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# Statutes and Civil Liability in the Commonwealth and the United States: A Comparative Critique

Neil J Foster



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Challenging Orthodoxy**

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**Statutes and Civil Liability in the Commonwealth and the United States: A  
Comparative Critique**

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The organisers of Obligations VI have designated this conference as one in which we will be “Challenging Orthodoxy”. This paper does a fair amount of that. It deals with the question of how statutes can be used as a source of private law liability. Current orthodoxy on this subject in the United States of America seems to be (at the risk of oversimplification) that:

1. At a State level, breach of many statutes (including even minor traffic legislation) will provide a basis for civil damages; but whether the courts will do so in a particular case is decided on broad “policy” grounds, and an outcome is almost impossible to predict;
2. At a Federal level, hardly any Federal statutes will these days create civil liability.

I want to suggest a radical revision of these views. It is “radical” in the sense that it goes back (as the etymology of the word suggests)<sup>2</sup> to the “roots” of the development of the doctrine. The roots of both US State and Federal jurisprudence in this area, as I hope to show, will be found in the classic United Kingdom decisions relating to the tort of “breach of statutory duty”. I want to suggest that if courts in the United States took

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<sup>2</sup> The first entry in the *Oxford English Dictionary* for the word is: “Of or relating to a root or to roots,” (from the Latin *radix*.)

into account the contours of that action as it is still applied in the Commonwealth, there may be a way forward to deal with both of the major problems (that is, on the one hand unconstrained use of “policy-based” considerations at State level in applying statutes; on the other hand, a narrow refusal at the Federal level to read the implications of statutes) which currently beset statute-based civil liability in US private law jurisprudence.

### Overview of the Issues

The contours of the common law tort of negligence have been reasonably stable in the Commonwealth<sup>3</sup> since *Donoghue v Stevenson*,<sup>4</sup> and in the United States of America since *McPherson v Buick*.<sup>5</sup> These two legal systems require a court to find a duty of care owed by the defendant to the plaintiff, a breach of that duty whereby the defendant has not taken reasonable care, and damage caused by that breach which has been not too remote, of a type for which the law will provide compensation.

In contrast, there is a fairly wide apparent divergence of approach when the question arises as to how standards of behavior set by statute are relevant to civil liability. In the majority of Commonwealth countries,<sup>6</sup> there is a specific tort action called “breach of statutory duty” (“BSD”), which provides that once certain pre-conditions are met,<sup>7</sup> the defendant’s breach of a statute, which causes harm to the plaintiff, provides in itself a ground of civil liability.<sup>8</sup> The situation (like much else in the law of torts) is much more complex in the United States of America. The majority of States adopt the view that breach of a statute by a defendant is not a separate tort action, but will provide the answer to the question of whether there has been a breach of duty in a negligence claim: it is “negligence *per se*” (“NPS”). However, there are some cases where breach of the statute will not automatically resolve the issue of breach, providing instead simply evidence that may be taken into account by the fact-finder (perhaps by way of a presumption of breach.) In both these cases a wide range of “policy” based judicial “excuses” may be

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<sup>3</sup> This ambiguous but useful word is used in this article to refer to the system of common law shared by most of the former colonies and Dominions of the United Kingdom who are a part of the “British Commonwealth”. The major jurisdictions are the UK, Australia, Canada and New Zealand, but it will include other countries or regions (such as Singapore or Hong Kong) whose courts continue to cite, for example, the decisions of the House of Lords, the Privy Council or the new UK Supreme Court as at least valuable guidance for development of their own common law. The term excludes, of course, the United States of America.

<sup>4</sup> [1932] A.C. 562.

<sup>5</sup> *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); cited of course in the later decision of *Donoghue v Stevenson*, above n 4. See John C.P. Goldberg & Benjamin Zipursky “The Moral of MacPherson” (1998) 146 *University of Pennsylvania Law Review* 1733.

<sup>6</sup> The exception (ironically, given the location of this conference) being Canada, where the Supreme Court abolished this separate action in *R v Saskatchewan Wheat Pool* [1983] 1 SCR 205.

<sup>7</sup> See Part I.B below.

<sup>8</sup> For an overview of this Commonwealth tort action, see C Sappideen & P Vines (eds) *Fleming’s The Law of Torts* (10th ed; Pyrmont: Lawbook Co, 2011), ch 18 “The Tort of Breach of Statutory Duty”. In the interests of full disclosure I should mention that I was the revising author for this latest edition of the new ch 18 and relevant parts of ch 24, “Employers”, dealing with the statutory tort. More detailed analysis of the action can be found in K M Stanton, *Breach of Statutory Duty in Tort* (Sweet & Maxwell, 1986) and K M Stanton, Paul Skidmore and Michael Harris, *Statutory Torts* (Sweet & Maxwell, 2003). For a defence of the continuing validity of the BSD action against some suggestions it should be abolished, see Neil J. Foster, “The Merits of the Civil Action for Breach of Statutory Duty” (2011) 33 *Sydney Law Review* 67-93 (available at: [http://works.bepress.com/neil\\_foster/43](http://works.bepress.com/neil_foster/43) ).

applied at the discretion of the court. In other cases, particularly (though not solely) when Federal statutes are involved, the courts may still sometimes find that there is an “implied right of action” which looks and sounds very similar to the Commonwealth BSD action.

The aim of this paper is not to resolve all the problems presented by the jurisprudence and commentary on these various forms of action, but to provide a starting point for comparison between the approaches that the two systems have adopted on this issue of implied statutory civil liability. It is hoped that a proper understanding of the development of the law, and the current differences between the two systems, may illuminate the choices that courts have made, illustrate some of the major differences that exist between the Commonwealth and the United States in the area of tort law, and suggest some ways forward for courts in the US. A better understanding of both the similarities and the differences may also help commentators and courts to avoid the problems that can be created by assuming that the law in one system is the same as the other.

There are, of course, many dangers in “cross-system” comparisons, especially between the Commonwealth and the US areas, some of which are helpfully illuminated by Jane Stapleton in an important paper.<sup>9</sup> In the US tort law is usually regarded as a State matter, whereas in Commonwealth jurisdictions usually there is a unitary approach (even in a federation like Australia, where there is a “unified” common law.) In particular the role of the jury in US tort litigation must be taken into account in explaining the formulation of legal rules: “a covert concern with jury decision-making in the U.S. generates a pronounced tendency to crystallize rules of law with which the trial judge can govern access to the jury”.<sup>10</sup> As will also become apparent in this paper, the complexities created by the US Federal division of powers are significant: “important aspects of U.S. tort law that have no close parallels elsewhere, such as the specific constitutional constraints on it recognized by the U.S. Supreme Court.”<sup>11</sup>

Stapleton also makes a number of invaluable comments about the phenomenon (as to which there is no real parallel in the Commonwealth system) of the “Restatements” of the law, especially relevant in the area of torts. The Restatements are not issued with any formal legal authority- they are not adopted by any legislature, nor does any judicial body formally approve them. They are intended in effect to be a summary or “harmonization” of the law of torts as it is found in the various state jurisdictions.<sup>12</sup> Since they come with the imprimatur of respected academics and judicial officers (acting non-judicially), the law as summarized in a Restatement may be influential in further development of the law in court decisions.

However, Stapleton notes that there is always going to be some debate as to whether the Restatement exercise is a “neutral” attempt to summarise the “best” or “most common” law, or a “political” exercise designed by at least some of the participants to

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<sup>9</sup> “Benefits of Comparative Tort Reasoning: Lost in Translation” (2007) 3/1 *Journal of Tort Law* Art 6. For another helpful general overview, of differences between the US and the *European* systems, see U Magnus, “Why is US Tort Law so Different?” (2010) 1 *Journal of European Tort Law* 102-124.

<sup>10</sup> Stapleton, above n 9 at 28.

<sup>11</sup> Stapleton, above n 9, at 29.

