and still used in Australia, New Zealand and the UK. But the interesting thing is that Canadian courts, while acknowledging the authority of the Supreme Court decision, have continued to attempt to find ways to take statutory provisions into account in determining civil liability.

(b) The course of decisions after *Saskatchewan Wheat Pool*

Professor Klar traces a course of decisions in Canada which, despite the decision in *Saskatchewan Wheat Pool*, seem to persist in creating tort duties based on statutory provisions. His critique of these decisions shows that the Canadian courts find it hard to avoid this temptation. I would like to suggest that they raise the question: is the fact the courts are finding it so hard to resist incorporating statutory obligations into tort law, perhaps related to the fact the breach of statutory duty action forms an important part of the common law, and an indication that the Canadian Supreme Court were too hasty in writing it off?

Professor Klar summarises the *ratio* of *Saskatchewan Wheat Pool* as this: "One cannot create the common law duty of care merely based on the existence of a statutory duty."⁹¹ As an analysis of the law of negligence this is absolutely correct. However, the fact that Canadian courts have been *trying* to do this may show that Canadian common law needs the tort of breach of statutory duty, which within itself contains the limits and balances to allow the recognition of an appropriate civil liability.

At this point it is worth noting the occasional tendency to create a "straw tort" which is easily knocked down. In *Saskatchewan Wheat Pool*, for example, Dickson J refers by way of summary to the decision in *London Passenger Transport Board v Upson* in this way: "[T]he House of Lords affirmed the existence of a tort of statutory breach distinct from any issue of negligence. The statute prescribes the duty owed to the plaintiff who need only show (1) breach of the statute, and (ii) damage caused by the breach."⁹² Yet as his Lordship surely knew, there were a number of other elements that needed to be satisfied before the action could succeed, including "Parliamentary intention", the requirement for the plaintiff to be within the class protected by the statute, and the requirement for the harm to be within the scope of harm dealt with by the statute. One might not want to defend all the "classical" elements of the tort, but it is at least clear that it involves a slightly more subtle analysis than simply asking whether there is a statutory duty of some sort.

While it is contained in an overall summary at the beginning of the paper, there is something of a similar over-simplification in Professor Klar's brief comment about the detrimental consequences which would follow if "a mere breach of a statutory duty, resulting in damage to another, gave rise to an action for damages".⁹³

imposed by s 4 of the Manitoba *Workplace Safety and Health Act*, but with no further discussion simply says at [27] "Despite the apparent clarity of the duty imposed on an employer by this statute, a breach of a statutory obligation does not always constitute negligence." On a quick perusal of the statute there is no provision excluding civil liability. While not a traditionally "industrial" situation (in that the injury occurred not in a factory but in a feed lot) there seems no reason why the caveat in *Saskatchewan Wheat Pool* should not have applied to allow a civil action based on the statute.

⁹¹ Klar, above n 77, at 33.

⁹² [1983] 1 SCR at 212.

⁹³ Klar, above n 77, at 31.

No court ruling on a breach of statutory duty action has ever made such a claim, at least not since the beginning of the 19th century.

But when the action is removed, there seems to be a “statutory-duty-shaped” hole in Canadian civil jurisprudence, which as Professor Klar eloquently points out is being filled by courts distorting the normal rules of negligence to find a remedy for deserving cases.

Professor Klar outlines two groups of cases where statutes have played a role in decisions. One group he regards as uncontroversially applying the direction of *Saskatchewan Wheat Pool* to use the statute simply as evidence of a failure of reasonable care. The second group, however, seem to be in danger of undermining the Supreme Court’s authority by using statute, not just to define the standard of care, but to create a new duty of care where the common law would not previously have recognised one.

Within this second group a first category of unexceptionable cases hold that there is no liability arising from statutory breach *per se*. Some of these cases echo the findings of other common jurisdictions where the tort of breach of statutory still exists, but where the courts in other countries have applied the elements of the action and refused recovery. So, for example, the decision in *Gould v Regina (East School Division No 77)*⁹⁴, that a school authority could not be held liable for failure to perform general educational duties, seems very similar to the decision of the House of Lords on the BSD issue in *Phelps v Hillingdon London Borough Council*⁹⁵, denying recovery on this ground by reference to the much-maligned “intention of Parliament”.

