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Form, Substance and Sheep Overboard: The ‘Type of Harm’ Rule in the Civil Action for Breach of Statutory Duty

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“Form, Substance and Sheep Overboard: The ‘Type of Harm’ Rule in the Civil Action for Breach of Statutory Duty”

Associate Professor Neil Foster

The classic decision of Gorris v Scott (1874) LR 9 Ex 125 (the case of the “washed-over sheep”) has regularly been cited in cases dealing with the civil action for Breach of Statutory Duty (BSD). It is usually said to stand for the proposition that in a BSD action, only the “type of harm” which the relevant legislation was designed to guard against, can be sued for in a civil action based on that legislation. In Gorris the fact that the legislation requiring that sheep be penned during a sea voyage was part of a scheme regulating animal health, was said to preclude recovery for the loss of the sheep as chattels when washed overboard on the journey. This paper seeks to interrogate this decision, and others following, to ask: is this distinction one that the law should continue to recognize? Is it simply a mis-guided acceptance of the “form” of the rule creating the duty, at the expense of the substance of the relevant obligations? Or are there good reasons to respect the intention of Parliament in crafting rules of this sort?

On March 6, 1873, the steam ship Hastings was lying at Hamburg in Germany. Scott was the owner of the ship. He was approached by Gorris and another, who were “cattle dealers”, to take a cargo from Hamburg to the port of Newcastle in Great Britain. There was some dispute as to whether the cargo was described as “general cargo”, excluding livestock. But in any event a telegram from Scott to the master of the Hastings authorised the ultimate loading of 100 sheep, “in good order and well conditioned”, “to be delivered in like good order and condition at the said port of Newcastle”.

Sadly, the sheep did not all arrive. A large number were washed overboard in a gale which came up on the passage, and were drowned. Gorris sued for the loss of the sheep, relying on the admitted fact that the Hastings did not have separate pens for the sheep to be carried in, which would (it was conceded) have probably prevented their being washed overboard. Those pens of a specific size were required when animals were to be transported by ship under a regulation made by the Privy Council, The Animals Order of 1871, and which applied when animals were to be brought to Great Britain by a ship owned by a British subject. The regulation was made under authority of the Contagious Diseases (Animals) Act 1869 (32 & 33 Vict c 70), s75, which provided:

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1 Newcastle Law School, NSW, Australia; neil.foster@newcastle.edu.au. This paper is still a work in progress, and comments are welcome.

2 See the detailed report of Gorris v Scott in (1874) 2 Asp Mar Law Cas 282, which recites the pleadings and alleges this uncertainty, at 284, as the “twelfth plea”.

3 From the bill of lading, above n 2 at 282.

4 The action in tort, as opposed to an action on the contractual obligations arising under the bill of lading, may have been necessary because the bill of lading contained an “exclusion clause” referring to the precise event that occurred: “Not answerable for washing or throwing overboard” (see the report above n 2 at 283, right col). The court does not discuss the complex issues raised by a tort claim for breach of statutory duty which arguably circumvented a contractual clause; the contract itself could not over-ride the statute, but whether the plaintiff should have been able to rely on the statutory civil action in circumstances where he had agreed to a contrary contractual clause was not directly addressed. Counsel for the plaintiff seems to have argued that this clause needed to be seen against the background of the statute (see 286 left col). Arguably the clause then meant “not answerable for washing... overboard which occurs despite all statutory precautions having been taken.”
The Privy Council may from time to time make such orders as they think expedient for all or any of (inter alia) the following purposes: (1) For insuring for animals brought by sea to ports in Great Britain a proper supply of food and water during the passage and on landing. (2) For protecting such animals from unnecessary suffering during the passage and on landing.

Gorris’ argument was fairly straightforward. If the required pens (which were of certain maximum sizes and had to also have “proper battens or other footholds thereon”) had been in place, his sheep would not have died. Scott was clearly in breach of the regulation. A previous case, Couch v Steel, had already established that when a safety regulation on a ship was breached, a sailor who suffered because of the breach could recover civil damages.

But Gorris’ claim was rejected by the Court of Exchequer. The court held that, even though the breach of regulations could be said to have caused the harm that he suffered, this harm was not the harm which the regulations were designed to avoid. The source of the power to make the regulations made it clear that their purpose was the avoiding of disease among the animals.