<sup>12</sup> See J C P Goldberg, A J Sebok & B C Zipursky *Tort Law: Responsibilities and Redress* (2<sup>nd</sup> ed; Wolters Kluwer, 2008) at 15: “Specifically, the Restatement aims to gather together and interpret decisional law coming out of all US jurisdictions in an effort to identify “black letter” law: rules and standards on which there is a wide degree of consensus among judges.”

push the law in a particular direction.<sup>13</sup> In addition, a state court can always decline to follow the guidance given by a Restatement where it conflicts with judicial authority in that state. And, of course, different state courts, even if agreeing to follow a Restatement rule, may develop their own interpretation of the rule.<sup>14</sup>

Keeping these matters in mind, we turn to the tricky business of cross-system comparisons. In Part I of the paper, I briefly outline the ways that statutes create civil liability in the Commonwealth legal system. In Part II I discuss the rules developed for implied civil liability based on statutes in the United States. After outlining the two main options (“negligence per se” and “implied rights”), Part IIA describes and critiques the “negligence per se” (NPS) analysis, which squeezes statutory obligations into the broad common law action for negligence, starting with a classic decision of Cardozo J. I outline the similarities and differences between the NPS approach and Commonwealth “breach of statutory duty” (BSD) approach, demonstrating the historical links between the two actions which are often not noticed, and pointing out where I think the NPS analysis goes wrong by ignoring the fundamental preliminary question of legislative intention. Ignoring this question has led to the development of an unsatisfactory policy-based set of “excuses” which operate, and a confusion of the questions of duty and breach, as well as incoherence in dealing with Federal/State interactions. Part IIB deals with the other stream of cases dealing with “implied rights of action”, mostly based in Federal statutes, which are shown to have the same roots as the NPS cases in the BSD jurisprudence. Yet the increasingly narrow approach taken to statutory interpretation in the Federal sphere has the result that federal rights impliedly created by Congress go un-enforced. In Part III I bring out some general themes in the area and suggest that a better way forward may be for US courts to return to the roots of statutory civil liability claims in the Commonwealth BSD model.

## I. Statutory Civil Liability in the Commonwealth

How do statutes create civil liability in the Commonwealth? Not all statutory obligations lead to civil liability; many of course may only be enforced by the criminal law. Statutes can impact on civil liability in many ways. This paper will not be concerned with all of them.

### A. Express Statutory Civil Liability in the Cth

A statute may, of course, *explicitly* create civil liability for breach. The best example of explicit statutory civil liability in the Australian context was the former s 52 *Trade Practices Act* 1974 (Cth). Under that section, a company was bound not to engage, in trade and commerce, in misleading or deceptive behaviour. A person who could show

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<sup>13</sup> For example, she quotes Frank J. Vandall, “Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2 (b) Design Defect”, 30 *U. Mich. J.L. Reform* 261, 279 (1997): “the ALI’s mission is no longer to restate the law, but rather to issue pro-manufacturer political documents”. A similar comment was made to me in private discussions with a colleague who teaches Torts in a US Law School.

<sup>14</sup> See Stapleton above n 9 at 40.

that this had happened, and that as a result they had suffered loss, could under s 82 of the Act recover damages from the company.<sup>15</sup>

This action under s 82 was held by the High Court **not** to be an action in tort, but a special action created by the Act: see *Marks v GIO Australia Holdings Ltd.*<sup>16</sup> The Court held that in determining what rule of “remoteness” should apply to s 82 actions, neither the “contractual” rule nor the “tort” rule should automatically be applied; the rule to be applied was to be derived from the language of the statute itself, although analogies from the other areas could be considered. Similarly, *Henville v Walker* held that the doctrine of contributory negligence did not apply to s 82 actions, since it was not present in the Act, and the s 82 action could not be classified as a “tort” action.<sup>17</sup>

So not all statutory civil liability is “tortious”. Parliament may even decide to abolish a tort action, and then substitute for it a specific statutory procedure.<sup>18</sup>

On the other hand, Parliament may choose to declare that a particular form of civil action **is** to be treated as a tort, either generically, or by “inserting” it into the pre-existing common law in some way. In NSW, a statutory cause of action for damages for removal of support from a neighbouring building, which was not actionable in many cases under common law, was created by amendment to s 177 of the *Conveyancing Act* 1919. Under s 177(1), this was accomplished by declaring that: “For the purposes of the common law of negligence, a duty of care exists in relation to the right of support for land.”

So in this case the statutory right is treated as if it were part of the common law of negligence, presumably to avoid specifically defining issues like remoteness, limitation, and contributory negligence.<sup>19</sup> As we will see, while this is a rare expedient in the Commonwealth, the notion of “incorporating” a statutory provision into the pre-existing law of negligence has become a significant aspect of US tort law, in the doctrine of “negligence *per se*”.

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<sup>15</sup> This provision has now been replaced by the *Australian Consumer Law* (the “ACL”) in Sched 2 of the *Competition and Consumer Act* 2010 (Cth) from 1 Jan 2011. An equivalent prohibition on misleading and deceptive conduct is now contained in s 18 of the ACL (and damages for breach awarded under s 236 of the ACL.) The new provision now applies not only to corporations but also, because of a co-operative agreement with the States, to individuals- see the *Fair Trading Amendment (Australian Consumer Law) Act* 2010 (NSW), inserting new s 28 of the *Fair Trading Act* 1987 (NSW). It seems likely that the status of the new action (as a non-tortious, statutory civil liability provision) will be the same as that of former s 52, but no occasion has yet arisen for the courts to comment on this aspect.

<sup>16</sup> (1998) 196 CLR 494.

<sup>17</sup> (2001) 206 CLR 459. See, for example, McHugh J at [140], 206 CLR 505.

<sup>18</sup> In NSW this was accomplished by the *Trees (Disputes Between Neighbours) Act* 2006 (NSW), which in s 5 abolished the tort action for nuisance “as a result of damage caused by a tree to which this Act applies”, vesting jurisdiction to decide such disputes in the specialist Land and Environment Court.

<sup>19</sup> For a recent case discussing this provision, see *Lym International Pty Ltd v Marcolongo* [2011] NSWCA 303 (22 Sept 2011). To illustrate the operation of this “hybrid” statutory/common law provision, at [198] Campbell JA held that a provision of the legislation which required something “not to be done” had to be read, in light of the characterization of the action as a part of the law of negligence, as an obligation to “take reasonable care” to see that the action not be done.

## ***B. Implied Statutory Civil Liability in the Cth***

The more interesting area, for the purposes of this paper, however, is the question of whether a statute can create *implied* civil liability, without expressly so providing.<sup>20</sup> In the Commonwealth, this is generally dealt with under the rubric of the tort of “breach of statutory duty” (“BSD”).<sup>21</sup>

The modern Commonwealth view of the criteria for determining whether a statutory obligation creates a civil remedy is usually seen as well summed up in the judgment of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council*:

a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private action for breach of duty.<sup>22</sup>

Similarly, the High Court of Australia said in *Byrne and Frew v Australian Airlines Ltd*:

A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of obligation causes injury or damage of a kind against which the statute was designed to afford protection.<sup>23</sup>

*Fleming’s The Law of Torts* (10th ed) summarises the elements of the BSD action as follows:

The elements of the civil action for breach of statutory duty... can be identified as: (a) the intention of Parliament to allow an action; (b) the plaintiff must fall within the “limited class” of the public for whose benefit the statutory provision was enacted; (c) the damage suffered must also fall within the intended scope of the statute; (d) the obligation under the statute was imposed on the defendant; (e) the defendant must have breached the statute; and (f) that breach must have caused actual damage of some sort to the plaintiff.<sup>24</sup>

The general details of the action are dealt with in *Fleming* and in other standard tort texts.<sup>25</sup> But as some may consult this paper who are more familiar with the US context than the Commonwealth, it seems worth stressing a number of important features of the action.

<sup>20</sup> For discussion of these issues in the context of UK legislation, see K M Stanton, “New Forms of the Tort of Breach of Statutory Duty” (2004) 120 *Law Quarterly Review* 324-341.

<sup>21</sup> Note as mentioned previously that the BSD action is no longer available in Canada- see above, n 6. The paper will continue to refer to “Commonwealth” law even though Canadian law will have to be excluded.

<sup>22</sup> [1995] 3 All ER 353, 364.

<sup>23</sup> [1995] HCA 24; (1995) 185 CLR 410, 424.

<sup>24</sup> *Fleming*, above n 8 at 424.

<sup>25</sup> See above n 8, and also more generally Luntz, H, Hambly, D, Burns, K, Dietrich, J & Foster, N *Torts: Cases and Commentary* (6<sup>th</sup> ed; Sydney: LexisNexis Butterworths, 2009); Jones, M & Dugdale, AM (eds) *Clerk & Lindsell on Torts* (20<sup>th</sup> ed; London: Sweet & Maxwell, 2010); Murphy, J & Witting, C *Street on Torts* (13<sup>th</sup> ed; Oxford: OUP, 2012); Balkin, R P & Davis, J L R *Law of Torts* (4<sup>th</sup> ed; Chatswood: LexisNexis Butterworths, 2009), Barker, K, Cane, P, Lunney, M & Trindade, F, *The Law of Torts in Australia* (5<sup>th</sup> ed), South Melbourne: Oxford University Press, 2012.

