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# The Merits of the Civil Action for Breach of Statutory Duty

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# *The Merits of the Civil Action for Breach of Statutory Duty*

Neil Foster\*

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## *Abstract*

The tort action for Breach of Statutory Duty provides an 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. This article argues that the tort, far from deserving the accusations of incoherence and unpredictability sometimes levelled at it in the common law world, has a respectable and coherent history and justification within the common law of torts. There are reasons for doubting whether it should have been abolished in Canada, and its abolition has caused a distortion of the law of negligence in that jurisdiction. 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.

## **I Introduction**

Few would doubt the truth of the proposition that, if Parliament has given a legal right to citizens, there should be some means of enforcing that right when it is breached. Our common law ‘rights’ are enforced by a variety of remedies, many of them falling squarely within the realm of tort law.<sup>1</sup> It is not surprising, then, that the courts should use the mechanisms of tort law to enforce rights that have been granted by specific decision of Parliament.

But what is meant when we say that someone has a ‘right’ to enforce a statutory duty against another person? Clearly not every statute imposes obligations that are intended to be enforced by private individuals. Given the vast expansion of legislation emanating from parliaments in recent years, there clearly need to be some guiding principles to determine when it is appropriate to allow a personal civil action based on breach of a statutory right. Those principles have been set out for many years in the elements of the specific tort of breach of statutory duty. This article considers the current situation of this tort in the common law world.

Statutes can create private rights in a variety of ways. A statute may explicitly create a private remedy, and spell out clearly the circumstances in which

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<sup>1</sup> For recent discussion of these issues see, eg Robert Stevens, *Torts and Rights* (Oxford University Press, 2007).

the remedy can be used.<sup>2</sup> There are other cases, however, where statutes provide rights, but do not clearly address the issue of whether a private remedy is available or not. The law of breach of statutory duty addresses the circumstances in which a private remedy exists, as well as the conditions under which it can be exercised.

Not all statutes are alike. Courts may differ at varying times as to whether Parliament intended a statute to be actionable. The fact that the outcomes of different actions brought under the heading of breach of statutory duty may seem to be contradictory has led to some suggesting or deciding that the tort as a whole is incoherent and ought to be abolished, in whole or in part. The purpose of this article is to clear away some of the misunderstandings about the tort, and to argue that it is still a valuable weapon in the common law armoury, which should be maintained to allow citizens to defend, when others will not, rights given by their democratically elected parliaments.

## II Early History of the Action for Breach of Statutory Duty

Chapter 50 of the second *Statute of Westminster* in 1285 sets out an early basis for a civil action based on statutory breach.<sup>3</sup> But perhaps the modern history of the action can be traced to ‘Action upon Statute (F)’ in Comyn’s *Digest*, an 18th century 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.<sup>4</sup>

In one of the earliest modern cases applying this principle, Lord Campbell CJ in *Couch v Steel*<sup>5</sup> 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 apparent fluctuation in the courts’ attitudes, sometimes giving the feel of a series of successive reversals. In *Atkinson v Newcastle and Gateshead Waterworks Co*<sup>6</sup> the Court of Appeal refused to allow a plaintiff, whose house and workshop had burnt down, to sue the Waterworks Company for breach of a statutory duty to maintain adequate water pressure in its 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 were clearly distinguishable from *Couch*, which was not overruled; and interestingly a close reading of the judgment of Brett LJ indicates that,

<sup>2</sup> In the United Kingdom, see section 2(1) of the *Misrepresentation Act 1967* (UK); in Australia, see section 82 of the former *Trade Practices Act 1974* (Cth).

<sup>3</sup> For a general overview, see K M Stanton, *Breach of Statutory Duty in Tort* (Sweet & Maxwell, 1986) 2 and K M Stanton, Paul Skidmore and Michael Harris, *Statutory Torts* (Sweet & Maxwell, 2003).

<sup>4</sup> Sir John Comyns, *A Digest of the Law of England* (5<sup>th</sup> ed, 1822) 442. The *Digest* was first published in 1762.

<sup>5</sup> (1854) 3 E & B 402; 118 ER 1193 (‘*Couch*’).

<sup>6</sup> (1877) LR 2 Ex D 441 (‘*Atkinson*’).

for his part, his Lordship's doubts about *Couch* supported rather than undermined a broad statutory duty civil action.<sup>7</sup>

Without examining the judgment in detail, it is worth making one point. The relevant legislation was applicable to the company because it was incorporated by reference into the Local Act of Parliament that established the company.<sup>8</sup> It seems to be occasionally suggested that the 'private' nature of the legislation in *Atkinson* and other similar cases impliedly counted *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: the court in *Atkinson* 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.<sup>9</sup> 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.

What *Atkinson* clearly establishes, however, as seen in later references to the 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.'<sup>10</sup>

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.<sup>11</sup>

Consider for example, following *Atkinson*, later decisions on the obligations of a water company. In *Dawson & Co v Bingley Urban District Council*<sup>12</sup> the Court of Appeal dealt 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

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<sup>7</sup> His Lordship, later Lord Esher MR, was of course highly influential in shaping the modern law of negligence through his minority judgment in *Heaven v Pender* (1883) 11 QBD 503, adopted by Lord Atkin in *Donoghue v Stevenson* [1932] AC 562.

<sup>8</sup> *Newcastle and Gateshead Waterworks Act 1866*, 26 & 27 Victoria, c xxxiv.

<sup>9</sup> *Atkinson* (1877) LR 2 Ex D 441, 448; and see Cockburn CJ at 449—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.'

<sup>10</sup> *Atkinson* (1877) LR 2 Ex D 441, 448 (Lord Cairns LC).

<sup>11</sup> *Ex parte Island Records Ltd* [1978] 1 Ch 122, 134–5. Burrows notes that Lord Evershed had said something very similar writing extra-judicially some years previously, referring to the 'spin of a coin' being 'as good a forecast as any of the result of a case'—see John Burrows, 'Breach of Statutory Duty' in S Todd (ed), *The Law of Torts in New Zealand* (Brooker's, 4th ed, 2005) 350, quoting Lord Evershed, 'The Impact of Statute on the Law of England' (1956) 42 *Proceedings of the British Academy* 247, 259.

<sup>12</sup> [1911] 2 KB 149 ('*Dawson*').

of this statute was actionable, when a breach of the statute in *Atkinson* was not. In *Read v Croydon Corporation*<sup>13</sup> Stable J in the King's Bench Division held that the duty to provide pure water under section 35 of the *Waterworks Clauses Act 1875* (precisely the same statute at issue in *Atkinson*) was actionable. How then to explain the more recent decision of the Court of Appeal in *Capital & Counties plc v Hampshire County Council*<sup>14</sup> 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 a fire?

But the apparent contradictions in these cases are largely resolved when the specific circumstances of each are considered. Judges, after all, are aware 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.<sup>15</sup> In *Dawson* the court was conscious of *Atkinson*, but focused 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*, and noted that this was not a case of nonfeasance, 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.<sup>16</sup>

On the other hand, the legislative obligation in *Capital & Counties* 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 Lords 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.<sup>17</sup>

### A *The Nature of the Statutory 'Right' in Question*

Not all the reasons offered for distinguishing past authority, in all the cases, are equally convincing. But it should be more clearly acknowledged than it has often

<sup>13</sup> [1938] 4 All ER 631 (*Read*).