A second, not very common, approach (represented by the decision in *Whistler Cable Television Ltd v IPEC Canada Inc*⁹⁶) is to find a civil action based on statutory breach, in fairly clear contravention of *Saskatchewan Wheat Pool*. While that decision remains part of the law of Canada it is hard to argue that this approach is justified. Indeed, even on a traditional analysis it is by no means clear that a statute which prohibits unlicensed broadcasting is passed for the primary benefit of licensed broadcasters.

The third approach is for the court to create new duties of care in the tort of negligence based primarily on statutory obligations. Professor Klar’s criticism of these cases seems perfectly correct. It is possible the decisions might have been justified on other grounds- eg causing damage by revealing a person’s criminal record (as in *Y O v Belleville*)⁹⁷ sounds like a claim that today might be made in equity for breach of confidence or privacy (depending on the state of these actions in particular jurisdictions). But the facts do not raise any immediately apparent duty of care in the law of negligence.⁹⁸

Yet if in many of the cases the Canadian courts are creating a duty of care in negligence based on statute (sometimes with no apparent consciousness of contravening *Saskatchewan Wheat Pool*), is it not possible that they are doing so because indeed an individual’s rights are being breached, and the demands of justice suggest that a compensatory remedy ought to be available? And might this not suggest that the common law of Canada ought to provide a specific remedy for

⁹⁴ [1997] 3 WWR 117, 32 CCLT (2nd) 150 (Sask), referred to in Klar, above n 77, at 41.

⁹⁵ [2001] 2 AC 619.

⁹⁶ (1992), 75 BCLR (2nd) 48, discussed in Klar, above n 77, at 42-43.

⁹⁷ (1991) 3 OR (3d) 261 (Gen Div), discussed in Klar, above n 77 at 44-45.

⁹⁸ However, for a breach of statutory duty claim which succeeded in similar circumstances, see *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281, a decision of the Victorian County Court, discussed further below in section 5.

statute-based claims, rather than leaving it up to individual judges to "shoe-horn" such claims into the law of negligence?

Professor Klar concludes by urging that Canadian courts, in obedience to *Saskatchewan Wheat Pool*, move away from asking whether or not Parliament "intended" to provide for civil liability. Cases involving statutory authorities will of course mean that the courts will often have to consider the statutes which established the bodies concerned. But, especially where a claim is made of *failure* to act, the question of the existence or not of a duty of care ought to be considered on the general basis of whether or not the law of negligence would impose a duty to act in the circumstances of the interaction between the plaintiff and the defendant, not relying specifically on the terms of the statute.

But these comments are not relevant only to Canada. Even in jurisdictions where the breach of statutory duty action is still available, these are important questions. Australian law, for example, seems to have come close at one point to imposing liability on statutory authorities on the basis of something like a breach of statutory duty analysis, in the judgement of Brennan CJ in *Pyrenees Shire Council v Day*⁹⁹. In that case his Honour took the view (not shared by the other four members of the High Court who heard the case) that the failure of the council to follow up a known defect in a chimney (which later resulted in a fire) was a breach of the Council's statutory duty, and actionable as such.

24....Where a purpose for which a power is conferred is the protection of the person or property of a class of individuals and the circumstances are such that the repository of the power is under a public law duty to exercise the power, the duty is, or in relevant respects is analogous to, a statutory duty imposed for the benefit of a class, breach of which gives rise to an action for damages by a member of the class who suffers loss in consequence of a failure to discharge the duty. The general principles of public law establish the existence of the statutory duty to exercise the power and the statute prescribes the class of individuals for whose benefit the power is to be exercised.

25. Where the power is a power to control "conduct or activities which may foreseeably give rise to a risk of harm to an individual"... and the power is conferred for the purpose of avoiding such a risk, the awarding of compensation for loss caused by a failure to exercise the power when there is a duty to do so is in accordance with the policy of the statute. An individual who is among the class whose interests are intended to be protected by exercise of the power has... a right to compensation for damage suffered as the result of any breach of the duty to exercise the power in protection of that individual's person or property.¹⁰⁰

While this reasoning did not form part of the majority judgement in the case, it raised the possibility of a move towards increasing liability of statutory authorities through the breach of statutory duty action. In jurisdictions where this action still runs it is incumbent on the courts, however, to develop the tort in a principled way so as not to undercut the delicate balance that is developing in terms of imposing liability on public bodies in the law of negligence: as to which in the UK reference may be made to decisions such as *Stovin v Wise* [1996] AC 923, and more recently *Her Majesty's Commissioners of Customs and Excise v Barclay's Bank* [2006] UKHL 28.