1. While there may have been some wavering on the question over the years, the orthodox view that is now accepted in all jurisdictions that recognize the action is that it is a *separate* action from that of the tort of negligence. It is not a sub-set of the law of negligence. So Lord Wright in *London Passenger Transport Board v Upson*:

I think the authorities... show clearly that a claim for damages for breach of statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence.<sup>26</sup>

More recently, the comments of Crennan & Kiefel JJ in the High Court of Australia in *Stuart v Kirkland-Veenstra* also support this well-established view-

The action for breach of statutory duty, although itself a tort, is regarded as distinct from the tort of negligence.<sup>27</sup>

2. There is still an orthodox role in the law of negligence for statutes, however. Essentially breach of a statutory standard may be used as evidence of (though not conclusive evidence of) a breach of a duty of reasonable care. The judgment of Ipp JA in *Talbot-Price v Jacobs* sums up the modern Australian approach:

It has long been the law that breach of a statute or regulation may be evidence of negligence but is not irrefutable proof of negligence. Every case has to be decided according to its own circumstances. The breach of a statute or regulation is not definitive of a duty of care, or the performance of that duty: *Sibley v Kais* (1967) 118 CLR 424 at 427 per the Court; *Ridis v Strata Plan 10308* [2005] NSWCA 246; (2005) 63 NSWLR 449 at [65] per Tobias JA and [90], [133] and [154] per McColl JA; *Abela v Giew* (1965) 65 SR (NSW) 485 at 491 per Sugerman, Taylor and Moffitt JJ; *Tucker v McCann* [1948] VLR 222 at 227 per Herring CJ (with whom Lowe J agreed) and at 237 per Gavan Duffy J.<sup>28</sup>

## II. Implied Statutory Civil Liability in the US

What, then, is the law in relation to implied statutory civil liability in the United States?

Probably the most important thing to note at the outset is that there is no general law of torts in the US. Under the division of powers between the Federal Congress and the various States, the area of tort law was generally left to the States. While this could also be said of the Australian situation, one key difference between the US and Australian Constitutions is that the High Court of Australia is the final court of appeal from State Supreme Courts, not simply on “federal” issues, but on all matters of law.<sup>29</sup> The result

<sup>26</sup> [1949] AC 155, at 168.

<sup>27</sup> (2009) 237 CLR 215, [2009] HCA 15 at [130].

<sup>28</sup> [2008] NSWCA 189 at [56]. Other recent comments on this issue can be found in *Leighton Contractors Pty Ltd v Fox* [2009] HCA 35 at [49] and *Caltex Refineries (Qld) Pty Limited v Stavar* [2009] NSWCA 258 at [220]-[222].

<sup>29</sup> See the Australian Constitution, s 73(2): “The High Court shall have jurisdiction ... to hear and determine appeals from all judgments, decrees, orders, and sentences: (ii) ... of the Supreme Court of any State.”

that has been reached in Australia is that the common law of torts (as with the common law of contracts, or unjust enrichment, or indeed criminal law where it remains uncodified) is a unitary body of law that is interpreted authoritatively by the one final court.

In other words, there is only one common law of tort in Australia.<sup>30</sup> But in the US, the received doctrine since the decision of the US Supreme Court in *Erie Railroad v Tompkins*<sup>31</sup> is that the Federal Congress has no specific power over tort law in the States. “Tort law is State law”.<sup>32</sup> So anyone attempting to summarise “the” US law on statutes and torts (or any other tort doctrine, for that matter) has a difficult task.

Nevertheless, the Restatement tries to provide a general summary of majority views in the various States. In addition, despite the finding in *Erie* that tort law generally is a matter for the States, it is clear that the Federal courts have had to develop a version of “federal tort law” for various purposes legitimately within the legislative power of the Federal Congress. And whether or not most US lawyers would regard it as “tort law”, US Federal courts regularly deal with the question of whether civil actions may be implied from statutes.

According to what is commonly regarded as one of the main authoritative torts texts in the US, Dobbs,<sup>33</sup> at §133, statutes may create civil liability in the following ways:

1. By being adopted by a court as the definitive standard of care, in the classic negligence *per se* analysis (§314 ff).
2. By prescribing explicitly for civil recovery, although then perhaps “picking up” the common law of negligence with specific adjustments. Dobbs refers particularly to FELA, the *Federal Employers Liability Act*, which applies to railroad workers.<sup>34</sup>
3. Cases like *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*<sup>35</sup> are another category, where a statute *impliedly* creates a civil right- in that case the US Constitution was held to create an implied civil remedy.<sup>36</sup> In a later note Dobbs suggests that implication of a right of civil recovery may be easier under a Federal statute than that of a State, where there is no general body of tort law in the background:

<sup>30</sup> *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503 at [15]: “there is a single common law of Australia”.

<sup>31</sup> 304 US 64, 78 (1938).

<sup>32</sup> Barbara Kritchevsky, “Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation” (2010) 60 *Am UL Rev* 71-132, at 75.

<sup>33</sup> Dan B Dobbs, *The Law of Torts* (West; St Paul, Minnesota, 2000) (hereafter, “Dobbs”). For other treatments of the area see W P Keeton et al *Prosser and Keaton on Torts* (5<sup>th</sup> ed; West, 1984) §36, 230-233; F J Vandall, E Wertheimer & M C Rahdert, *Torts: Cases and Problems* (2<sup>nd</sup> ed; LexisNexis, 2003) 231-245; V R Johnson & A Gunn *Studies in American Tort Law* (3<sup>rd</sup> ed; Carolina AP, 2005) 304-327.

<sup>34</sup> 45 USCA §51. For a recent example of the continuing relevance of FELA, see the Supreme Court decision in *CSX Transportation Inc v McBride* 131 S.Ct. 2630 (2011), where the majority held that in a FELA action the common law rules as to causation were altered so that, in effect, as long as a “but for” connection could be found between the negligence of the railroad and the harm to the worker, liability would be established (as opposed to what the court said was the normal common law rule, “proximate cause”.)

<sup>35</sup> 403 US 388 (1971).

<sup>36</sup> See for comment on recent developments Michael A. Rosenhouse, J.D. “Bivens Actions—United States Supreme Court Cases” 22 *A.L.R. Fed.* 2d 159 (2007). For a recent *Bivens* decision see *Reichle v Howards* (No. 11–262, June 4, 2012).

Federal statutes differ from State statutes in that there is no federal common law of tort, only law emanating from the Constitution and the federal statutes. Conceivably, one could more readily find that Congress implicitly created a tort claim in such a system than in the ordinary state-law system.<sup>37</sup>

One might argue that, there being no “back-up” system to allow wrongs to be compensated for, that it should be easier to imply the existence of civil liability in Federal statutes. This area of “implied rights of action” is discussed in much more detail below, in part B.

4. Clearly statutes may also explicitly limit or abolish tort liability. In the US context one important question is whether a federal statute setting a particular course of behavior can preclude the operation of (or “pre-empt”) State tort law; see Dobbs §133 p 314.<sup>38</sup>

Broadly speaking, we may say for the purposes of this paper that implied statutory civil liability arises under US law in the following ways:

- A. In “ordinary” tort actions under State law, courts will apply a statute in some cases as “negligence *per se*” (“NPS”) - that is, they will read a statutory standard into the “breach” stage of a negligence action. This represents, according to the Restatement, a majority approach, discussed below as “A.1”. In some States, however, breach of a statute may be regarded as providing a “presumption” of breach that needs to be rebutted by the defendant, or in other States simply as “evidence” of breach in a negligence claim (“A.2”).
- B. In some cases the courts may rule that a statute itself creates an “implied right of action”. Perhaps because of the strength of the NPS jurisprudence at the State level, this argument seems to be raised very rarely in relation to State statutes (though there seems no doubt that, in theory, it could be.)<sup>39</sup> But because of the lack of involvement of Federal courts in general tort law following *Erie*, and because for a number of reasons Federal courts may provide an attractive venue for plaintiffs, claims that a Federal statute has created an implied right of action have often been made. As we will see, as these matters are clearly within Federal jurisdiction they have often been considered by the US Supreme Court.