In the official report, Kelly CB is quoted as putting this very clearly:

The Act was passed merely for sanitary purposes, in order to prevent animals in a state of infectious disease from communicating it to other animals with which they might come in contact.

It is interesting to compare the Law Reports version with the much longer and more detailed account of the decision given in the Maritime Law Cases version. There Kelly CB seems less clear on the harm being the actual spread of infectious diseases on the ship, and comments more that a rough passage may lead to the animals being weakened and “more susceptible” to disease when they arrive.

The objects (sic) of these regulations was really to prevent unnecessary suffering to the animals by their being overcrowded, and tumbling and jostling over and against one another on the passage, and so being brought hither in a condition which should render them more liable to become infected with disease.

However, in the more detailed report Kelly CB is dealing with an argument which the LR report glosses over: that the relevant regulation-making power does in fact refer to the avoiding of “unnecessary suffering” by the animals, and one would have thought that being washed overboard involved such. He deals with this directly in a later comment:

It is quite true that the sheep, being washed overboard and drowned, may have endured some “unnecessary suffering”, but that is not the suffering intended by the Act of Parliament.

Whatever the minor differences in the theories about how the legislation was designed to attack infection, all the members of the court were clear that the harm which

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6 Gorris v Scott (1874) LR 9 Ex 125, at 127.
7 Above, n 2.
8 Above, n 2, at 286 (right col.)
9 Above, n 2, at 287 (left col.)
eventuated to Gorris’ unfortunate sheep was not the harm which the legislation aimed to prevent. Hence there was no valid civil claim.

Gorris, then, has since its pronouncement stood for the proposition that to make a successful claim in the civil tort action for “breach of statutory duty” (BSD), the plaintiff must demonstrate, not only that they have suffered harm from breach of a statutory provision which Parliament may have intended generally to ground civil recovery, and that they fall into a protected class, but also that what has happened to them was within the fairly precise “scope of harm” which Parliament had been meaning to address.

This is reflected in modern statements of the elements of the tort, such as the summary given by the High Court of Australia in Byrne and Frew v Australian Airlines Ltd:

A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of obligation causes injury or damage of a kind against which the statute was designed to afford protection. (emphasis added)

Fleming’s The Law of Torts similarly summarises the elements of the BSD action as follows:

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

Application of Gorris has then led to denial of recovery in later BSD claims over the years. In Ward v Hobbs a few years afterwards, the House of Lords affirmed this approach, again in a case based on the Contagious Diseases (Animals) Act 1869. The relevant provision made it unlawful to bring contagious animals to a market; the plaintiff had purchased such animals and lost money when they later died. But as one of its reasons for denying the claim, the House held that he could not sue for BSD in relation to the statutory breach, as the provision was designed to protect the health of the public, and was not enacted for the benefit of those who purchased the animals.

10 For previous critique of this “limited class” rule, see Neil J Foster, “Reforming the action for Breach of Statutory Duty in the 21st century: reconsidering the “section of the public” rule” Private Law In The 21st Century Conference (Brisbane, 2015), available at: http://works.bepress.com/neil_foster/98/.
13 (1878) 4 App Cas 13.
14 See K M Stanton, Breach of Statutory Duty in Tort (London: Sweet & Maxwell, 1986) at 111. It should be noted that the BSD argument was described by Earl Cairns LC at 23-24 as a “subsidiary point”, the main reason for the rejection of the claim being that the seller had explicitly denied any warranty about the condition of the animals. Still, his Lordship did say that the statute imposed a “duty not to send infected animals into a public place; for an obvious reason, lest they should by contact or neighbourhood taint other animals and thereby occasion injury to the public”, and that the harm suffered by the purchaser was “not the gist of the enactment”. 

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Usually the courts have been quite ready to find that Parliament has intended that civil action be available for breach of workplace safety legislation. But in a notoriously criticised line of decisions, courts have sometimes held that legislation requiring the fencing of dangerous machinery was designed to prevent the harm caused when workers put their bodies into the machine, but was not usually designed to deal with the harm caused when parts are ejected out of the machine and cause injury. The logic of Gorris has been held to deny recovery in these cases—see Nicholls v F Austin (Leyton) Ltd 6, Carroll v Andrew Barclay & Sons Ltd 7, and Close v Steel Company of Wales Ltd 8, and in Australia Mummy v Irvings Pty Ltd 9, citing the prior English cases. It has been suggested that Nicholls at least on this point could be justified by the specific wording of the relevant statute. But by the time the High Court of Australia came to consider the issue in Mummy, the majority held that the “plain sense” of the different Victorian statute, similar as it was to the one under consideration in Nicholls, meant that recovery under the statute for harm caused by a piece of wood ejected from a circular saw was not available under a BSD action.