Commenting on these decisions Professor Klar notes:

It is ironic that English courts, which do recognize the tort of breach of statutory duty, have held that a statute cannot be relied upon to generate common law duty, whereas Canadian

⁹⁹ (1998) 192 CLR 330, 72 ALJR 152.

¹⁰⁰ (1998) 192 CLR 330, at 347.

courts, which do not recognize the tort of breach of statutory duty, have used statutes to generate common law duties.¹⁰¹

It may be suggested that the "irony" may have been generated by the wrong turning taken by the Supreme Court of Canada in *Saskatchewan Wheat Pool*. Indeed, in a related note Professor Klar suggests that it is possible that Canadian courts, by creating duties of care in negligence based primarily on statutory provisions, have impliedly taken the view that they "are now free to follow the English approach of recognising a breach of statutory duty as actionable in some cases".¹⁰²

The point may be further illustrated by the decision of the Ontario Court of Appeal in *Canada Post Corporation v G3 Worldwide (Canada) Inc.*¹⁰³ In this decision Canada Post were allowed to continue with an action for an injunction and gain-based damages against G3, which had violated Canada Post's statute-based monopoly on delivering mail.

In response G3 argued that a civil action based on the provisions of the statute was precluded by the decision in *Saskatchewan Wheat Pool* ("SWP"). The Court of Appeal distinguished this action from that dealt with in the earlier case; but, with respect, somewhat unconvincingly. At paras [13]-[14] Macfarland JA says that this case is different from SWP because SWP had to do with a "breach of a statutory duty of care" and this case is "not a negligence case". In fact the question of "duty of care" was not the issue in SWP; it was a question as to whether there could be a civil action for breach of statutory duty, which is a separate tort. The issue in *Canada Post Corporation* was, in fact, precisely the issue noted in the quote in para [14] from SWP: "where A has breached a statutory duty causing injury to B, does B have a civil cause of action against A?" The decision in SWP seems to resolve that issue precisely against Canada Post.

Ignoring the result in SWP, then, at para [20] Macfarland JA quotes Dickson CJ's remarks in SWP about how impossible it is for the court to determine Parliament's intention to allow a civil action when no such intention is expressed. But the judgment then proceeds to do precisely that, concluding with the comment in [25] that where there is a right, there must be a remedy "as a matter of common sense" (as if those issues had never been considered by the centuries of jurisprudence on the tort of breach of statutory duty.)

The irony of this decision is seen by reference to *Consignia v Hays*,¹⁰⁴ a UK case with an almost identical situation (a statutory postal monopoly, the question of whether civil law could be used to enforce the monopoly). In a jurisdiction which still allows an open breach of statutory duty action, Jacob J ruled, applying the past breach of statutory duty jurisprudence, that the statute did not allow a civil remedy. (The situation was somewhat unusual in that various statutory provisions had been in force over the years- prior to the period in respect of which damages were being claimed there had been provision of an explicit civil action for damages, and subsequent to that period the current legislation also so provided. But the legislation in force during the time claimed for did not do so, and in the end Jacob J effectively said he could not

¹⁰¹ Klar, above n 77, at 55 n 97.

¹⁰² L Klar, "The Tort Liability of the Crown: Back to *Canada v Saskatchewan Wheat Pool*" (2007) 32 *The Advocate's Quarterly* 293-309, at 309. See also L Klar, "Case Comment: *Syl Apps Secure Treatment Centre v B D: Looking for Proximity within Statutory Provisions*" (2007) 86 *Canadian Bar Review* 337-353, esp 352: "if Canadian law now contemplates that certain types of statutes should give rise to private rights of action... this should be stated clearly."

¹⁰³ 2007 ONCA 348 (8 May, 2007); leave to appeal refused *G3 Worldwide (Canada) Inc. c.o.b. Spring and Spring Canada v. Canada Post Corporation*, 2007 CanLII 46216 (S.C.C.), 1 Nov 2007.

¹⁰⁴ An unreported decision of Jacob J in the UK Ch D, WL 1479742, 11 Dec 2001.

assume a “Parliamentary blunder”, and had to operate on the basis that the provision had been deliberately omitted.)

But in Canada, where one would have thought that the action for breach of statutory duty did not exist, the Ontario Court of Appeal finds a civil remedy (and virtually says that the Canadian Parliament must have blundered in not spelling it out—see para [33] in *Canada Post Corporation*.)