### ***A. As part of the law of Negligence***

Application of statutory standards regularly comes before US State courts, however, as part of negligence cases.

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<sup>37</sup> Dobbs, §135 at 319 n4.

<sup>38</sup> See *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000), holding that where a Federal authority had specified that cars made in a particular year need not be fitted with air-bags, a tort claim under State law alleging negligence due to lack of an air-bag could not succeed.

<sup>39</sup> See the Illinois litigation in *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 404 Ill. App. 3d 543, 556, 936 N.E.2d 181, 193 (Ill. App. Ct. 2010), discussed briefly below.

## 1. Negligence *Per Se*

The majority view is that a statute, where it is applicable, will conclusively determine the “breach” question in a negligence action. The *Restatement of the Law (Third) Torts: Liability for Physical and Emotional Harm* (American Law Institute; adopted May 16, 2005) puts it this way:

### §14. Statutory Violations as Negligence Per Se

An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.

Given the somewhat ambiguous nature of the legal authority of the Restatements and their successive revisions,<sup>40</sup> it is also worth noting how the Second Restatement treated the issue:

### § 286. When Standard Of Conduct Defined By Legislation Or Regulation Will Be Adopted

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.<sup>41</sup>

The contrast between the two formulations is interesting, but probably not as great as it appears. The Second Restatement (“R2”) seems to give more discretion to a court to adopt a statute or not (“may adopt”), whereas the Third (“R3”) seems more directive (the actor “is negligent”). But the words “without excuse” in R3 give the clue to the fact that, while apparently a strict rule, there is still a wide scope for “excuses” to be accepted even under the latest formulation (so much so that the next section of the Restatement, R3 §15, is entitled “Excused Violations”).

The origin of the NPS doctrine is usually found in the judgment of Cardozo J in *Martin v Herzog*.<sup>42</sup> The case was interesting because it arguably involved *both* plaintiffs and defendant being in breach of a statutory provision. The plaintiffs, riding in a carriage, were injured when struck by the defendant’s motor vehicle near dusk. The issue that

<sup>40</sup> Apparently some courts have indicated that they will be continuing to use the Second Restatement rather than adopting the Third, on the basis of suggestions that the Third has been heavily influenced by defendant lobbying (not on this particular point, but generally).

<sup>41</sup> *Restatement (Second) of Torts* § 286 (1965).

<sup>42</sup> 228 NY 164, 126 NE 814 (1920). No doubt this judgment, as well as the future development of the area, was also heavily influenced by the important article by E Thayer, “Public Wrong and Private Action” (1913-14) 27 *Harv L Rev* 317-343. Professor Thayer argued strongly that when evidence of statutory breach emerged in a negligence case (dealing with prohibitory legislation), the breach must be seen as negligence *per se* and not merely as evidence of breach- see eg p 322.

became important was whether, by failing to have a lantern displayed on the carriage contrary to a local statute, the plaintiffs were guilty of contributory negligence. But the decision of the court has subsequently been taken to be authoritative on the question of liability for negligence in general. The trial judge had allowed the jury to decide whether breach of the statute was careless in the circumstances. But the majority of the New York Court of Appeals, concurring in a judgment written by Cardozo J, agreed with his comments that: “the unexcused violation of the statutory signals is more than some evidence of negligence. It is negligence in itself”. The possibility that the defendant’s vehicle had crossed the centre line of the road before the collision (also in breach of a statute) was not in the end taken into account- the plaintiffs’ breach of the law, however, was to preclude them from recovery (at a time when “contributory negligence”, as in the UK and elsewhere in the Commonwealth, was a complete defence rather than a matter for apportionment of damages.)

Other elements of the judgment would find their way into the later law. One aspect of the finding was that this was a “statute intended for the protection of travelers on the highway, of whom the defendant at the time was one”.<sup>43</sup> This requirement is reflected, of course, in later formulations in the Restatements.

To the Commonwealth lawyer a question that arises is: why choose to incorporate the statute into the law of negligence, as opposed to treating it as a separate tort? Much more work needs to be done before a serious answer can be offered. But it is interesting to note that Cardozo J himself was conscious of the debate. He comments:

There may be times when, if jural niceties are to be preserved, the two wrongs, negligence and breach of statutory duty, must be kept distinct in speech and thought...In the conditions here present they come together and coalesce.<sup>44</sup>

He cites English texts for this proposition in the form of “Clark & Lindsell”<sup>45</sup> and Salmond, as well as referring to the (then reasonably recent) decision of the US Supreme Court in *Rigsby*, which is usually cited as a major landmark in the development of “implied rights of action”.<sup>46</sup> If Cardozo J himself was sufficiently clear in thought to realize the distinction, his comments on this issue seem to have been forgotten by later US State courts, which have continued the pattern set in *Martin* of regularly incorporating the statutory standard into the law of negligence, rather than discussing in detail whether statutes of the type concerned *should* give rise to stand-alone civil liability.

It is instructive to compare the development of the law of the Commonwealth on this question of whether a breach of traffic rules would automatically create (or, as in *Martin*, remove) civil liability. Only a few years later the English Court of Appeal considered the question in *Phillips v Britannia Hygienic Laundry Co Ltd*.<sup>47</sup> This was approached in what might be called the orthodox way, by discussing whether the particular statute (effectively requiring vehicles on the road to be a safe condition) was

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<sup>43</sup> Above n 42 at 129 NE 815.

<sup>44</sup> Above n 42 at 129 NE 815.

<sup>45</sup> No doubt the differences in US and UK spelling of the word “clerk” contributed to this understandable mis-spelling of the name of the famous text, Clerk & Lindsell.

<sup>46</sup> *Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916), discussed in more detail in Part B below.

<sup>47</sup> [1923] 2 K.B. 832.

**intended** to create liability. All the judges agreed that it was not. There was a difference of opinion between Bankes LJ and Atkin LJ as to the precise reason for the finding. Bankes LJ concluded that where a statute is designed for the protection of the “public as a whole” it would not be civilly actionable. Atkin LJ differed on that point, noting the oddness of a rule that would allow enforcement of less important statutes but preclude those designed to protect a larger group of people.<sup>48</sup> But he agreed in the end that Parliament did not intend to allow a civil action in the case of this sort of provision (a general “roadworthiness” requirement).

Whatever the precise rationale adopted, *Phillips* has been taken as standing for the proposition that in general highway and traffic regulations will not be civilly actionable in the Commonwealth.<sup>49</sup> It has also been consistently cited for the proposition that only duties owed to a “limited class” of the public will be recognized as civilly actionable.<sup>50</sup>

But the acceptance in the United States of the reasoning in *Martin v Herzog* seems to have “opened the floodgates” in the US to negligence *per se* cases based on traffic laws.

### **(a) Influence of Cth BSD cases on US NPS jurisprudence**

To what extent, then, was the NPS doctrine influenced by the previous history of the BSD action in the UK? It becomes apparent in the early cases that a number of the features of the NPS analysis are directly related to the early UK BSD jurisprudence.

#### **(i) Similarities between issues raised in NPS and BSD cases**

It may be helpful to demonstrate some of the general similarities first. The following table arranges the issues usually thought to be relevant to Commonwealth BSD claims and notes some of the main Negligence Per Se cases (NPS) that raise the same or similar issues. The elements of the BSD action are taken from the passage in Fleming’s

<sup>48</sup> Interestingly, two members of the High Court of Australia, Evatt and McTiernan JJ, agreed with these comments in one of the major Australian cases affirming the availability of BSD actions in workplace safety cases, *O’Connor v S P Bray Ltd* [1937] HCA 18; (1937) 56 CLR 464 at n 15: “We agree that cases of actions for breach of statutory duty cannot be confined to instances where the plaintiff belongs to some so-called “special class of the community.” Still, the main judgment in that case is usually regarded as that of Dixon J, who did not cast any doubt on the “special class” rule.

<sup>49</sup> See, eg, in Australia *Hopewell v Baranyay* [1962] VicRp 45; [1962] VR 311; *Tucker v McCann* [1948] VLR 222; *Abela v. Giew* (1965) 65 S.R. (N.S.W.) 485; 82 W.N. (Pt. 2) 435; *Bowling v Weinert* [1978] 2 NSWLR 282 (applying the previous case to hold that no BSD action arose for breach of water traffic regulations governing boats); in New Zealand *Gardiner v. McManus* [1971] N.Z.L.R. 475 (noted in B. H. Giles “Town Planning and the Tort of Breach of Statutory Duty” (1972) 2(1) *Auckland University Law Review* 39 at 42.)