In its later decision of Dairy Farmers Co-operative Ltd v Azar 22 the High Court of Australia was dealing with a similar statutory provision requiring the fencing of “all dangerous parts of the machinery”. The plaintiff had been injured when working on a conveyor belt feeding milk crates under a “gripper” which placed bottles into the crate; his hand was crushed between descending milk bottles and some broken glass in the bottom of a crate which he was trying to clear out. The court considered the decisions noted above, but concluded that the case they were dealing with could be distinguished. This was not a case of something being “ejected” from a machine; the “machinery” as a whole was dangerous because it created a “nip point” and that area ought to have been securely fenced off, to prevent the sort of injury suffered by the plaintiff.

While the logic of these cases is consistent with the emphasis in Gorris on providing an action only where the harm suffered is of the sort the statute seeks to prevent, interestingly none of the cases directly refer to Gorris. The reason, on reflection, is clear—these cases are based on questions relating to the interpretation of the particular statutory provision, and in the end come down to the issue: has the statute been breached? In that sense the issue in the machine-guarding cases is prior to the “scope of the statute” issue. Clearly there can be no action for breach of statutory duty if the statute has not been breached; it is once that point is determined, that the next question arises: was the harm the sort of harm aimed at by the statute? In Gorris itself it was clear that the regulations had been breached and harm had been caused; the limiting factor was then an additional hurdle that had to be surmounted.

One case where Gorris was explicitly cited illustrates how the principle was seen to operate, even in industrial safety cases. In Whittaker v Rozelle Wood Products Ltd 23 the highly respected common law judge Jordan CJ was considering an accident in a factory occasioned to a boy under the age of 16. There were two relevant provisions

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16 [1946] AC 463.
20 See the discussion in Stanton, above n 14 at 112.
21 Above, n 19 at 108.
22 (1990) 170 CLR 293.
23 [1936] NSWStRp 13; (1936) 36 SR (NSW) 204.
which it was alleged had been breached. One was s 41 of the *Factories and Shops Act* 1912 (NSW), which prohibited employment of those under 16 at certain dangerous machines, including “spindle moulders” where the plaintiff had been injured. The other provision was s 45 of that Act, which provided that those under 16 should not work in certain factories unless a general “certificate of health and fitness” had been provided by a doctor.

Jordan CJ held here that s 41, which related to the clear risk of physical harm from dangerous machines, was intended to protect people in the plaintiff’s situation from the type of harm he had suffered, and hence gave rise to a right to damages. But s 45 was in a different class— it was more a general measure related to health, and did not itself give rise to an actionable claim.

The aim of the section is to promote the general health of the young, not to protect them from dangerous machinery, or from accidents. I am of opinion that it is not possible to discover, in this section, an intention on the part of the legislature to create a legal duty to the persons likely to be injured in their health, as well as a duty to the State.

An example of the application of the *Gorris* principles can be seen more recently in the Western Australian case of *Shire of Brookton v Water Corporation*.24 There a requirement to cover “putrescible waste” at a local tip was held to have been directed at preventing odours and disease; when the failure to cover caused a fire to spread to the defendant’s land, the court held that protection against the danger of fire was not a purpose of the statute, and hence a BSD action was not available. McLure J (as she then was) commented:

> [78] As the statutory purpose is not directed at damage by fire (as distinct from smoke pollution), it cannot be said that the legislature intended to create a cause of action at the suit of the respondents for property damage as a result of the escape of fire from the tip site.

In *Wentworth v Wiltshire County Council*25 it was held that the statutory duty of a highway authority to maintain a road was directed to the personal safety of road users, and hence a breach of the duty did not give rise to an action for financial loss suffered by a local business where the road required repairs.