<sup>14</sup> [1997] QB 1004 (*Capital & Counties*).

<sup>15</sup> See, eg Burrows, above n 11, 432: 'Yet there cannot be the slightest doubt that the courts at least strive to be as faithful to the statute as they can.'

<sup>16</sup> 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 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.

<sup>17</sup> See *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (*Bedfordshire County Council*) 731–2 (Lord Browne-Wilkinson).

been, that the courts in wrestling with these problems are attempting to fulfil 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* seem appropriate:<sup>18</sup>

[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.<sup>19</sup>

Kitto J refers to the existence of a 'private right'. What is the nature of this right? How does an enactment by Parliament confer such a private right in these cases? A detailed jurisprudential justification of this process is not really possible in this overview of the existing law. But it seems worth noticing that the logic is fairly straightforward. The court finds that the implication of what Parliament has enacted is that Parliament intended to legislate for the protection of a class of persons which includes the claimant. That implication is drawn based on a range of material noted by Kitto J. One important piece of evidence tending to show that Parliament intended such protection is that the legislation makes further and better provision for protection of an already recognised 'common law' right.

This emerges in what is the *locus classicus* of the law on the topic in Australia, the judgment of Dixon J in *O'Connor v S P Bray Ltd*:<sup>20</sup>

In the absence of a contrary legislative intention, a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right, although the sanction is penal, because it protects an interest recognised by the general principles of the common law.

This view was supported by Kitto J in the *Sovar* case noted above, where his Honour commented:

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.<sup>21</sup>

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<sup>18</sup> (1967) 116 CLR 397 ('*Sovar*') 405.

<sup>19</sup> Citing *Martin v Western District of the Australasian Coal and Shale Employees' Federation Workers' Industrial Union of Australia (Mining Department)* (1934) 34 SR (NSW) 593, 596.

<sup>20</sup> (1936) 56 CLR 464 ('*O'Connor*') 478.

<sup>21</sup> *Sovar* (1967) 116 CLR 397, 404.

These cases are part of a line of authority that emerged early in the development of the tort, where 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.<sup>22</sup>

*Couch v Steel*<sup>23</sup> was followed by a number of other decisions holding that where statutes concerning safety in the workplace were enacted by Parliament, they were generally to be read as giving the right to workers to recover damages for breach of the statute: see, for example, *Britton v Great Western Cotton Co*<sup>24</sup> and the Scottish decision of *Kelly v Glebe Sugar Refining Co*.<sup>25</sup> The culmination of these cases in the 19th century was the landmark decision of *Groves v Lord Wimborne*.<sup>26</sup>

The case is sometimes referred to as the beginning of statutory duty claims for workplace injury, but it is not. It was decided against the background of those other cases. In fact *Groves* is interesting precisely because the statute concerned not only imposed a criminal penalty on an employer in breach, but also gave discretion to the Secretary of State to divert part or all of the penalty to the injured worker or the worker’s family. This allowed the defendant to mount a plausible claim that in this case Parliament had already made a judgment about the appropriate avenue for compensation, and hence excluded the common law action. All the members of the Court of Appeal disagreed with this argument, and found in favour of the worker.

Other cases involving this type of legislation have been discussed elsewhere, and will not be considered in detail in this article.<sup>27</sup> But the general principle is that where Parliament has passed legislation designed to protect a person—especially where that protection relates to the possible infringement of a right recognised at common law—then the courts will give effect to that protective intent by providing the person with a ‘personal right to due observance’ of the provision.

Stevens, in his discussion of the ‘rights’ basis of the law of torts, refers to the classic summary of common law rights given by Cave J in *Allen v Flood*,<sup>28</sup> as rights to reputation, bodily safety and freedom of movement, and enjoyment of property.<sup>29</sup> Arguably statutes designed to further provide for the protection of these rights will have a particularly strong claim to be intended by Parliament to create civil actionability. So, for example, a statute imposing a duty on a public broadcaster not to reveal the name of a rape victim can readily be seen to reinforce

<sup>22</sup> See the oft-cited comments of Glanville Williams, ‘The Effect of Penal Legislation in the Law of Tort’ (1960) 23 *Modern Law Review* 233, 233: ‘When [penal legislation] concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases it is ignored.’

<sup>23</sup> (1854) 3 E & B 402; 118 ER 1193

<sup>24</sup> (1872) LR 7 Ex 130.

<sup>25</sup> (1893) 20 R 833.

<sup>26</sup> [1898] 2 QB 402 (‘*Groves*’).

<sup>27</sup> See Neil 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.

<sup>28</sup> [1898] AC 1, 29.

<sup>29</sup> Stevens, above n 1, 5.

and support rights as to reputation that the victim has at common law,<sup>30</sup> and so it is not surprising that such a statute has been found to be civilly actionable.<sup>31</sup>

But of course the indicative list of ‘rights’ offered by Cave J is not exhaustive of the rights recognised in the legal system. Stevens later includes ‘statutory rights’ in his discussion of the matter:

Some rights are created by statute, many imposing positive duties to act or to achieve a result. These rights are diverse and are consequently difficult to classify with any further precision. They can overlap with and partially replace judicially created rights.<sup>32</sup>

Hence some rights given by statute go beyond merely supporting a pre-existing common law right, and are new creatures altogether. In such cases the courts will have to apply the statutory interpretation techniques noted by Kitto J in *Sovar* to the question whether Parliament intended to grant a right that was personally actionable.

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 that of workplace safety. While for some years courts could state that the general starting point when considering a statutory breach was that a person injured by a breach should have a civil remedy,<sup>33</sup> 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 sometimes identified as the dictum of Lord Tenterden CJ in *Doe d Bishop of Rochester (Murray) v Bridges*<sup>34</sup>:

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, however, 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 actually been paid for 16 years!

<sup>30</sup> For the (perhaps counter-intuitive) view that an allegation of rape can be seen as defamatory of the victim under the law of defamation, see *Youssoupoff v Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 581.

<sup>31</sup> See *Doe v Australian Broadcasting Corporation* [2007] VCC 281 (3 April 2007) (‘*Doe*’), discussed in section VI below.

<sup>32</sup> Stevens, above n 1, 16. As he later comments at 331: ‘Moral rights are not the only sort of rights there can be. The legislature can create any legal rights it chooses, for any purpose.’

<sup>33</sup> Comments to this effect can be found in *Couch* (1854) 3 E & B 402, 411 (Lord Campbell CJ); *Groves* [1898] 2 QB 402, 407 (A L Smith LJ); and even in as relatively late a case as *Monk v Warby* [1935] 1 KB 75, 81 (Greer LJ).

<sup>34</sup> (1831) 1 B & Ad 847, 859; [1824-1834] All ER Rep 167, 170.