<sup>50</sup> See for example the comments of the UK Supreme Court in *Morrison Sports Ltd v Scottish Power Plc* [2010] 1 W.L.R. 1934 at [40]: “one of the necessary preconditions of the existence of a private law cause of action is that the statutory duty in question was imposed for the protection of a limited class of the public.” The *dicta* to the contrary of Atkin LJ in *Phillips* were specifically disapproved.

noted above. Elements of the NPS action are taken from Dobbs, R3, or the summary by Diamond et al (cited as “D4”).<sup>51</sup>

**Elements of Cth BSD and US NPS compared**

| <b>Commonwealth BSD</b>   | <b>US Negligence Per Se cases</b>  |
|---|--|
| <p>(a) the intention of Parliament to allow an action; see eg <i>Atkinson v Newcastle and Gateshead Waterworks Co</i> (1877) LR 2 Ex D 441- 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.”</p> <p>-note that usually a <b>regulation</b> as well as an Act of Parliament may be actionable</p> | <p>“A judge must first examine the statute to determine if it is the sort of legislative pronouncement appropriate to set the standard of care in a negligence case”- D4 86</p> <p>-one factor: whether there is an “explicit” or “specific” rule rather than a general one</p> <p><b>-regulations</b> may be actionable- see eg <i>Bayne v Todd Shipyards Corp</i> 568 P 2d 771 (Wash 1977)<sup>52</sup>; NB however some states differ- eg <i>Elliot v City of New York</i> 747 NE2d 760 (NY 2001) suggests only legislatively enacted statutes can be relied on (D4 86 n 4)</p> |
| <p>(b) the plaintiff must fall within the “limited class” of the public for whose benefit the statutory provision was enacted</p> <p>-hence a statute that imposes duties for the benefit of the “<b>public at large</b>” may not be actionable- see <i>Phillips v Britannia Hygienic Laundry Co</i> [1923] 2 KB 832 re traffic violations</p>  | <p>“whether the class of persons designed to be protected by the statute includes the plaintiff” (D4 87-88)</p> <p>-R3 §14 “if the accident victim is within the class of persons the statute is designed to protect”</p> <p>-see Dobbs §§137-139</p> <p>-see specifically Dobbs §142 “Statutes Creating Duties Only to the <b>Public</b>” for some decisions refusing liability on this ground</p>  |
| <p>(c) the damage suffered must also fall within the intended scope of the statute; see <i>Gorris v Scott</i> (1874) LR 9 Ex 125</p> <p>-see <b>licensing</b> cases, eg <i>John Pfeiffer Pty Ltd v Canny</i> [1981] HCA 52; (1981) 148 CLR 218</p>  | <p>“whether the statute was designed to protect against the type of harm suffered by the plaintiff” (D4 87)- citing (as many cases in this area do) <i>Gorris v Scott</i>.</p> <p>- R3 §14 “a statute that is designed to protect against the type of accident the actor’s conduct causes”</p> <p>-see Dobbs §§137-139</p> <p>-tricky issues raised by “failure to have a valid <b>license</b>” cases D4 87; Dobbs §135 at 320 between nn14-16 discusses cases going either way under NPS.</p>   |
| <p>(d) the obligation under the statute was imposed on the defendant</p>  | <p>-this seems to be a clearly obvious requirement. But what view do the US courts take on the question of <i>vicarious liability</i> for breach of statute?<sup>53</sup></p>  |

<sup>51</sup> Diamond, Levine & Bernstein *Understanding Torts* (4<sup>th</sup> ed; LexisNexis, New Providence, 2010.)

<sup>52</sup> Extracted in Goldberg et al, above n 12, at 339-342.

<sup>53</sup> This does not seem an easy question to answer. There are some cases where there is an explicit rule preventing a Governmental employer being vicariously liable. For example, the *Federal Tort Claims Act* generally allows the Federal Government to be sued in tort as if it were a private person, but there are a number of restrictions on its liability for acts of its employees- one of these is that cannot be used in the

|   |   |
|---|---|
| <p>(e) the defendant must have breached the statute</p> <p>-hence there can be “<b>strict</b>” liability, as no “fault” needs to be shown</p> | <p>“all the jury needs to find is that the statute was violated” D4 89</p> <p>See eg Dobbs §140 at 331: “When courts conclude that the actor’s conduct is outside the scope of the statutory command, the actor is not in violation and cannot be guilty of negligence per se.”</p> <p>-D4 90 comments that in most recent cases US courts are willing to “excuse” statutory violation where fault not involved- see <i>Restatement (Third) Torts: Liability for Physical and Emotional Harm</i> (May 2005) (R3) §15 “Excused violations”</p> <p>-still, there are <b>some</b> strict liability examples- see Dobbs §141 at 332 citing <i>Spalding v Waxler</i> 205 NE 2d 890 (1965, Ohio) (brakes failed, no evidence of carelessness, defendant in breach and liable)</p> |
| <p>(f) that breach must have caused actual damage of some sort to the plaintiff</p>   | <p>“she must still establish the other elements of a negligence cause of action: cause-in-fact, proximate cause and damages” D4 89</p>  |

Because of the similarity between elements of the BSD tort and the NPS approach, and their shared historical roots, it is not surprising that similar issues have been raised by the courts in the different systems. Some further examples may illustrate the point.

An interesting example of the “**limited class of persons**” rule can be seen in a case Dobbs cites, *DiCaprio v New York Central RR*.<sup>54</sup> There a statute requiring a railroad to be fenced was held to have been designed to stop cattle wandering onto the tracks, and not to protect a small child who wandered onto the track!<sup>55</sup>

There is a very good example of the “**type of harm**” rule in a case discussed by Dobbs, *Stafford v Borden*.<sup>56</sup> A statute prohibited supply of petrol in containers smaller than a certain size. Allen, an arsonist, purchased fuel in a smaller container, and then used it to light a fire. The victims of the arson sued the petrol station for breaching the statute, arguing that the only way that the arson had been possible was that the fuel was

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case of an “intentional” tort by an employee- 28 USC §2680(h) (see Goldberg et al, above n 12, at 441-442.) But is there an explicit rule about vicarious liability for breach of a statute? My guess is that, for NPS, since it is a part of the law of negligence, the court would just treat it as a negligence case and apply the relevant rule for vicarious liability for negligence. But in an Implied Right of Action case, I suspect that the court would probably look to the statute to see if they can find an implication about vicarious liability. I think the decision mentioned later, *Gebser v Lago Vista Independent School District* 5234 US 274 (1998), demonstrates this sort of approach. In the Commonwealth, the House of Lords ruled that there would normally be vicarious liability for breach of statutory duty in *Majrowski v Guy’s and St Thomas’ NHS Trust* [2007] 1 AC 224. The High Court of Australia by majority held that there would not normally be such liability in the older case of *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36, but it is unclear whether it would take the same view today.

<sup>54</sup> 231 NY 94 (1921); Dobbs §138, p 327, n 3.

<sup>55</sup> To be fair, the statute did explicitly say that “a railroad corporation shall erect and maintain fences on both sides of its right of way sufficiently high and strong to prevent horses, cattle, sheep, and hogs from going upon its road from the adjacent lands”- *Di Caprio v. New York Cent R. Co.*, 231 N.Y. 94, 96, 131 N.E. 746, 746-47 (1921).

<sup>56</sup> 252 Ill App 3d 254 (1993); Dobbs, §137, p 323 n 4.

transported in a small container. The case is interesting because it seems clear that the statute was designed to prevent harm by fire, which of course was the type of harm suffered. But it seems fair to say that the statute had intended to guard against *accidental* harm by fire, not the sort of harm that actually ensued. As the court said:

Unquestionably, the protection of human life and property is inherent in this purpose; however, the specific dangers these rules address are those attending the possible leakage of flammable liquids from their containers, or the potential for disaster if persons inadvertently come in contact with such liquids unaware of their nature. (See *Morales v. City of New York* (1988), 70 N.Y.2d 981, 526 N.Y.S.2d 418, 521 N.E.2d 425.) There is nothing in the language of the statutes or the rules promulgated by the fire marshal that indicates that the prevention of arson was the intent behind their enactment.<sup>57</sup>

Dobbs point out that exclusionary rules of this sort may be described as dealing with the “type of risk” (describing how the harm comes about) or the “type of harm” (classifying what interests the law will protect- eg bodily integrity, personal property, economic loss.) The cases reveal that different analyses can be used in different cases. As he notes, *Gorris v Scott* (noted below) could be analysed as a “risk” case (the statute was not aimed at injury caused by water washing over the boat) or as a “harm” case (aimed at preventing disease of the animals, not their drowning.)