To sum up this section: it has been argued that *Saskatchewan Wheat Pool* was wrongly decided, and has left a “statutory-duty-shaped” hole in Canadian civil jurisprudence which the courts are filling by either illegitimately extending the law of negligence (as Klar has argued) or in other ways. This latest case is a perfect example. Faced with what seems to be an obvious gap in enforcement of a valuable statutory right, the Court had to unconvincingly distinguish *SWP*. While *SWP* remains authoritative it seems that the court in *Canada Post Corporation* is wrong in making a statutory duty actionable in civil law. Rather than try to create such an action from the beginning, since the common law elsewhere already contains such a tort, and did in Canada until *SWP*, it may be time for the Supreme Court of Canada to revisit *SWP*.

4. Recent Development of the Action in other common law jurisdictions

In this section I want to just draw attention to a number of recent decisions in various common law jurisdictions (other than Canada, of course) which illustrate the ongoing vitality and strength of the action for breach of statutory duty in providing a remedy to citizens whose rights, given by Parliament, have been breached by others. As noted previously, I will not be touching on the “core” area for the tort, industrial safety actions, not because these are not important (in my view they are vital), but because it might be thought by some that this is the only area where the tort operates.¹⁰⁵

In the UK it is true, of course, that a number of decisions of the House of Lords have refused to extend the operation of the tort to cover decisions made by Government bodies under what might be broadly called “social welfare” schemes—Council responsibility for child welfare (*X v Bedfordshire County Council*)¹⁰⁶, education (*Phelps v Hillingdon London Borough Council*)¹⁰⁷ and housing (*O’Rourke v Camden LBC*)¹⁰⁸. It is perhaps worth stressing that none of these decisions in any way suggested that the tort should be radically altered or abolished. The House applied to the pieces of legislation concerned the age-old questions about Parliamentary intention, and concluded (reasonably in all these cases) that imposition of a civil liability was not what Parliament could have intended.

¹⁰⁵ See Foster, above n 21 for discussion of how the tort has changed, though still continues to operate, with the change in structure of occupational health and safety laws in the UK and in Australia. While they cannot be discussed within the scope of this paper, it should be noted that recent decisions of the NSW courts have continued to apply the tort of breach of statutory duty in industrial injuries arising under the newer forms of legislation, although there are still some uncertainties as to issues such as risk management and applicable defences: see *Macey v Macquarie Generation & H I S Engineering Pty Ltd* [2007] NSWDC 242, *Irwin v Salvation Army (NSW) Property Trust* [2007] NSWDC 266, *Estate of the Late M T Mutton by its Executors & R W Mutton trading as Mutton Bros v Howard Haulage Pty Limited* [2007] NSWCA 340, *Fox v Leighton Contractors Pty Ltd* [2008] NSWCA 23. For an example of the use of the tort in another jurisdiction in a workplace safety case, see *Bourk v Power Serve Pty Ltd* [2008] QSC 29, esp [64]ff.

¹⁰⁶ [1995] 2 AC 633.

¹⁰⁷ [2001] 2 AC 619.

¹⁰⁸ [1998] AC 188.

In a similar decision in *Hague v Deputy Governor of Parkhurst Prison*¹⁰⁹ a breach of prison regulations regarding appropriate use of “solitary confinement” was held not to be actionable, as the regulations overall were broadly concerned with prison management. On the other hand, as *Street on Torts* notes,¹¹⁰ Lord Bridge at 741 in that case suggested that *some* of the rules, especially those governing safety in prison workshops, might have been actionable.

In *Health and Safety Executive v Thames Trains Limited*,¹¹¹ after a rail accident where 31 people were killed, Thames Trains attempted to join the UK Health and Safety Executive as partly liable on the basis that they were in breach of a statutory duty to inspect alterations to rail works and equipment, the failure of which it was alleged caused the accident. The Court of Appeal ruled that there was no breach of statutory duty action, mainly because the regulation relied upon was very vague and did not in fact impose a direct duty to inspect (it simply required HSE approval to be obtained). In any event the Court held that if there was an implied duty of some sort, it was one for the benefit of the public as a whole, not just rail users.