Nevertheless, the words of Lord Tenterden have sometimes been cited as if they were an appropriate starting point for the courts today in considering a new claim that a breach of statutory duty is actionable.<sup>35</sup>

Over the course of the development of the tort 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 of whether Parliament intended to create a civil remedy for breach of the particular statute; if a remedy is possible, the other criteria address the question of whether a remedy is available in the specific case. The textbooks, and in particular the major study by Stanton et al,<sup>36</sup> deal with these matters in more detail. But for present purposes they can be summarised as follows.

### (a) Availability of a Civil Remedy

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?<sup>37</sup> 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?<sup>38</sup> Is the obligation concerned a specific and confined obligation, or is it more general and ill-defined?<sup>39</sup> Does the provision occur in a statutory context where other obligations are likely to be actionable, or not?<sup>40</sup> 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?<sup>41</sup> While it would arguably be simpler if Parliament explicitly provided for actionability (or against

<sup>35</sup> See, eg the very influential judgment of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173 (*'Lonrho'*) 185. For a recent example see Pill LJ's judgment in *Poulton v Ministry of Justice* [2010] EWCA Civ 392 (22 April 2010) (*'Poulton'*) [102].

<sup>36</sup> Above n 3, especially ch 2.

<sup>37</sup> See, eg *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 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 also Stanton et al, above n 3, 29; and the decision in *Poulton*, above n 35, where no civil liability was found despite it being acknowledged that there was no other penalty for breach. For a case where this was one factor that weighed with the court in favour of liability, however, see *Ziemniak v ETPM Deep Sea Ltd* [2003] 2 Lloyd's Rep 214 (*'Ziemniak'*) 217–8 [15]–[16] (Kay LJ).

<sup>38</sup> See, eg Lord Diplock's judgment in *Lonrho*; but see also the objection to this criterion by Lord Atkin in *Phillips v Britannia Hygienic Laundry Co* [1923] 2 KB 832 (*'Phillips'*) 841. The UK Supreme Court, however, has recently affirmed that this criterion is still valid: see *Morrison Sports Ltd v Scottish Power UK plc* [2010] UKSC 37 (28 July 2010) [39]–[40].

<sup>39</sup> 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, 221; but see the critique offered in Stanton et al, above n 3, 53.

<sup>40</sup> For cases where the non-actionability of other parts of the Act concerned ruled out actionability of the provision in question, see *Phillips* and *O'Rourke v Camden London Borough Council* [1998] AC 188, discussed in Stanton et al, above n 3, 47; *Hall v Cable and Wireless plc* [2009] EWHC 1793 (Comm) (21 July 2009). But this is by no means an automatic barrier; see, eg the comments of Dixon J in *O'Connor* (1937) 56 CLR 464, 479.

<sup>41</sup> See, eg the discussion by McMurdo P in *Schulz v Schmauser* [2001] 1 Qd R 540, 546 [7], holding that one reason for ruling in favour of the actionability of the particular provision in question was that it replaced previous legislation which had been held to give a civil action. But again this cannot be decisive—see the discussion in Stanton et al, above n 3, 48 noting the Court of Appeal's approach in *Capital & Counties*.

it), suggestions that there be a general statutory presumption either way have not been adopted.<sup>42</sup>

### *(b) Application of the Statute to the Claim*

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?<sup>43</sup> Does the harm that the plaintiff has suffered fall within the area of the harm against which the legislature intended to guard?<sup>44</sup> Has the defendant, or someone for whose actions the defendant is liable, actually breached the statute?<sup>45</sup> Has the breach of the statute actually caused the harm complained of by the plaintiff?<sup>46</sup>

## III Arguments for Abolition of the Action

The balancing of these criteria is not always easy, and the difficulty of determining the issues in some cases has led to some commentators 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 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.<sup>47</sup>

<sup>42</sup> See, eg Alec Samuels, ‘Is a Breach of Statutory Duty Actionable?’ (1995) 16 *Statute Law Review* 225.

<sup>43</sup> See, eg *Read*, 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.

<sup>44</sup> 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* [2004] UKHL 31 (1 July 2004); 4 All ER 221, where damage caused by water penetrating a hole in a boot was held to be different from damage caused by crushing, and hence not within the purview of the legislation.

<sup>45</sup> 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 27, 98 nn 82–3; though the comments in n 83 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* [2007] 1 AC 224, 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 229 [10] and 231 [16]–[17].

<sup>46</sup> 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, above n 3, [9.022]–[9.024] and the comments of the High Court of Australia, especially McHugh J, in *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424.

<sup>47</sup> Williams, above n 22. 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. Williams’ comments about the desirability of the statutory action arising

Another important critic of the tort was the late John Fleming, whose highly regarded textbook, *The Law of Torts*, contained (at least in the edition published shortly after the author's death) 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.<sup>48</sup> While the ensuing discussion of 11 pages dealt with the authorities in the area with Fleming's customary thoroughness—and extensive citation of both US and Commonwealth case law—the tone of the treatment made it quite clear that in the author's 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 below, 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 an essay by Davis, which appears in a *Gedenkschrift* for Fleming.<sup>49</sup>

More recently the UK Law Commission canvassed the possible abolition of the tort, either total or partial, in its Consultation Paper *Administrative Redress: Public Bodies and the Citizen*, basing its view on 'a perception of uncertainty and unpredictability' in the action.<sup>50</sup> However, the final Law Commission report did not in the end recommend abolition of the action.<sup>51</sup>

Perhaps the pressure for abolition is mounting, as suggested in a recent monograph by Cornford, although Cornford's argument is not developed in great detail.<sup>52</sup>

Some brief comments may be offered on these arguments.<sup>53</sup>

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in circumstances where there is a duty of care already arising outside the statute (eg, at 252, 256) interestingly reflect (though the article does not seem to cite) the comments of Dixon J in *O'Connor* (1936) 56 CLR 464, 478 noted above.

<sup>48</sup> Comment here is based on John G Fleming, *The Law of Torts*, (LBC Information Services, 9th ed, 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 Nicholas J Mullany and Allen M Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (LBC Information Services, 1998) 69.

<sup>49</sup> Davis, above n 48. See the comment of Phillips JA in *Gardiner v State of Victoria* [1999] 2 VR 461, 467 [21] in response to Professor Davis's article, that it 'seems rather extreme'.

<sup>50</sup> UK Law Commission, *Administrative Redress: Public Bodies and the Citizen*, Consultation Paper No 187 (2008) 34. An earlier version of this article was supplied to the Law Commission as part of the consultation process.

<sup>51</sup> See *Administrative Redress: Public Bodies and the Citizen*, Report No 322 (2010) 5 [1.35].

<sup>52</sup> Tom Cornford, *Towards a Public Law of Tort* (Ashgate, 2008) 198. For comment on Cornford's book see reviews by S H Bailey in [2009] *Public Law* 869 and by Greg Weeks in (2009) 17 *Torts Law Journal* 311; although Weeks's comment at 315 that the suggested abolition of the tort is 'largely moot' in Australia, by reference to Part 5 of the *Civil Liability Act 2002* (NSW) is quite mistaken—while pt 5, s 43 in particular, imposes a restriction on the breach of statutory duty action against public authorities, it has no impact on breach of statutory duty actions against private individuals. It is unfortunate that the operation of the tort in general has become confused by the assumption of some commentators that its main sphere of action is in relation to government bodies.