In *Polestar Jowetts Ltd v Komori UK Ltd; Vibixa Ltd v Komori UK Ltd*26 the court held that regulations made under the UK *Health and Safety at Work Act* 1974 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, contrary to the *Supply of Machinery (Safety) Regulations* 1992. The court held (inter alia) that these regulations could not be relied on to recover financial loss, as the regulations made under the HSW Act could only deal with personal safety. Arden LJ (as she then was) summed up this part of the decision as follows:

> [13] (3) … health and safety regulations made under section 15(1) the 1974 Act cannot form the basis of a claim by the purchaser of machinery in respect of property damage or consequent loss of profits.

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In a similar decision, Vickery J in the Victorian Supreme Court held in "Quality Roads Pty Ltd v Baw Baw Shire Council (Ruling No 1)" that, where a statutory civil action had been created under a specific provision of the Road Management Act 2004 (Vic) s 40, requiring that roads be properly inspected and maintained, this provision could not be relied on by a commercial firm who had been contracted by the Victorian government to work on certain roads. The history of the legislation and other features of the Act showed that the duty was intended for the benefit of “road-using members of the public” whose safety was at risk, not for a company which claimed that it would suffer economic loss. At [57] his Honour concluded:

Taking into account the history, nature, scope and terms of s 40 of the RMA, and the Act as a whole, I am driven to the conclusion that s 40 is directed to harm caused to the road using public from road incidents arising from hazards on public roads and poor road maintenance practices by road authorities. The provision is not directed to providing a supplementary cause of action to a private company, which is in the business of providing road maintenance services under a road maintenance contract with the road authority, where it claims economic harm arising out of an alleged breach of the contract.

In "Kerle v BM Alliance Coal Operations Pty Limited" McMeekin J was considering whether the employer of Mr Kerle (and other relevant parties) were liable for injuries he suffered due to falling asleep on his drive home from work at a coal mine, after working four consecutive night shifts. His claim in negligence was successful, but the BSD claim failed due to application of "Gorris". The relevant legislation (which, as industrial safety law, would usually be regarded as creating civil liability), was the Coal Mining Health and Safety Act 1999 (Qld) and regulations made under the Act. There were a number of provisions dealing with the need to provide safety in relation to mining operations, but his Honour concluded that the scope of the various statutory obligations was limited to safety on the work-site, and did not extend to safety on the road home. He commented:

[67] The fundamental difficulty with the argument that the statute imposes obligations giving rise to a private right of action actionable at the suit of the plaintiff here is that the legislation is not concerned with hazards off the mine site but rather on it...

[71] It is well established that breach of a legislative provision intended to achieve one purpose cannot be called in aid as justifying an award of damages for harm from a different source. "Gorris v Scott" is a well-known authority to that effect. In "Masterwood Pty Ltd v Far North Queensland Electricity Board (No 2)" McPherson JA identified the ratio of that decision as: “The loss sustained was not within the scope of the risk contemplated or provided for by the statute.” So here.

It has to be said, with respect, that another view could be taken as to scope of the legislation, which does include specific reference to the need to consider “persons whose safety or health may be affected while at a coal mine or as a result of coal mining operations” (s 5, emphasis added). But if McMeekin J’s interpretation of the legislation was correct, then clearly the application of "Gorris" was correct.

"Gorris" has also regularly been cited and applied in the United States. In the US Supreme Court decision in "Kernan v American Dredging Co" the court referred to:

29 While Queensland has adopted the “harmonised” Work Health and Safety Act 2011 referred to in Foster & Apps, above n 15, it has retained separate legislation governing the coal-mining industry.
30 (1874) LR 9 Exch 125.
31 [2000] 1 Qd R 253 at 259 [8].
the familiar principle in the common law of negligence that injuries resulting from violations of a statutory duty do not give rise to liability unless of the kind the statute was designed to prevent. Indeed that principle, which is but an aspect of the general rule of negligence law that injuries in order to be actionable must be within the risk of harm which a defendant's conduct has created… was established as long ago as 1874 by a leading English case, *Gorris v. Scott*, and has been followed in this country almost without exception.33