The decision of the US Supreme Court in *Kernan v American Dredging Co*<sup>58</sup> illustrates the difficulty in this process of analysis and classification. Kernan was a passenger on a barge navigating the Schuylkill River in Philadelphia and was injured by an explosion. The cause of the explosion was an open lamp, which was located only 3 feet above the water level, in a situation where there was an “extensive accumulation of petroleum products” on the river. Federal regulations required that lights on such barges be elevated at a height of 8 feet. The lower courts found that if the light had been at 8 feet, the explosion would not have occurred. Despite the fact that it seemed fairly clear that the “8 foot” requirement was enacted for the purposes of better *navigation*, not to avoid explosions, the majority of the Supreme Court (Brennan J writing for the Court) held that the worker had a valid civil action based on breach of the statute.

However, it is worth noting that in this case Dobbs gives a misleading impression of the decision. Dobbs §139 at 328-329 discusses the facts of *Kernan* and gives the impression that the court found that it fell within a “negligence per se” analysis by a strained interpretation. In fact Brennan J bases his decision, explicitly *not* on the traditional negligence *per se* reasons, but on the particular statute involved, the “Jones Act”,<sup>59</sup> which itself adopted the provisions of FELA, the *Federal Employers’ Liability Act*, and applied them to sailors. That legislation gave a civil remedy to injured workers (and their families in the case of wrongful death, as here); previous decisions held that in relation to two specific Federal safety Acts, “a defect resulting from a violation of either statute which causes the injury or death of an employee created liability without regard to negligence”.<sup>60</sup> The issue in the decision was simply whether the navigation regulations could be added to the list of statutes that created this form of “strict” liability, and

<sup>57</sup> *Stafford v. Borden*, 252 Ill. App. 3d 254, 259, 625 N.E.2d 12, 15-16 (Ill. App. Ct. 1993).

<sup>58</sup> 355 US 424 (1958).

<sup>59</sup> 46 U.S.C.A. § 688.

<sup>60</sup> *Kernan*, 355 US at 431.

according to Brennan J the interpretation of the relevant clause in FELA meant that it could. Hence it was not a common law issue of negligence *per se*. Brennan J comments:

The courts, in developing the FELA with a view to adjusting equitably between the worker and his corporate employer the risks inherent in the railroad industry, have plainly **rejected many of the refined distinctions necessary in common-law tort doctrine** for the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved. Among the refinements developed by the common law for the purpose of limiting the risk of liability arising from wrongful conduct is the rule that violation of a statutory duty creates liability only when the statute was intended to protect those in the position of the plaintiff from the type of injury in fact incurred. This limiting approach has long been discarded from the FELA.<sup>61</sup> {emphasis added}

It is true that the dissenters in the case objected on the basis that they would have applied the decision in *Gorris v Scott* and ruled out the navigation statute as applicable. But no member of the Supreme Court thought that they were simply deciding an issue of common law negligence *per se*.

The similarity of issues raised in the US and UK BSD cases is no accident. It seems clear that the US courts were conscious of the developing breach of statutory duty tort in the UK when developing the negligence *per se* doctrine. Some of the material about to be noted is also relevant to the later issue of “implied rights of action”- but both streams of US law seem to find their *fons et origo* in the common law BSD action.

We find the following passage in what is usually regarded as the key early US Supreme Court decision on implied rights of action, *Texas & P. Ry. Co. v. Rigsby*:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, ‘Action upon Statute’ (f), in these words: ‘So, 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.’ (*Per Holt, Ch. J., Anonymous, 6 Mod. 26, 27.*) This is but an application of the maxim, *Ubi jus ibi remedium*. See 3 Bl. Com. 51, 123; *Couch v. Steel*, 3 El. & Bl. 402, 411, 23 L. J. Q. B. N. S. 121, 125, 2 C. L. R. 940, 18 Jur. 515, 2 Week. Rep. 170.<sup>62</sup>

*Couch v Steel*, along with *Groves v Wimborne*, are key UK decisions on the BSD action. They are both cited in 1911 in *Racine v. Morris*:

4 The Legislature may by statute create a duty unknown to the common law, a violation of which statute will give a cause of action for damages to one to whom the duty was owing. *Willy v. Mulledy*, 78 N. Y. 310, 34 Am. Rep. 536; *McRickard v. Flint*, 114 N. Y. 222, 21 N. E. 153; *Huda v. American Glucose Co.*, 154 N. Y. 474, 48 N. E. 897, 40 L. R. A. 411; *Pauley v. Steam G. & L. Co.*, 131 N. Y. 90; ***Couch v. Steel***, 77 Eng. Com. L. 402; ***Groves v Wimborne***, L. R. (2 Q. B. 1898) 402.<sup>63</sup> (emphasis added)

Bellia notes that

<sup>61</sup> *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 438, 78 S. Ct. 394, 401, 2 L. Ed. 2d 382 (1958).

<sup>62</sup> *Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916).

<sup>63</sup> *Racine v. Morris*, 201 N.Y. 240, 244, 94 N.E. 864, 865 (1911).

The Supreme Court of the United States has cited *Couch* at various times for the proposition that courts have broad authority to order remedies for statutory violations.<sup>64</sup>

*Gorris v Scott* (1874) LR 9 Ex 125, which seems to have struck law teachers in the USA as well as elsewhere around the Commonwealth as a stark example of the “type of harm” rules, is regularly cited. (In that decision it was held that a statute requiring sheep being carried by ship to be penned, was designed to further veterinary health issues, not to protect the wider physical well being of the sheep. When a number of sheep were washed overboard in a heavy storm, the fact that there were no pens as required by the statute was held not to ground a BSD action.) In the US Supreme Court in *Kernan v. Am. Dredging Co* we read about:

the familiar principle in the common law of negligence that injuries resulting from violations of a statutory duty do not give rise to liability unless of the kind the statute was designed to prevent. Indeed that principle, which is but an aspect of the general rule of negligence law that injuries in order to be actionable must be within the risk of harm which a defendant's conduct has created, see Seavey, *Principles of Torts*, 56 Harv.L.Rev. 72, 90-92 (1942), was established as long ago as 1874 by a leading English case, **Gorris v. Scott**, L.R. 9 Ex. 125, and has been followed in this country almost without exception. Restatement, *Torts*, s 286; Prosser, *Torts* (2d ed. 1955), s 34; Lowndes, *Civil Liability Created by Criminal Legislation*, 16 Minn.L.Rev. 361, 372-377 (1932); cf. The Eugene F. Moran, 212 U.S. 466, 476, 29 S.Ct. 339, 341, 53 L.Ed. 600 (under admiralty law).<sup>65</sup>

More recently the US 7<sup>th</sup> Circ has continued to cite the case with approval, noting that “the old tort cases are often the most illuminating.”<sup>66</sup> The case is called a “hardy perennial” in another decision.<sup>67</sup> A Westlaw search reveals that it is cited on more than 40 occasions in US decisions ranging from 1895 to 2011.

Yet, as noted previously, despite the influence of the BSD cases, following *Martin* State tort decisions continued to “insert” statutory duty into the *negligence* analysis rather than to deal with it under the BSD rules.

Clearly one factor may have been the immense regard in which Cardozo J was held by US courts and academics on questions of tort law.<sup>68</sup> Another may have been the

<sup>64</sup> A J Bellia Jr, “Article III and the Cause of Action” (2004) 89 *Iowa L Rev* 777-862, at 844: “See *Tex. & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40 (1916) (stating that where “a disregard of the statute is a wrongful act” resulting in “damage to one protected by the statute,” “the right to recover the damages in default is implied” at common law); accord *Merrill Lynch v. Curran*, 456 U.S. 353, 375 n.52 (1982); *Cannon*, 441 U.S. at 691 n.10.” It must be said, however, that Bellia seems to be wrong when on the next page he concludes that “*Couch* was thus not a case about implying rights of action from a statute”. While it is true that it involved personal injury, Lord Campbell, in a passage that Bellia himself quotes on that page, said: “the simple **enactment** requiring the supply of medicines **would have entitled** the plaintiff to an action, in the same manner as if the obligation had been imposed by the common law.” (emphasis added) The point of the case was that the common law at the time (following *Priestley v Fowler* (1837) 3 M & W 1, 150 ER 1030) did not give the plaintiff an action, and so it had to be based on the statute. See the discussion of *Couch* in N Foster, “Breach of Statutory Duty and Risk Management in Occupational Health and Safety Law: New Wine in Old Wineskins?” (2006) 14 *Tort Law Review* 79-104, at 80-81.