<sup>53</sup> One other article that is sometimes referred to as critiquing the tort of breach of statutory duty is the complex double-barrelled note by P D Finn (as he then was), 'A Road Not Taken: The Boyce Plaintiff and Lord Cairns' Act' (1983) 57 *Australian Law Journal* 493 (Part I), 571 (Part II). But while seeming to refer occasionally in disparaging terms to the tort as such (eg, at 506: 'a disreputable' action, 'devoid of unifying principle; based upon a non-existent legislative intent; ...

### A *Davis' Arguments*

Davis suggests that the tort should be judicially abolished because it has no rational or coherent basis, it has left a legacy of confusion, decisions based on the tort demonstrate inconsistent policy outcomes, legislatures around the common law world have reduced the application of the tort, and in its 'strict liability' aspects it is contrary to recent trends favouring fault-based liability.<sup>54</sup>

Davis goes on to review some academic justifications for retaining the tort and concludes that none of these proffered justifications fully explain the cases. The cases, however, could conceivably have a number of different justifications without necessarily being 'irrational'. In particular one justification seems to be given inadequate consideration by Davis: 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.'<sup>55</sup>

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 fairly closely to (rather than merely being 'similar' to) a right given by the democratically elected Parliament. Of course the broad principle rationale may not emerge in every case applying the tort, but some such justification seems clearly to lie behind its creation.

An essential feature of the tort will be that, where it is available, the precise circumstances in which a right arises will be as variable as the statutes enacted by Parliament. Davis's comment that 'each statutory provision is different from every other' misses the point that the action is as flexible as the various statutes.<sup>56</sup>

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*, which Davis immediately goes on to quote.<sup>57</sup> 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.

Davis' claim of a 'legacy of confusion' is undermined when the cases he refers to are carefully examined. His analysis of the interaction between *Atkinson*, *Couch* and *Groves* does not support his point.<sup>58</sup> *Groves* does not involve any departure from the principles expressed in the previous cases. Of course there are

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guided by propositions that cannot win anything approaching universal assent'), the article at other points is more concerned with a course of judicial decisions which amounts to 'subversion' of the tort (at 571). Finn does not in any way suggest that the tort should be 'disposed of'.

<sup>54</sup> Summarising Davis, above n 48.

<sup>55</sup> Davis, above n 48, 73, citing E M Fricke, 'The Juridical Nature of the Action upon the Statute' (1960) 76 *Law Quarterly Review* 240.

<sup>56</sup> Davis, above n 48, 73.

<sup>57</sup> (1937) 56 CLR 464, 478, noted above.

<sup>58</sup> For *Atkinson* see above n 6 and surrounding text; for *Couch* see above n 5; for *Groves* see above n 26 and the more detailed discussion in Foster, above n 27, 81–2.

comments in *Atkinson* that criticise the decision in *Couch*, but this does not mean that there is anything particularly unusual in a differently constituted court—such as in *Groves*—not accepting those critiques in a case that was quite different. In short, Davis’s fairly blunt (and, as he himself confesses, ‘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 analysis of three decisions.

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 since Davis wrote his article, the trend has been revealed as by no means uniform. In Victoria, for example, where in the late 1990s, when Davis wrote, common law damages for workplace injuries had been removed, the action for damages for at least some of those injuries has now been restored.<sup>59</sup>

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 argue that since Parliament has limited the operation of the tort in a particular area, it is happy for the tort to have a continuing effect in other areas.<sup>60</sup>

Davis’s 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 *Burnie Port Authority v General Jones Pty Ltd*<sup>61</sup> overturning of *Rylands v Fletcher*<sup>62</sup>, the decision in *Northern Territory of Australia v Mengel*<sup>63</sup> to declare that *Beautesert Shire Council v Smith*<sup>64</sup> 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.<sup>65</sup>

Reasons could be offered for suggesting why some of these decisions themselves represented a wrong turning.<sup>66</sup> 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 or so after Davis’ article. Australian courts continue to wrestle with determining in precisely which circumstances the *Burnie*

<sup>59</sup> 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. Victorian courts continue to award damages for breach of statutory duty in the industrial area—see, eg *Acir v Frosster Pty Ltd* [2009] VSC 454 (7 October 2009) (*‘Acir’*) [221]–[225] (Forrest J).

<sup>60</sup> See, eg the decision of the NSW Parliament in section 32 of the *Occupational Health and Safety Act 2000* (NSW) to rule out civil liability for a breach of the provisions in the *Act* itself, but to allow civil actions under the *regulations* made under the *Act*; and section 39A of the *Act*, which provides that the Executive may explicitly provide that certain regulations are not civilly actionable.

<sup>61</sup> (1994) 179 CLR 520 (*‘Burnie’*).

<sup>62</sup> (1868) LR 3 HL 330 (*‘Rylands’*).

<sup>63</sup> (1995) 185 CLR 307 (*‘Mengel’*).

<sup>64</sup> (1966) 120 CLR 145 (*‘Beautesert’*).

<sup>65</sup> [1994] 2 AC 264.

<sup>66</sup> See John Murphy, ‘The Merits of *Rylands v Fletcher*’ (2004) 24 *Oxford Journal of Legal Studies* 643, especially 660 and following for a powerful critique of *Burnie*.

rule designed to replace *Rylands* should really operate—what is a ‘dangerous substance or dangerous activity’?<sup>67</sup> The simple fact that the *Burnie* rule is said to create a ‘non-delegable duty’ should alert us to the improbability that ‘fault-based liability’ is now to be the defining standard of tort law. Whatever the circumstances that create a non-delegable duty, the 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 the harm caused by the contractor.<sup>68</sup>

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*<sup>69</sup> that at least in some circumstances there can be vicarious liability for intentional torts), and to uphold through clearer definition the doctrine of ‘non-delegable duty’ in *Leichhardt Municipal Council v Montgomery*.<sup>70</sup>

It is true, as Davis notes, that one could read the passing comment of the High Court in *Mengel*—which drew a link between the action for breach of statutory duty and the action in *Beauesert*—as indicating that, having ‘disposed of’ the latter, the Court was preparing to do the same to the statutory duty action.<sup>71</sup> But in context that is not what was being said. The statutory duty action was mentioned by way of *contrast* to the *Beauesert* tort, having the element of Parliamentary intention (which the other tort did not), and its own set of specific rules. The *Beauesert* tort had been rarely, if ever, 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 Federation<sup>72</sup> (and of course in the UK since long before then), so 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.

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<sup>67</sup> See Andrew Corkhill, ‘“Dangerous” Substances and Activities in the Context of a Non-Delegable Duty of Care’ (2007) 15 *Torts Law Journal* 233. For a recent decision discussing the notion of a ‘dangerous’ activity see *Transfield Services (Australia) v Hall* (2008) 75 NSWLR 12, a judgment which still shows confusion in interpreting *Burnie* on this point.

<sup>68</sup> An irony also noted by Murphy, above n 63, 661 n 104, citing G T Schwartz, ‘*Rylands v Fletcher*, Negligence and Strict Liability’ in Peter Cane and Jane Stapleton (eds) *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press, 1998) 214.