More recently the US Seventh Circuit has continued to cite the case with approval, noting that ‘the old tort cases are often the most illuminating’.34 The case was called a ‘hardy perennial’ in another decision.35 A Westlaw search reveals that it was cited on more than 60 occasions in State and Federal US decisions ranging from 1874 to 2014. In the most recent of these decisions, Scalia J for the US Supreme Court referred to:

the common-law rule that a plaintiff may not recover under the law of negligence for injuries caused by violation of a statute unless the statute “is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation.” W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 36, pp. 229–230 (5th ed. 1984); see cases cited id., at 222–227; *Gorris v. Scott*, [1874] 9 L.R. Exch. 125 (Eng.).36

But is the *Gorris* principle, then, an example of the worst tendency of legal pedantry? To bring the question home to the aim of this paper: does the *Gorris* principle amount to an illegitimate elevation of “form” over the “substance” of legal rights? After all, if someone has been actually harmed by a breach of duty which was owed by the defendant, then how can it be fair to deny recovery for the “legalistic” reason that the relevant statute happened not to be aimed at preventing that form of harm?

In essence, this question can only be answered by situating the BSD tort in the wider sphere of tort actions in general, and addressing the question of what the law of torts aims to achieve. This wider question, of course, has been the subject of much scholarly comment over the last few decades. My aim is not to review, let alone resolve, all those questions. But I think it may be helpful to note that this aspect of the BSD tort sits comfortably with those theories of private law that emphasises that torts deal with “rights” that the law recognises.37

The classic analysis of the BSD tort stresses that its availability depends on the intention of Parliament in enacting the relevant legislation (or in empowering the enactment of regulations). The oft-cited words of Kitto J in the High Court of Australia decision of *Sovar v Henry Lane Pty Ltd*38 note:

[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

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33 Kerman, above, at 442 (citations omitted).
34 Aguirre v Turner Const Co 582 F 3d 808, 815 (7th Cir 2009).
35 Gauger v Hendle 349 F 3d 354, 363 (7th Cir 2003); the decision itself overruled by Wallace v City of Chicago 440 F 3d 421 (7th Cir 2006) (though not with any relevance to the authority of Gorris.)
38 (1967) 116 CLR 397, at 405.
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.

Prior to this comment, his Honour had identified the nature of the right concerned as follows:

In the case of an enactment … prescribing conduct to be observed by described persons in the interests of others who, whether described or not, are indicated by the nature of a peril against which the prescribed conduct is calculated to protect them, the prima facie inference is generally considered to be that every person whose individual interests are thus protected is intended to have a **personal right to due observance of the conduct, and consequently a personal right to sue for damages** if he be injured by a contravention.39 (emphasis added)

This “personal right to due observance” of the prescribed conduct, then, will only arise in cases where the specific conduct prescribed has not been observed, and in a case where the harm suffered by the plaintiff is consistent with the “nature of the peril” addressed by the statute.

In other words, the nature of the “right” at stake here is that it is a right created by Parliament in specific circumstances, defined by the statute itself. It is not a free-ranging right to be free from all harm. That, for good or ill, is a role that has come to be played to a certain extent by the tort of negligence, a tort anomalously identified (as others have pointed out), not by the right it protects, but by the standard of care not observed by the defendant. But for the BSD action, where the right has been created by the statute, it does not seem unreasonable for the scope of the protection provided by the tort, to track the aims of the statute.

Professor Jane Stapleton puts it this way:

All liabilities, including those arising under statute, are limited. A statute may expressly limit the type of consequence that comes within its scope…. Or such limits may be generated implicitly by the clear purpose of the statute, for example, *Gorris v Scott* (1873-1874) LR 9 Ex 125.40

In the context of the law of negligence McHugh J discussed this general principle with reference to *Gorris in Henville v Walker*.41 His Honour discussed the case in the context of causation, noting that there are situations where the action of a defendant may be a factual cause of harm to the plaintiff, but the law may determine this should not be regarded as a “legal cause”.