<sup>65</sup> *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 442, 78 S. Ct. 394, 402, 2 L. Ed. 2d 382 (1958).

<sup>66</sup> *Aguirre v. Turner Const. Co.*, 582 F.3d 808, 815 (7th Cir. 2009).

<sup>67</sup> *Gauger v. Hendle*, 349 F.3d 354, 363 (7th Cir. 2003), overruled by *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006) (though not with any relevance to the authority of *Gorris*!)

<sup>68</sup> His Honour, of course, was the principal architect of the decision in *MacPherson v Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) only 4 years previously, which even at the time was regarded as a landmark in the law of negligence: see eg J C P Goldberg & B C Zipursky *Torts (Oxford Introductions to*

fact that approaching the matter in this way allowed the courts to respond to a wider group of claims from plaintiffs. In other words, opening up the use of traffic laws in negligence claims bluntly meant that more plaintiffs were likely to succeed.

To some extent it seems that NPS liability is also subject to the same **critiques of inconsistency** and judicial “policy-making” that have been directed at the BSD action. Dobbs notes, for example, that for many years courts rejected any NPS liability based on breaches of laws directed at those selling alcohol- the courts “simply rejected the statutory standard as inappropriate”.<sup>69</sup> But later the courts began finding such liability “[a]s public and judicial attitudes changed”.<sup>70</sup> (In the Commonwealth, an Australian BSD decision rejected the liability of a hotel by holding that the relevant statute was passed for the benefit of the “public at large”.<sup>71</sup> This involved an application of a specific, if slightly illogical, rule in the BSD analysis, rather than broad public policy considerations.)

### (ii) Differences between BSD and NPS litigation

Despite the similarities, a fundamental difference between the BSD cases and the current NPS doctrine is worth noting. The “orthodox” BSD analysis in the Commonwealth retains a strong emphasis on the fact that the finding of civil liability in a statute is very much a question of **legislative intention**. Of course this does not require an explicit statement by the Parliament, but the way that the issue is to be resolved is through the tools of statutory interpretation. Later courts have regularly cited the comments of Kitto J in the High Court of Australia decision of *Sovar v Henry Lane Pty Ltd*:

[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>72</sup>

By contrast, in dealing with negligence *per se* from §314, Dobbs treats the issue under US law as one where the courts are “free to adopt” a statutory standard as part of the law of negligence. The issue is framed as one for the *court*, not for the legislature.

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*US Law*) (OUP, 2010) at 80: “*McPherson* ... established Benjamin Cardozo’s reputation as a leading jurist.” So perhaps it is not surprising that his approach to this question of the relationship between statute and civil liability became quickly established as the prevailing view in US tort law.

<sup>69</sup> Dobbs, §135 at 321.

<sup>70</sup> Dobbs, above n 69, citing *Rong Yao Zhou v Jennifer Mall Restaurant Inc* 534 A 2d 1268 (DC 1987). A later decision in the same litigation, *Zhou v. Jennifer Mall Rest., Inc.*, 699 A.2d 348 (D.C. 1997) dealt with insurance issues.

<sup>71</sup> See *Re Laszlo Joseph Chordas v Bryant (Wellington) Pty Limited* [1988] FCA 462; 1988 Torts 91 ALR 149, a decision of the Federal Court of Australia, on appeal from the ACT Supreme Court, at [32]: “Section 79 was enacted in the general public interest, not for the protection of persons who may be injured by the conduct of intoxicated persons.”

<sup>72</sup> (1967) 116 CLR 397, at 405.

From a Commonwealth common law perspective, this is odd. Of course, in the end it is a court that has to answer the question of interpretation, but most common law courts would reject Dobbs' characterization as a way of approaching statutory civil liability.

The US cases, while paying "lip-service" to legislative intention, regularly continue to leave a wide discretion to courts. Yowell discusses some Texas decisions on NPS and raises the question whether a court is *bound* to apply a statute once it finds that it is intended to protect a class including the plaintiff from harm of the type that occurred.<sup>73</sup> His view is that the courts ought to retain a residual discretion to decline to apply a statutory standard in negligence even if these criteria are satisfied.

Arguably he is right, but not for the reasons he puts forward for addressing this question: adapted from the Second Restatement, he suggests the questions should be about obsolescence, unreasonableness or obscurity. In my view this is a key area where the Commonwealth BSD analysis would be more helpful. The preliminary question there is always, "was it the intention of the legislator to allow a civil action"? That, with respect, is the better way of addressing the issues. If a law is clearly penalizing trivial behavior and with a very minor penalty, it will be unlikely that one could say that the lawmaker intended an unlimited civil action.

The absence of the "legislative intention" inquiry in NPS cases can be seen in the original decision in *Martin*. No part of Cardozo J's judgment seems directed to whether Parliament intended to imply a civil remedy for breach of the legislation. The questions of Parliamentary intention as to *whom to protect* are impliedly discussed, when it is noted that the legislation in question was prescribed "for the benefit of another that he may be preserved in life or limb", and was intended to protect "travelers on the highway, of whom the defendant at the time was one".<sup>74</sup> But the question of the legislature's intention as to the *creation of civil liability* is not discussed. Indeed, at one telling point his Honour simply says the jury should not be able to relax "the duty that one traveler on the highway owes under the statute to another".<sup>75</sup> Here is an implied finding that the statutory provision itself has created a bilateral relationship between travelers on the road, each owing a duty "to another" not to breach the law.<sup>76</sup>

This failure to raise the question of legislative intention about creation of private duties, then, becomes a theme that allows the US State expansion of the law of negligence *per se*. But of course, while the door is opened to a wider group of claimants, once the size of the potential group becomes clear, the courts are then left to wrestle with ways of "controlling" the flood. In the US jurisprudence it seems that this is done by the introduction of a series of "excuses" (authorized by the telling word in the judgment in

<sup>73</sup> P Yowell, "Judicial Discretion in Adopting Legislative Standards: Texas's Solution to the Problem of Negligence Per Se?" (1997) 49 *Baylor L Rev* 109-127.

<sup>74</sup> *Martin*, above n 42 at 126 NE 815.

<sup>75</sup> *Ibid.*

<sup>76</sup> Ironically, in yet another famous decision handed down by Cardozo J 4 years after *Martin*, *Palsgraf v Long Island Railroad* 162 NE 99 (NY 1928), his Honour was very conscious of the question whether the law created, not just a general "obligation", but a duty to the specific plaintiff- as Goldberg & Zipursky note, above n 68, at 102, the key concept was that the victim in an action for negligence "sues for breach of a duty owed to himself" and not anyone else. Nevertheless, the implication of the comments in *Martin* are that when a statute aims to protect a certain class against particular harm, members of that class are owed individual duties by others who are addressed by the statute.

*Martin*, “unexcused”) that can be used when it becomes apparent that the automatic assumption of civil liability based on statutes can no longer be sustained.

“Excuses” that are discussed in the Third Restatement include:

- Whether a violation was “reasonable” in light of personal characteristics of the actor (such as age or capacity);
- Whether “reasonable care” was taken to attempt to comply with the statute;
- Subjective knowledge of the facts rendering the statute applicable;
- Manner of presentation of statutory obligations; or
- Whether compliance would have involved greater risk than non-compliance.<sup>77</sup>

Blomquist gives an interesting overview of the historical development of the doctrine, and a strong critique of how it operates at the moment.<sup>78</sup> He points out that the early cases involving the phrase “negligence per se” (the earliest he cites is *Simpson v Hand*)<sup>79</sup> seem to use it, not in reference to statutory rules, but as a way of emphasizing how *clearly* negligent some behavior was. In that context it seems to have functioned something like the Latin tag *res ipsa loquitur*: the carelessness “speaks for itself”. But gradually the term came to be applied more specifically to carelessness involving breach of statutes designed for safety. Blomquist sees the decision of Cardozo J in *Martin* as “crystallizing” this sort of approach. He criticizes the decision itself, as inconsistent with Cardozo’s own extra-judicial writings, and as internally incoherent. As he points out, in *Martin* both the buggy driver (in failing to have lights) and the car driver (in crossing the middle line) were in breach of statute. Why then was the buggy driver’s breach focused on as the relevant one?<sup>80</sup>

Nevertheless, courts later regularly referred to *Martin*, and Blomquist reports that from 1921-2000 there were over 10,000 opinions mentioning “negligence per se”. He reviews a number of these in his article, and then offers a critique of the jurisprudence through application of a theoretical model offered by Summers.<sup>81</sup>

Whether or not this particular model is persuasive, Blomquist correctly brings out a number of defects in negligence *per se* doctrine and practice. He points out that courts wrestle with the need to interpret legislation as creating a civil right when none is spelled out. In a telling critique, he notes that a wide-ranging definition of “broad excuses” for statutory violation means that, far from simplifying a standard negligence analysis, cases may be prolonged.