<sup>69</sup> (2003) 212 CLR 511.

<sup>70</sup> (2007) 230 CLR 22. This decision refused to extend the application of non-delegable duty to a roads authority; but it did not in any way suggest an abolition of the category as a whole.

<sup>71</sup> Davis, above n 48, 82.

<sup>72</sup> As noted in Foster, above n27, 84 and following, Australian High Court decisions affirming the general principles in *Groves*, for example, can be found starting as early as 1906.

### *B The UK Law Commission*

The UK Law Commission in its Consultation Paper also recommended that the action for breach of statutory duty should be abolished.<sup>73</sup> Despite the fact that this recommendation was not ultimately adopted, it seems worth giving a brief response to the reasons offered.

It is odd that the paper could have recommended such a far-reaching change to a fundamental area of the law of torts with such a cursory examination of the background for the existence of the tort.<sup>74</sup> This was especially of concern when the topic of the paper was not directly related to the action for breach of statutory duty as such; for, of course, while the name of the tort includes the word 'statute', it is no more likely to be an action taken against a public body than any other tort. Duties are imposed by statute on both 'public' and private defendants, and indeed, given the tendency of duties specifically imposed on public bodies to be expressed in vague generalities, duties imposed on those bodies are often unlikely to be actionable on the traditional criteria noted previously.<sup>75</sup> The Commission cited no evidence that the action was particularly aimed at, or excessively used against, public bodies as opposed to private individuals.

The Consultation Paper noted some of the complex issues raised by the cases. It suggested that these meant that the law in the area was in a state of 'uncertainty and unpredictability'. For reasons noted above, the areas of uncertainty are less than is commonly supposed, and too much of the discourse on the tort has unthinkingly accepted the metaphor of 'coin-tossing'<sup>76</sup> without paying close attention to the actual course of authority.

The Consultation Paper was inconsistent at some points. Paragraph 4.75 indicated that the courts have been 'restrictive' in their application of the law (outside the important area of industrial injury). One might think that since the action, then, is not causing major problems for defendants it should be left in place for those rare but often important cases where plaintiffs can make it out.<sup>77</sup> But the paper then argued at paragraph 4.78 that since the tort is 'close to obsolete' it should be abolished. This seems inconsistent with a claim that it is causing any real problems.

The fact that the action continues to be litigated at the highest level in both Scotland<sup>78</sup> and England<sup>79</sup> should, however, give some pause to those who think it

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<sup>73</sup> UK Law Commission, above n 49, 78 [4.105]. For general comment on the Law Commission's paper (though not on the recommendation to abolish the breach of statutory duty action) see Richard Mullender, 'Negligence, Public Bodies and Ruthlessness' (2009) 72 *Modern Law Review* 961, and T Cornford, 'Administrative Redress: The Law Commission's Consultation Paper' [2009] *Public Law* 70.

<sup>74</sup> In particular the Paper did not refer to the two major texts by Stanton that examine the history and operation of the tort, above n 3.

<sup>75</sup> For an example of such an 'aspirational' duty being held not to be civilly actionable, see *Friends of the Earth v Secretary of State for Business Enterprise and Regulatory Reform* [2008] EWHC 2518 (Admin) (24 October 2008).

<sup>76</sup> See Burrows, above n 11.

<sup>77</sup> Below examples from around the Commonwealth are noted where the action has been used recently, often in defence of important rights which would otherwise have gone without remedy.

<sup>78</sup> In the House of Lords on appeal from Scotland, see *Robb v Salamis (M & I) Ltd* [2006] UKHL 56 (13 December 2006), *Spencer-Franks v Kellogg Brown and Root Ltd* [2008] UKHL 46 (2 July

can be easily ‘written off’ as archaic or irrelevant. And of course the fact that cases are not making it to court in some areas may actually be a sign that parties are fairly clear on the parameters of the law and settling claims—which would arguably be the case in the industrial injury area. As Murphy notes, ‘the fact that a rule is seldom tested in court is as often a good sign—that the rule is sound and clear—as it is a bad one.’<sup>80</sup>

The Consultation Paper’s recommendation for the abolition of the tort of breach of statutory duty may be partly explained in paragraph 4.85, where a preference for ‘serious fault’ as a criterion for recovery is expressed. But as noted above there are many areas of the law of torts where ‘fault’ is not always relevant, and the fact that some actions for breach of statutory duty may be ‘strict’ is obviously not a reason for abolishing the whole tort action.

The Consultation Paper did what the Supreme Court of Canada did in the *Saskatchewan Wheat Pool* decision (see below for discussion of this case) by accompanying its recommendation for abolition of the tort by a qualification preserving its operation in the workplace health and safety area—see paragraphs 4.79 and 4.105. But in the end the summary of issues for discussion at paragraph 7.6 contained a blanket question about overall abolition. If it is conceded that the tort is beneficial in some areas (and in the area where it is most in practical use), there is a real need to offer compelling, not superficial, reasons why it should be ‘carved up’ and removed in other areas.

### C *Cornford, Towards a Public Law of Tort*<sup>81</sup>

It is impossible in the course of this article to interact in detail with this important recent monograph. It may be suggested that there seems some irony in a work whose aim seems to be to argue for a much greater role of public duties as actionable in the law of tort, including a recommendation that the one area of the law that can currently offer such actionability be done away with.<sup>82</sup> In the end Cornford’s suggestion that the tort of breach of statutory duty be abolished is made, not essentially on the basis that the tort is not working, but on the basis that it stands in the way of the introduction of the much wider principle of private liability of public bodies that he is arguing for in his book.<sup>83</sup> Since there is by no means any consensus that Cornford’s suggested restatement of the private law duties of public bodies is either feasible or desirable, further discussion of his

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2008) and (now in the Supreme Court) *Morrison Sports Ltd v Scottish Power* [2010] UKSC 37 (28 July 2010).

<sup>79</sup> *Smith v Northamptonshire County Council* [2009] UKHL 27 (20 May 2009).

<sup>80</sup> Murphy, above n 63, 662.

<sup>81</sup> Cornford, above n 51.

<sup>82</sup> See a similar point made by Bailey, above n 51, in his review of the book at 873: ‘It could be argued that such a radical step [ie the abolition of the tort action for breach of statutory duty] would have to be taken by Parliament; if it would, that might be seen to undermine the author’s case still further, given that Parliament would be continuing to enact duties breach of which was certainly not in itself going to give rise to compensation.’

<sup>83</sup> See, eg Cornford, above n 50, 198: ‘An obvious step, if one wants to institute what I called above the “public approach” to negligence, is to abolish the tort of breach of statutory duty altogether.’



suggested abolition of the breach of statutory duty tort can be put to one side for the moment.

Even if the above criticisms of academic and ‘law reform’ commentary on the abolition of the tort are accepted, however, it must be acknowledged that a powerful reason for doubting the continued validity of the tort is its apparent removal from the common law arsenal by the Supreme Court of Canada. Attention must be directed to this as a reasoned choice made by the highest court in a common law country.