In *Polestar Jowetts Ltd v Komori UK Ltd; Vibixa Ltd v Komori UK Ltd*¹¹² the Court of Appeal held that health and safety regulations under the *Health and Safety at Work Act 1974* (UK) (the “HSW Act”) were designed to protect personal safety, and an action could not be taken to recover economic or financial loss caused by their breach. In that case a fire had broken out due to the failure of some machines, which was acknowledged to be contrary to a particular regulation, the *Supply of Machinery (Safety) Regs 1992*. The court held that (1) these were not regulations made under the HSW Act; (2) if they were, they could not be relied on to recover financial loss, as regulations made under the HSW Act should only deal with safety.

In each of these cases the courts have been applying the established jurisprudence to deny recovery due to Parliamentary intention. But in other areas courts have ruled that the action is available, even outside the industrial safety area. *Rickless v United Artists Corporation*,¹¹³ for example, held that a statute making it an offence to use portions of films without consent of the actors involved, gave rise to civil liability. In that case the family of the actor Peter Sellers were able to recover substantial damages where previously discarded clips of his were put together to make a film for which they had refused permission. This seems a good example of a situation where a private right should have been enforced, given the policy evident in the statute.

In *Roe v Sheffield City Council and ors*¹¹⁴ the Court of Appeal held that a statutory duty imposed under s 25 of the *Tramways Act 1870* which required that tram lines laid into a public road be “on a level with the surface of the road” gave rise to civil liability. (The plaintiff’s car had slid on some wet rails and caused injury, and one of the causes was said to be that the rails were too high above the surface of the road.) There had been a previous decision of the House of Lords in *Dublin United Tramways Co Ltd v Fitzgerald* [1903] AC 99 which found against a tram company in similar circumstances, but there was some doubt as to whether the decision was based on the common law of negligence or the statutory duty. Other cases had seemed to assume the duty was actionable.

¹⁰⁹ [1991] 3 All ER 733.

¹¹⁰ 12th ed p 495 n 27.

¹¹¹ [2003] EWCA Civ 720.

¹¹² [2006] EWCA Civ 536.

¹¹³ [1988] QB 40.

¹¹⁴ [2004] Q.B. 653, [2003] EWCA Civ 1.

Pill LJ, giving the majority judgment, concluded that the duty was actionable as it seemed reasonable that Parliament, having authorised a positive interference with the public highway, would want to provide for a cause of action where the duties that went along with that interference were breached.¹¹⁵ The duty was similar to that imposed for the safety of workers, it was limited and quite specific, and there was no other effective means of ensuring the protection the statute provided. Perhaps the most difficult question was whether the “class of persons” protected was too wide, but his Lordship relied on the comments of Atkin LJ in *Phillips* to the effect that “road-users” was not too broad a class. (One could perhaps argue for a narrower class, such as those driving near tram lines.)¹¹⁶

In *Cullen v Chief Constable of the Royal Ulster Constabulary*¹¹⁷ the House of Lords had to decide whether a prisoner held under anti-terrorism laws, who had been denied access at certain points in his questioning contrary to regulations, had a civil action for breach of the regulations. The civil action ultimately failed, but it is important to note that three of the five-member panel of Law Lords would have found that the relevant regulations did create a civilly actionable duty. Lords Bingham and Steyn in a joint judgment found that there was an actionable duty based on Parliament’s intention to provide a realistic remedy to those the duty was meant to protect; because there was a pre-existing common law obligation involved; and because a Royal Commission Report which lay behind the provision clearly assumed that a civil remedy would be available for breach.¹¹⁸ While Lord Hutton disagreed with this judgement on the question of the nature of the damage which would entitle recovery of damages (Lords Bingham and Steyn arguing that the breach of the regulation should be actionable *per se*, Lord Hutton that for an award of damages some more concrete harm must be shown), his Lordship agreed that a breach of the regulation should give a person a right to recover damages where he or she had suffered “loss or injury of a kind for which the law awards damages”.¹¹⁹

While technically the decision is not authority for the civil actionability of the regulations in question, it is telling that a majority of their Lordships felt that important rights protecting someone being questioned could be protected by the ancient action for breach of statutory duty.

There are a number of other UK decisions which might be regarded as “breach of statutory duty” cases, dealing with obligations created by European law which are now in some cases binding in the UK. As this line of cases represents a development unique to the UK it will not be considered further here.¹²⁰

In Australia, as in the UK, there have been a number of decisions holding that general “social welfare” legislation does not create civil duties: *Cubillo v Commonwealth*,¹²¹ for example, holds that there is no civil statutory duty claim in relation to the general welfare of Aboriginal children. The Federal Court has also ruled that duties under the *Social Security Act 1991* (Cth) and the *Australian Postal*

¹¹⁵ Above, at [49].