[102] Thus in *Gorris v Scott*42, in the course of a voyage on the defendant's ship, the plaintiff's sheep were washed overboard because the defendant neglected his statutory duty to provide pens on the deck of the ship. The action was dismissed because the statute was aimed at preventing disease and was not directed to the events that had happened. Thus in spite of the existence of a breach of duty that resulted in damage to the plaintiff, there was no relevant causal connection because the damage was outside the contemplation of the statute. Similarly, in *Close v Steel Company of Wales Ltd*,43 the defendant, in

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39 *Sovar* (1967) 116 CLR 397, at 404.
42 (1874) LR 9 Ex 125.
breach of its duty, had failed to fence a dangerous drilling machine. The plaintiff was injured when the drill bit fragmented. His action failed because the House of Lords held that the duty to fence was limited to keeping the worker from coming into contact with the dangerous machinery and did not extend to protecting the worker from injury caused by ejected pieces of the machine.\footnote{44}

Later the question of causation in a medical negligence claim was also discussed using Gorris as relevant to the issue, in Freidin v St Laurent.\footnote{45} It is interesting to see that Gorris has been transformed in some discussions from a principle that limits liability for breach of statutory duty, to a more general principle relating to the causation of harm, which focusses on the purpose for which causation needs to be established.\footnote{46}

A discussion of the respective roles of “form” and “function” in the law is found in an article by Robert Summers, “The Place of Form in the Fundamentals of Law”.\footnote{47} Summers is not always easy to summarise, but one of his insights is that, contrary to what has sometimes been said, the “form” of legal institutions (including, for our purposes, legal rules) matters, and can be regarded as a significant part of the legal system. A legal rule of course matters because of its \textit{content}- is it a fair rule? Is it able to be administered? Does it lead to better social outcomes overall? But in posing these questions we cannot ignore the fact that a legal rule has a specific \textit{form}, and that form is an important part of how it operates.

Suppose we were to postulate a rule that, whenever someone has been harmed in any way by an action which amounts to a breach of statutory rules, there would be recovery (the “General Harm” rule). This would be in contrast to the rule in Gorris, which requires a specific connection between the harm suffered and the aim of the relevant legislation. Can we defend the Gorris rule against the General Harm rule?

One insight from Summers that bears on this issue is the observation that the “form” of a legal rule is indispensable to the identifiability of a valid law.\footnote{48} The specific statutory obligation which has led to what Kitto J above called the “personal right to due observance” of the relevant conduct, comes from a statute which has been duly enacted by the legislature. The right in question depends wholly on the terms of that statute; it was never a “pre-existing” right hanging in mid-air. (True, some actionable statutory obligations build on a framework of pre-existing common law rights, as noted by Dixon J in O’Connor v S P Bray Ltd.\footnote{49} But even where that is so, the common law prior to the enactment of the relevant statute did not give the specific right to a worker given by the statute, such as a right that dangerous machinery be properly fenced.)

The duty, then, depends on the statutory provision having been properly enacted, pursuant to the forms that our community has adopted for valid legislation.

Summers also goes on to note:

\begin{quote}
[A] major source of the legitimacy of law-making and lawimplementing institutions is public acceptance, acquiescence and assent. These are more likely when institutional power to act is explicitly authorized, and located in duly circumscribed institutional roles that are highly determinate.\footnote{50}
\end{quote}

\footnote{44} cf Lord Simonds in Nicholls v F Austin (Leyton) Ltd [1946] AC 493 at 505: “The fence is intended to keep the worker out, not to keep the machine or its product in.”
\footnote{45} [2007] VSCA 16; (2007) 17 VR 439, [31]–[34].
\footnote{46} See also comments on the relevance of Gorris in D Hamer, “‘Factual causation’ and ‘scope of liability’: What’s the difference?” (2014) 77(2) Modern Law Rev 155–188, at 167-169.
\footnote{47} (2001) 14/1 Ratio Juris 106-129. Summers expanded these ideas in his later monograph Form and Function in a Legal System: A General Study (Cambridge, CUP, 2005).
\footnote{48} Summers (2001), above n 47, at 114.
\footnote{49} (1936) 56 CLR 464 at 478.
\footnote{50} Summers (2001), above n 47, at 114-115.
It may be suggested that, for the public generally to accept that a breach of a statutory provision ought to give rise to a “personal right to sue for damages if … injured by a contravention” (to again quote Kitto J), the question whether the statute itself was designed to provide protection against the specific harm is not unimportant. If, to take some of the examples given previously, Parliament has designed a regime which is designed to compensate members of the travelling public who are injured by the poor condition of a road, and if that scheme is then effectively “hijacked” by business owners claiming loss of profits, the law is far less likely to be supported. Use of funds in that way will probably mean that less money is available for injured motorists. A similar reaction might be expected if a scheme to provide compensation to injured workers were used to finance the economic loss of expensive machinery.