#### IV Abolition in Canada and its Consequences

In *R v Saskatchewan Wheat Pool*<sup>84</sup> 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.<sup>85</sup> In this section two questions are posed about this: (1) are the reasons offered by the Supreme Court of Canada for abolishing the tort action convincing?; and (2) does the apparent reluctance to embrace this abolition by later Canadian courts,<sup>86</sup> 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 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.<sup>87</sup> 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,

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<sup>84</sup> [1983] 1 SCR 205 (*Saskatchewan Wheat Pool*).

<sup>85</sup> The fact that there is no separate action for breach of statutory duty in Canada, following *Saskatchewan Wheat Pool*, was reaffirmed by the Supreme Court of Canada more recently in passing in *Holland v Saskatchewan* [2008] 2 SCR 551 [9], although the primary context was a denial of a ‘hybrid’ tort of ‘negligent breach of statutory duty’.

<sup>86</sup> Revealed by Professor Klar’s discussion in a recent paper, L Klar, ‘Breach of Statute and Tort Law’ in Jason W Neyers, Erika Chamberlain and Stephen G A Pitel (eds) *Emerging Issues in Tort Law* (Hart Publishing, 2007) 31.

<sup>87</sup> *Saskatchewan Wheat Pool* [1983] 1 SCR 205, 210, referring to the earlier Federal Court judgment, [1981] 2 FC 212.

while at one stage it was described by Dickson J as a ‘*new* nominate tort of statutory breach’ (emphasis added)<sup>88</sup> is acknowledged later (as noted above) 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 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 seemed little attempt clearly to 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 were extensively quoted. The tone underlying the judgment was that the law is irrational, too complex, and (this was not stated openly) ‘out of date’. Hence the Court identified a 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 was seen as a major issue. Strict liability, as noted previously, 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.<sup>89</sup> 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 assumed that ‘loss distribution’ is a major (perhaps *the* major) legal policy imperative involved in tort law. The main reason for shifting a loss was said to be that fault is involved.<sup>90</sup> Other policy issues that 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*<sup>91</sup> concerning vicarious liability and ‘enterprise risk’) were effectively ignored. The court did not address the policy question of why, if a defendant has caused harm to a plaintiff and the defendant in doing so was in breach of a statutory provision aimed at protecting the plaintiff, it can be just to say to the plaintiff 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’<sup>92</sup> So the nominate tort of breach of statutory duty was to no longer be recognised.

There was a caveat in the judgment, however, which seems to have escaped notice in much later comment.<sup>93</sup> This was the fairly ambiguous remark<sup>94</sup> that

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<sup>88</sup> *Saskatchewan Wheat Pool* [1983] 1 SCR 205, 211.

<sup>89</sup> See Stevens, above n 1, 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.

<sup>90</sup> *Saskatchewan Wheat Pool* [1983] 1 SCR 205, 224.

<sup>91</sup> [1999] 2 SCR 534.

<sup>92</sup> *Saskatchewan Wheat Pool* [1983] 1 SCR 205, 225.

<sup>93</sup> Although noted by Klar, above n 83, 33 n 9. See also Caroline Forell, ‘Statutes and Torts: Comparing the United States to Australia, Canada and England’ (2000) 36 *Willamette Law Review* 865, 891.

‘[I]ndustrial legislation historically has enjoyed special consideration. Recognition of the doctrine of absolute liability under some industrial statutes does not justify extension of such doctrine to other fields...’<sup>95</sup>

The remark seems to have been 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, 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 judgment saw 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 judgment was 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’)<sup>96</sup> 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.<sup>97</sup> In this area at least, Parliament’s intention was not hard to find. In other areas, established principles of statutory interpretation were available.

Some grounds have been offered above 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 United Kingdom. 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 Canadian Decisions after Saskatchewan Wheat Pool***

Professor Klar traces a series 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. It is suggested 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 that the breach of

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<sup>94</sup> Said to be in agreement with Glanville Williams, above n 22, 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.

<sup>95</sup> *Saskatchewan Wheat Pool* [1983] 1 SCR 205, 223.

<sup>96</sup> *Ibid*, 215–6.

<sup>97</sup> See, in other jurisdictions, the comments of Kay LJ in England in *Ziemniak* [2003] 2 Lloyd’s Rep 214, 223; EWCA Civ 636 (7 May 2003) [48]; Gaudron J in the High Court of Australia in *Slivak v Lurgi* (2001) 205 CLR 304, 32 [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.’

statutory duty action forms an important part of the common law, and an indication that the Canadian Supreme Court was 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.’<sup>98</sup> 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.

When the action is removed, there seems to be a ‘statutory-duty-shaped’ hole in Canadian civil jurisprudence, which as Professor Klar has pointed out is being filled by courts distorting the normal rules of negligence to find a remedy for deserving cases.

Professor Klar describes a line of authority where the courts have created new duties of care in the tort of negligence based primarily on statutory obligations. His criticism of these cases seems perfectly correct. It is possible the decisions might have been justified on other grounds—for example, causing damage by revealing a person’s criminal record (as in *Y O v Belleville*)<sup>99</sup> 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.<sup>100</sup>

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

Professor Klar concludes his article 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 that 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.

The point is well-made; even in jurisdictions where the action for breach of statutory duty still ‘runs’, it is incumbent on the courts to develop the tort in a principled way so as not to undercut the delicate balance that is developing in terms

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<sup>98</sup> Klar, above n 83, 33.

<sup>99</sup> (1991) 3 OR (3d) 261, discussed in Klar, above n 83, 44–5.

<sup>100</sup> However, for a breach of statutory duty claim which succeeded in similar circumstances, see *Doe* [2007] VCC 281 (3 April 2007), a decision of the Victorian County Court, discussed further below.

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*.<sup>101</sup>

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 courts, which do not recognize the tort of breach of statutory duty, have used statutes to generate common law duties.<sup>102</sup>

It may be suggested that the wrong turn taken by the Supreme Court of Canada in *Saskatchewan Wheat Pool* may have generated the ‘irony’. 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’.<sup>103</sup>

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. 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 *Saskatchewan Wheat Pool*, it may be time for the Supreme Court of Canada to revisit that case.

## V Recent Development of the Action in Other Common Law Jurisdictions

There are 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, these comments will not deal in detail with the ‘core’ area for the tort, industrial safety actions, not because these are not important (they are vital), but because there seems to be a real need to demonstrate that this is not the *only* area where the tort operates.<sup>104</sup>

<sup>101</sup> [1996] AC 923.

<sup>102</sup> Klar, above n 83, 55 n 97.

<sup>103</sup> Lewis Klar, ‘The Tort Liability of the Crown: Back to *Canada v Saskatchewan Wheat Pool*’ (2007) 32 *Advocate’s Quarterly* 293, 309. See also Klar, ‘Case Comment: *Syl Apps Secure Treatment Centre v B D*: Looking for Proximity within Statutory Provisions’ (2007) 86 *Canadian Bar Review* 337, especially 352: ‘if Canadian law now contemplates that certain types of statutes should give rise to private rights of action ... this should be stated clearly.’ For another recent decision where a Canadian court seems to have found a duty of care based on statute alone, see the decision of the Ontario Court of Appeal in *Canada Post Corporation v G3 Worldwide (Canada) Inc* (2007) ONCA 348 (8 May 2007); leave to appeal was refused *G3 Worldwide (Canada) Inc v Canada Post Corporation* (2007) CanLII 46216 (SCC) (1 November 2007). Compare *Consignia v Hays* (Unreported, Chancery Division, Jacob J, 11 December 2001), where on almost the same facts the UK court found that there was no action based on the statute.