¹¹⁶ Further proceedings in [2004] EWCA Civ 329 confirmed that the plaintiff could proceed in a number of causes of action against various defendants, but concluded with a very strong suggestion from the Court of Appeal that an early settlement would be appropriate given the length of time that the proceedings had already taken.

¹¹⁷ [2003] 1 WLR 1763.

¹¹⁸ Above, summarising their Lordships’ reasons at [10]-[12].

¹¹⁹ Above, at [44].

¹²⁰ For more details see in particular K Stanton, “New Forms of the Tort of Breach of Statutory Duty” (2004) 120 LQR 324-341, at 328ff.

¹²¹ (2001) 112 FCR 455.

Corporation Act 1989 (Cth) are for the benefit of the general public rather than a particular group, and hence not able to be used as the basis of a civil action.¹²²

In *Gardiner v State of Victoria*¹²³ a provision requiring an employer to provide employment to an injured worker who was once again fit to work was held to be designed for the public good, not the protection of the plaintiff. The Victorian Court of Appeal held that the provision was part of an “overall legislative scheme” the aims of which included not only delivery of compensation to workers but also “setting fair limits” to compensation and ensuring that employers bore their fair share of the burden of compensation; as a result it was “a cog in this part of the overall legislative scheme” and hence “enacted primarily for the general good rather than for the benefit of any particular persons or class of persons” (Phillips JA at [31]). Similarly, in *Saitta v Commonwealth*¹²⁴ it was held that the duty of the Commonwealth to pay benefits to nursing homes was one that was designed for the benefit of the residents, not (as alleged in this case) the benefit of one of the private contractors engaged to run the home.

In *Shire of Brookton v Water Corporation*¹²⁵ a requirement to cover “putrescible waste” at a local tip was held to have been directed at preventing odours and disease; when it caused a fire to spread to the defendant’s land, it was held that protection against the danger of fire was not a purpose of the statute, and hence a breach of statutory duty action was not available.

In *Armstrong v Hastings Valley Motorcycle Club Ltd*¹²⁶ a claim was made on the basis that an accident in a motorcycle race had been caused because the racing course was not licensed as required by legislation. But the action for breach of statutory duty was rejected mainly because the legislation did not impose a specific precaution, but simply set up a general licensing scheme.¹²⁷

Other decisions, however, have found in favour of a civil action. In *Pask v Owen*¹²⁸ the Queensland Supreme Court held that a provision making it illegal to supply a fire-arm to a minor, *did* create possible civil liability; the plaintiff had been shot after being given a gun by the defendant’s son, who had been given it by the defendant.

In NSW, as well as the decisions noted previously holding that a statutory duty to provide support for neighbouring land may be actionable,¹²⁹ there are 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) create civil obligations. The result is that if a property owner suffers damage as a result of a failure of the “body corporate” to properly maintain the premises, they may recover damages.¹³⁰ An interesting consequence of this is that it becomes 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.¹³¹

¹²² See *Scott v Secretary, Department of Social Security* [2000] FCA 1241, [17]-[19]; *Kirkup v Commonwealth of Australia* [2001] FCA 1243.

¹²³ [1999] VSCA 100.

¹²⁴ [2003] VSC 346.

¹²⁵ (2003) WASCA 240.

¹²⁶ [2005] NSWCA 207.

¹²⁷ Above, at [14].

¹²⁸ [1987] 2 Qd R 421.

¹²⁹ Above, text near notes 55ff.

¹³⁰ See *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 (citing a number of previous decisions to similar effect).

¹³¹ *Seiwa*, above, per Brereton J at [21].

Finally in this brief overview, reference should be made to *Kirvek Management and Consulting Services Ltd v Attorney-General of Trinidad and Tobago* [2002] 1 WLR 2792, [2002] UKPC 43. The Privy Council found that where a government body had been ignoring a Parliamentary directive that interest be paid on funds deposited in court by litigants, that breach of the prohibition gave a civil right to recovery unpaid interest. In the unusual circumstances of that case, legislation required sums of money to be invested in a bank account, but the practice of the registrar of the court had been to ignore the direction. Lord Scott, delivering the judgement of the Privy Council, noted that the legislation was clearly enacted for the benefit of litigants; it contained no other mechanism of enforcement; hence there should be deemed to be private rights of action available in the event of breach.