If it were argued that, while these specific cases are undeserving, more latitude should be given to judges to determine whether or not specific harm should be compensable in other cases, Summers’ comments on the requirement that rules be predictable, and their democratic foundations, are worth noting. In an important footnote he refers to what he calls the fallacy that “we can dispense with policy serving rules and merely have a system of law consisting of dispute settlers - in modern terms, government by judiciary, in light of authoritative policies.” He offers what I regard as four convincing reasons why such a system would be wrong:

First, even if we always had the wisest of all possible judges, which we could never have, citizens would still need for many matters the advance guidance that only the rule form can provide - guidance that ad hoc government by judiciary after the fact cannot provide. Second, even if precatory rules were to emerge from judicial ad hocery, the general power of judges in such a system to depart from the rules in particular cases depending on the weight of reason would undermine the necessary reliability of these very rules. Third, often the merits of disputes do not clearly point to one outcome over another, and certainly not one generalizable outcome. The idea of the regularly determinable wise result in every particular case is chimerical. We must simply have a rule, one way or the other for many matters. Fourth, government by judiciary lacks legitimacy.

Finally in this brief interaction with Summers, he notes the benefits that flow from a rule having “definite” and not vague form:

a more definite rule is usually also one that better serves legitimacy because lawmakers and citizens can be more certain just what power is being exercised, one that better serves rationality because the rule can be subjected to more telling scrutiny in the legislative process, and one that better serves democracy not only for these reasons but also because such a discrete rule is something for which legislators can be held accountable with more certainty.

To apply this to our example, a rule that damages may only be recovered where the harm occasioned was the harm aimed at by the statute, will arguably provide a clearer and more predictable rule for both plaintiffs and defendants.

51 See Quality Roads Pty Ltd v Baw Baw Shire Council (Ruling No 1), above n 27, and Wentworth v Wiltshire County Council, above n 25.
52 See Polestar Jowetts Ltd v Komori UK Ltd; Vibixa Ltd v Komori UK Ltd, above n 26.
54 Ibid.
55 Ibid, at 122.
In short, there seem to be good reasons to say that the rule in *Gorris*, that recovery of damages for breach of statutory duty should be limited to damages for the harm that the statute was designed to cover, should be maintained as part of this tort.

Some of the cases that stand out as seemingly wrongly decided in applying this rule, on further analysis turn out not to be based on *Gorris*, but to be an example of poor statutory interpretation. As mentioned previously, the question of what obligations are imposed by the statute is logically prior to the question whether the harm caused to the plaintiff is within the “scope” of the statutory protection.

One example of this phenomenon may be seen in the decision of the House of Lords in *Fytche v Wincanton Logistics plc* [2004] UKHL 31; [2004] 4 All ER 221.56 By a 3-2 majority the House held that there had been no actionable breach of regulations concerning “personal protective equipment”, where a hole had developed in a safety boot issued to a worker, which had allowed icy water in, causing frostbite. The majority took the view that the equipment was only “unsafe” if it failed to guard against crushing by heavy loads, and that the defect in other parts of the boot was not a breach of the regulations. The minority, with respect, were far more persuasive in arguing that the relevant statutory context meant that the equipment had to be generally “safe”, not just safe for specific, limited purposes.

*Gorris* was cited before the House in argument,57 though not referred to in any of the judgments. But the point to note is that the *Gorris* issue was not reached, because the majority had decided that the regulations had not been breached. Hence there was no occasion to consider the further question whether harm caused by frostbite was within the “scope” of the protection to be provided by the regulations.

With respect, similar comments may be made about the recent Queensland decision in *Kerle* noted above58: the interpretation given to the Act seems wrongly narrow, but as a result the *Gorris* rule was not really relevant.

But where legislation has been properly interpreted, and the harm suffered by the plaintiff has nevertheless not been the sort of harm designed to be dealt with by the legislation, then on balance the *Gorris* rule seems to properly respect the Parliamentary intention which forms the very basis for the action in the first place. Rather than being an inappropriate triumph of form over substance, arguably the rule represents a proper recognition that the private rule involved must take its content from the aims of the relevant statute.

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56 See a fuller discussion in Foster (2006), above n 5, at 93-95.
57 See [2004] ICR at 976.
58 See above, n 28.