<sup>104</sup> See Foster, above n 27 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.

However, it seems worth stressing that decisions of the Australian and UK courts in recent years have continued to apply the tort of breach of statutory duty in industrial injuries arising under the newer forms of legislation. There are still some uncertainties as to issues such as risk management and applicable defences.<sup>105</sup> There is an ongoing debate about whether provisions of the New South Wales legislation apply to members of the public.<sup>106</sup> But the tort continues to be applied across a range of Australian jurisdictions in workplace safety cases.<sup>107</sup>

Still, it is worth stressing that the industrial injury area is not the only one where the tort continues to be used around the common law world.

In the United Kingdom 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 (*Bedfordshire County Council*),<sup>108</sup> education (*Phelps v Hillingdon London Borough Council*)<sup>109</sup> and housing (*O’Rourke v Camden London Borough Council*).<sup>110</sup> But none of these decisions in any way suggested that the tort should be radically altered or abolished. The Appellate Committee of 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.

In a similar decision in *R v Deputy Governor of Parkhurst Prison; Ex parte Hague*<sup>111</sup> 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,<sup>112</sup> Lord Bridge in that case suggested that *some* of the rules, especially those governing safety in prison workshops, might have been actionable.

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<sup>105</sup> See *Macey v Macquarie Generation & H I S Engineering Pty Ltd [No 2]* [2007] NSWDC 296 (29 November 2007); *Irwin v Salvation Army (NSW) Property Trust* [2007] NSWDC 266 (17 December 2007); *Estate of the Late M T Mutton by its Executors & R W Mutton* [2007] NSWCA 340 (7 December 2007); *Websdale v Collins* [2009] NSWDC 30 (5 March 2009), *Sujuk v Ilvari Pty Ltd* [2010] NSWSC 354 (29 April 2010) (where, while the application of the regulations to the facts was denied, it was generally accepted at [189]–[205] that the regulations were actionable.) For a recent UK industrial injury case (of many) see, eg *Bhatt v Fountain Motors Ltd* [2010] EWCA Civ 863 (27 July 2010).

<sup>106</sup> See *Wynn Tresidder Management Pty Ltd v Barkho* [2009] NSWCA 149 (16 June 2009) and the comment in N Foster, ‘NSW Court of Appeal: Is public liability created under OH&S legislation?’ (2009) 6 *Australian Civil Liability* 186.

<sup>107</sup> See *Bourk v Power Serve Pty Ltd* [2008] QSC 29 (26 February 2008), especially [64] and following; *Parry v Woolworths Ltd* [2009] QCA 26 (20 February 2009); *Acir* [2009] VSC 454 (7 October 2009), especially [223] and following; *Griffiths v Queensland* [2010] QSC 290 (6 August 2010); *Chapman v University of Southern Queensland Student Guild* [2010] QDC 318 (12 August 2010) [50]–[51].

<sup>108</sup> [1995] 2 AC 633.

<sup>109</sup> [2001] 2 AC 619.

<sup>110</sup> [1998] AC 188.

<sup>111</sup> [1992] 1 AC 58.

<sup>112</sup> John Murphy, *Street on Torts* (Oxford University Press, 12<sup>th</sup> ed, 2007) 495 n 27.

Similar decisions are found in the Court of Appeal. In *Health and Safety Executive v Thames Trains Ltd*,<sup>113</sup> after a rail accident where 31 people were killed, Thames Trains attempted to join the UK Health and Safety Executive (HSE) as partly liable on the basis that the HSE was 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 valid 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*<sup>114</sup> the Court held that health and safety regulations under the *Health and Safety at Work etc 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 the *Supply of Machinery (Safety) Regulations 1992* (UK). The court held that (1) these were not regulations made under the HSW Act; and (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 *Trustee in Bankruptcy of Louise St John Poulton v Ministry of Justice*<sup>115</sup> the Court ruled that a provision requiring a court officer to give notice to the Lands Registry that a petition in bankruptcy had been filed, was not actionable at the suit of creditors who had been denied access to funds because land was sold.

In *Morrison Sports Ltd v Scottish Power UK plc*<sup>116</sup> the UK Supreme Court (Lord Rodger delivering the judgment), after examining the legislation in detail, concluded that the provision in question (breach of which had led to fire damage to property) was not civilly actionable, as there were specific enforcement provisions found in relation to other breaches, but not the one relied on.

In each of these cases the courts have applied the established jurisprudence to deny recovery due to parliamentary intention. But in other areas courts have ruled that the action *is* available, well outside the industrial safety area. *Rickless v United Artists Corporation*,<sup>117</sup> 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 was 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*<sup>118</sup> the Court of Appeal held that a statutory duty imposed under section 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

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<sup>113</sup> [2003] EWCA Civ 720 (22 May 2003).

<sup>114</sup> [2006] EWCA Civ 536 (9 May 2006).

<sup>115</sup> [2010] EWCA Civ 392 (22 April 2010).

<sup>116</sup> [2010] UKSC 37 (28 July 2010) ('*Morrison Sports*').

<sup>117</sup> [1988] QB 40.

<sup>118</sup> [2004] QB 653; [2003] EWCA Civ 1 (17 January 2003) ('*Roe*').

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.)

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.<sup>119</sup> The duty was similar to that imposed for the safety of workers, it was limited and quite specific, and there were 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' were not too broad a class. (One could perhaps argue for a narrower class, such as 'those driving near tram lines'.)<sup>120</sup>

In *Cullen v Chief Constable of the Royal Ulster Constabulary*<sup>121</sup> the House of Lords had to decide whether a prisoner held under anti-terrorism laws, who had been denied access to legal representation 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.<sup>122</sup> While Lord Hutton disagreed with this judgment 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.'<sup>123</sup>

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.

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<sup>119</sup> *Roe* [2003] QB 653, 672–3; EWCA Civ 1 (17 January 2003) [49].

<sup>120</sup> Further proceedings in [2004] EWCA Civ 329 (23 March 2004) 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. The decision was mentioned in *Morrison Sports* [2010] UKSC 37 (28 July 2010) [39] and not directly doubted (though there seems to be a hint that the class 'road users' adopted in *Roe* by the Court of Appeal might have been a bit too broad).

<sup>121</sup> [2003] UKHL 39 (10 July 2003) ('*Cullen*').

<sup>122</sup> *Cullen* [2003] UKHL 39 (10 July 2003) [10]–[12].

<sup>123</sup> *Ibid* [44].



There are also a number of other United Kingdom decisions that might be regarded as ‘breach of statutory duty’ cases, dealing with obligations created by European law that are now in some cases binding in the United Kingdom.<sup>124</sup>

Indeed, it seems that the tort of breach of statutory duty is a fundamental underpinning of the recognition of European law in the United Kingdom.<sup>125</sup> It seems likely, then, that any proposal to abolish or curtail the action for breach of statutory duty in that country may have wide and unintended consequences not only for the common law, but also for the European law obligations of the United Kingdom.