5. The Ongoing Importance of the Action

It seems appropriate to conclude with an example of an Australian case where the breach of statutory duty action seems to form a sensible avenue of compensation for a wrong which would otherwise not be adequately dealt with.

In *Jane Doe v The Australian Broadcasting Corporation*,¹³² a decision of Judge Hampel in the Victorian County Court, the anonymous plaintiff was a victim of rape. Section 4(1A) of the *Judicial Proceedings Reports Act* 1958 (Vic) made it an offence to publish information identifying a victim of sexual assault. Ms Doe's real name, the name of her assailant, and the suburb in which she lived were inadvertently revealed in radio news broadcasts made by the ABC. The broadcasts were naturally distressing to Ms Doe and evidence from her counsellor was to the effect that her emotional recovery from the events of the assault was set back and significantly prolonged. She sought damages from the ABC in the torts of breach of statutory duty, negligence, and "breach of privacy".

The finding of Judge Hampel that this last tort existed in Australian law has attracted some attention in academic and other commentary.¹³³ But what is more interesting for current purposes, of course, is the success of the plaintiff's action for breach of statutory duty. Judge Hampel held that the duty in question here was not a broadly worded duty on a matter of social policy like that dealt with in *X*, but rather a "very limited and specific" statutory duty.¹³⁴ It was clearly designed for the protection of a very limited class of persons, victims of sexual assault (a view supported by explicit statements from the relevant Minister in the second reading speech).¹³⁵ The publication of the plaintiff's name and destruction of her privacy was precisely the harm that the provision was designed to avoid. It was a breach of "Ms Doe's personal right to due observance" of the prohibition.¹³⁶ As a result the plaintiff had a civil cause of action based on breach of the statute.

It should be noted that as a County Court decision *Doe* is not binding on superior courts around Australia, although it may be persuasive. It has been reported to have gone on appeal to the Victorian Court of Appeal, which may provide more guidance in the future. But for present purposes the decision stands as a good example of the tort of breach of statutory duty providing a sensible and realistic option for

¹³² [2007] VCC 281.

¹³³ See, for a practitioner comment, Davidson, Alan "Privacy, Jane Doe and Naomi Campbell" (2007) 27(6) *Proctor* 39-40; the case is also mentioned in the recent Discussion Paper on Privacy issued by the Australian Law Reform Commission- *Review of Australian Privacy Law* (DP72, Sept 2007) p 282 at paras 5.18-5.20.

¹³⁴ Above, n 132 at [77].

¹³⁵ Above, n 132 at [75].

¹³⁶ Above, n 132 at [80].

enforcement of an important private right which might otherwise have gone unvindicated. It is interesting to note that in Canada similar cases have been decided in favour of plaintiffs, but only (as Klar notes) through a strained interpretation of "duty of care" in negligence.¹³⁷

Klar has well identified the potential problems that are raised by using a statutory duty to create a duty of care in the tort of negligence. But those problems are removed to their proper sphere when the tort of breach of statutory duty is invoked. Courts are required to address, with all the materials available, whether it can be said to have been Parliament's intention to allow recovery of civil damages when a statutory obligation is not met. The question, as noted by Kitto J in the passage quoted previously, is not "at large" and up to the judge's view of social policy. It will require careful consideration of the "nature, scope and terms" of the statute, importantly including "the pre-existing state of the law", so that previous decisions on similar or analogous statutes will provide a guide as to what the statute under consideration should be taken to mean.¹³⁸ The task will not always be easy, but it can be conducted in the way that the task of statutory interpretation is always done.

It seems uncontroversial that a citizen who has a right given by statute should be able to have a breach of that right remedied, or that breach compensated for. Parliament or the body it has authorised to make laws has made a judgment in the public good that some behaviour is wrong. In some cases there will be a remedy in the law of negligence, or nuisance, or misfeasance in public office. But where the limits of those torts exclude a particular situation or a particular plaintiff, the tort of breach of statutory duty is an invaluable weapon in the citizen's armoury to enable enforcement of private rights given by the law.

¹³⁷ See *JMF v Chappell* [1993] BCJ No 1281 (SC) (QL), and *LR v Nyp* (1995) 25 CCLT (2d) 309 (Ont Gen Div), noted in Klar, above n 77 at 45 n 59.

¹³⁸ See Kitto J in *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 at 404-405.