In Australia, as in the United Kingdom, there have been a number of decisions holding that general ‘social welfare’ acts do not create civil duties: *Cubillo v Commonwealth*,<sup>126</sup> 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 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.<sup>127</sup>

In *Gardiner v State of Victoria*,<sup>128</sup> 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’.<sup>129</sup> Similarly, in *Saitta Pty Ltd v Commonwealth*<sup>130</sup> 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.<sup>131</sup> Furthermore, in *Repacholi Aviation Pty Ltd v Civil Aviation Safety Authority*,<sup>132</sup> it was held that the provisions of the *Civil Aviation Act 1988* (Cth) were primarily directed to general air safety, and not designed to protect the commercial interests of aviation companies.

<sup>124</sup> For more details see in particular K M Stanton, ‘New Forms of the Tort of Breach of Statutory Duty’ (2004) 120 *Law Quarterly Review* 324, 328 and following.

<sup>125</sup> See *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086 (14 October 2008) [139].

<sup>126</sup> (2001) 112 FCR 455.

<sup>127</sup> See *Scott v Secretary, Department of Social Security* [2000] FCA 1241 (7 September 2000) [17]–[19]; *Kirkup v Commonwealth of Australia* [2001] FCA 1243 (4 September 2001).

<sup>128</sup> [1999] 2 VR 461.

<sup>129</sup> Above, n 128, per Phillips JA at [31].

<sup>130</sup> [2003] VSC 346 (12 September 2003).

<sup>131</sup> For other recent decisions denying liability see, *Shire of Brookton v Water Corporation* [2003] WASC 240 (10 October 2003) and *Armstrong v Hastings Valley Motorcycle Club Ltd* [2005] NSWCA 207 (20 June 2005).

<sup>132</sup> [2010] FCA 994 (10 September 2010) [20]–[31].

Other decisions, however, have found in favour of a civil action. In *Pask v Owen*<sup>133</sup> 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 New South Wales, there are a number of decisions holding that a statutory duty to provide support for neighbouring land may be actionable.<sup>134</sup> Cases also hold 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.<sup>135</sup>

The situation in New Zealand seems to be effectively the same as that in Australia. In *Select 2000 Ltd v Fresh NZ 2000 Ltd*<sup>136</sup> a claim based on provision of a fruit export scheme was rejected, the purpose of the scheme being to protect the central fruit exporting rather than individual fruit-growers. In *Attorney-General v Carter*<sup>137</sup> the Court of Appeal, following the comments of the House of Lords in *Bedfordshire County Council*, held that there was no action for 'negligent breach of statutory duty', but did not doubt the continuing validity of the action for breach of statutory duty *simpliciter*.

Liability has, however, been found in a number of cases. In *Smaill v Buller District Council*<sup>138</sup> a land developer was held to have an action against a local council for failing to carry out its statutory duty to refuse to allow building in certain areas. In *Altimarloch Joint Venture Ltd v Moorhouse*<sup>139</sup> Wild J in the High Court held that a local council was liable for breach of statutory duty in issuing an erroneous land information certificate.

Finally in this brief overview, reference should be made to the appeal from the West Indies in *Kirvek Management & Consulting Services Ltd v Attorney-*

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<sup>133</sup> [1987] 2 Qd R 421.

<sup>134</sup> *Anderson v MacKellar County Council* (1968) 69 SR(NSW) 444; *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738; *Pantalone v Alaouie* (1989) 18 NSWLR 119; *Piling Contractors (Qld) Pty Ltd v Prynew Pty Ltd* [2008] NSWSC 118 (26 February 2008).

<sup>135</sup> See *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157 (6 November 2006) (citing a number of previous decisions to similar effect) and more recently *Trevallyn-Jones v Owners Strata Plan No 50358* [2009] NSWSC 694 (23 July 2009) [128]–[155]. For discussion of the 'strata title' cases as applicable in Western Australia, see *Drexel London (a firm) v Gove (Blackman)* [2009] WASCA 181 (21 October 2009) [193]–[241]. Mention should also be made of the decision in *MacDonald v Public Trustee* [2010] NSWSC 684 (25 June 2010) that the failure of the Public Trustee to properly administer a deceased estate for some 40 years was an actionable breach of statutory duty, although the actionability of the provision was conceded.

<sup>136</sup> [2002] NZCA 41 (19 March 2002).

<sup>137</sup> [2003] 3 NZLR 160 at [41].

<sup>138</sup> [1998] 1 NZLR 190. As Burrows notes, since common law actions for personal injury are no longer maintainable in New Zealand, the use of the tort has declined in that country—see ch 7 of S Todd, above n 10, 418–9. But this case (read with other cases discussed by Burrows, above n 11, especially 433–4) illustrates that it is still available and occasionally relied upon for economic or property loss—see, eg *Rowan v Attorney-General* [1997] 2 NZLR 559.

<sup>139</sup> [2008] NZHC 1031 (3 July 2008).

*General of Trinidad and Tobago*.<sup>140</sup> 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 the recovery of 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 judgment of the Privy Council, noted that the legislation was clearly enacted for the benefit of litigants—it contained no other mechanism of enforcement—and hence there should be deemed to be private rights of action available in the event of breach.

## VI 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.<sup>141</sup>

In *Doe v Australian Broadcasting Corporation*<sup>142</sup>—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 a privacy tort existed in Australian law has attracted some attention in academic and other commentary.<sup>143</sup> But what is more interesting for current purposes 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 *Bedfordshire County Council*, but rather a ‘very limited and specific’ statutory duty.<sup>144</sup> 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).<sup>145</sup> 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

<sup>140</sup> [2002] UKPC 43 (25 July 2002); 1 WLR 2792.

<sup>141</sup> For another example, see Des Butler et al, ‘Teachers’ Duties to Report Suspected Child Abuse and Tortious Liability’ (2009) 17 *Torts Law Journal* 1, especially 6–12, arguing that a failure to comply with provisions requiring the reporting of child abuse may give rise to a civil action for breach of statutory duty.

<sup>142</sup> [2007] VCC 281 (3 April 2007).

<sup>143</sup> See, for a practitioner’s comment, Alan Davidson, ‘Privacy, Jane Doe and Naomi Campbell’ (2007) 27(6) *Proctor* 39.

<sup>144</sup> *Doe* [2007] VCC 281 (3 April 2007) [77].

<sup>145</sup> *Ibid* [75].

observance' of the prohibition.<sup>146</sup> 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. 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 enforcement of an important private right which might otherwise have not been vindicated. 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.<sup>147</sup>

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.<sup>148</sup> 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.

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<sup>146</sup> *Doe* [2007] VCC 281 (3 April 2007) [80].

<sup>147</sup> See *JMF v Chappell* [1993] BCJ No 1281 (SC) and *R (L) v Nyp* (1995) 25 CCLT (2d) 309, noted in Klar, above n 83, 45 n 59.

<sup>148</sup> *Sovar* (1967) 116 CLR 397, 404–5.