[T]he very conceptual foundation of the rationale for the negligence per se doctrine- “the doctrine’s ability to provide greater certainty than the usual reasonable person standard”- is undermined by the broad and far ranging excuses that may be considered as reasons for why a tort litigant violated a particular nonprescriptive standard.<sup>82</sup>

<sup>77</sup> See R3, §15.

<sup>78</sup> “The Trouble with Negligence Per Se” (2009) 61 *South Carolina L Rev* 221-286.

<sup>79</sup> 6 Whart 311, 323 (Pa 1841).

<sup>80</sup> Blomquist, above n 78 at 250-251.

<sup>81</sup> R S Summers, *Form and Function in a Legal System* (2006), noted in Blomquist, above n 78 at 272 n 391 and applied in section IV of Blomquist’s article.

<sup>82</sup> Blomquist, at 279. Presumably the words “tort litigant” here mean primarily “defendant”.

Finally, he considers the doctrine arguably an inappropriate usurpation of legislative power, as the court is reading something in which the legislative body failed to deal with.

In my view some of Blomquist's analysis is not convincing. If the role of the court is actually interpretation of legislative intent, as it should be, rather than policy-based creation of liability, the separation of powers argument is not strong.<sup>83</sup> For this reason I would also not support his final proposal, when he concludes, after arguing for limitation of cases where the doctrine should be applied, that it should simply be seen as based on "policy analysis" by the judge. However, I think his point about the undermining effect of the "excuses" that are accepted is correct, and in my view US NPS jurisprudence would be clearer and conceptually more satisfying if the only "excuses" that were accepted were those which can be found from the statute itself, or those which are generally applicable to all torts.

The area of "excused violations" is one of those, then, which reveals fundamental problems with the NPS doctrine, and why a more straightforward BSD doctrine would be better. Leonard is another author who has pointed out the conceptual difficulties with allowing a wide range of excuses in NPS claims.<sup>84</sup> He comments that of course there is no problem allowing excuses that would be allowed under a criminal prosecution.<sup>85</sup> But logically the court ought not to allow other excuses, as that would undermine the statutory purpose that is meant to be implemented by the NPS doctrine.

But Leonard argues against this result, as this would turn what is meant to be "negligence" litigation into "strict liability".<sup>86</sup> To the Commonwealth lawyer, this is not a problem- strict liability has long been seen to be a key characteristic of much of the BSD litigation, and indeed one of its main advantages over "ordinary" negligence actions. However, it seems clear that this "dislike" of strict liability by US courts may be part of what drives the artificial introduction of excuses.

Yet the NPS litigation reveals many instances in which "excuses" have been accepted. Leonard argues this is necessary. He uses the example of a defendant who has breached a statute forbidding driving with a prescribed concentration of alcohol in the blood. Suppose a defendant in that condition injures the plaintiff. But suppose the defendant can show that he was only driving because, unexpectedly, his child became ill and he needed to seek medical assistance. In that case a court might excuse the driving.

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<sup>83</sup> This point is developed in more detail in section B below.

<sup>84</sup> D P Leonard, "The Application of Criminal Legislation to Negligence Cases: A Reexamination" (1983) 23 *Santa Clara L Rev* 427-489.

<sup>85</sup> Leonard, above n 84 at 467. In the interests of complete disclosure, it must be mentioned that while this seems self-evident, there is a significant line of decisions in the Commonwealth holding that, where a criminal statute contains a separate "defence" provision which is not integrated into the statement of the main offence, such a defence may *not* be available to a civil action based on the statute: see in Australia *Sovar v Henry Lane Pty Ltd* [1967] HCA 31; (1967) 116 CLR 397, followed in *Estate of the Late M T Mutton by its Executors & R W Mutton trading as Mutton Bros v Howard Haulage Pty Limited* [2007] NSWCA 340. The result could only be reached, of course, in a context where civil liability for workplace injury as a result of statutory breach was long established, and the "defence" provision is then being interpreted against that background. See also s 47(3) of the *Health and Safety at Work etc Act 1974* (UK), which provides that certain defences to criminal proceedings in regulations made under s 15(6)(b) of that Act cannot be used as a defence in civil proceedings for BSD based on the regulations.

<sup>86</sup> Leonard, above n 84 at 469.

Leonard says that if the court would not immunize the defendant against civil liability here, “something seems wrong with that result.”<sup>87</sup> But one may beg to differ. Suppose it to be true that in a criminal prosecution a court might find the defendant not guilty (perhaps with a defence of necessity?), or else impose a nominal fine. Suppose it also to be true that in a civil action the conclusion that there was a statutory breach would have to lead to a large award of damages.<sup>88</sup> It is not self-evident that this is wrong.

There is a difference in kind between a criminal conviction and a civil action. One might want to allow a criminal court not to impose a conviction (with all the attendant reputational consequences as well as a possible prison term), where it is simply a question of how to punish the defendant alone. But in a case where the defendant, while breaking a law put in place by the community to avoid just this kind of incident, has caused immense personal injury to an otherwise blameless plaintiff, why should the plaintiff’s interests be put below those of the defendant? Does it not seem equally wrong to leave the plaintiff without civil remedy?

Leonard is perfectly correct, however, to criticize the *inconsistency* of allowing these excuses if a consistent NPS doctrine is to be applied:

If a criminal statute imposes responsibility without fault, courts deciding negligence cases based on the statute are departing from the basis of the theory when they permit excuses which would not be available in criminal prosecutions.<sup>89</sup>

It is suggested, however, that this critique demonstrates the problems with the NPS theory, and points back to a better view being the traditional BSD analysis. The many examples of cases where a court has had to introduce an extraneous excuse, or strain to read a statute oddly, point, for example, to the wisdom of the Commonwealth view that in general traffic laws are not suitable for the automatic creation of civil liability.<sup>90</sup>

In short, Leonard’s critique of the majority US version of “negligence *per se*”, where in theory the case remains a negligence one but the “breach” is irrefutably established by the statutory breach, is persuasive, and is another reason to suggest that the classic BSD analysis is preferable.

The more fundamental problem revealed by the “excuses” jurisprudence is that which has been noted before: that once the relevance of the statute to civil liability has been automatically assumed, without paying attention to the likely intention of the lawmaker, then it becomes necessary to artificially constrain the application of the statute by a series of *ad hoc* devices. It seems that the better approach would be to introduce a specific stage in the “negligence *per se*” analysis addressing the question of legislative

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<sup>87</sup> Leonard, above n 84 at 471.

<sup>88</sup> In fact, of course, in the Commonwealth driving offences of this sort will almost invariably be held not to give rise to actionable civil claims. But we will assume for the present purposes that the NPS analysis would in some cases allow reference to driving statutes of this sort.

<sup>89</sup> Leonard, above n 98 at 472.

<sup>90</sup> Whether this should be justified on the conceptually unsatisfactory grounds that such legislation is enacted for the “public benefit” and not to protect a limited class of the public is another question. It would be possible to maintain the exclusion of such laws as a matter of the intention of the legislature in general, taking into account the sort of issues that Leonard raises in his critique, referring to “the frequency with which such laws are violated, or the seeming unfairness of saddling defendants with huge liability for violating admittedly safety-oriented, but often minor, provisions” (above n 84 at 481.)

intention as to relevance of the statute to civil liability. Alternatively, it is suggested that the Commonwealth “breach of statutory duty” analysis provides a better overall model, rather than attempting to “shoe-horn” a statutory obligation into the common law action for negligence. It will be recalled that the very first hurdle that needs to be crossed in establishing a viable BSD claim is that of legislative intention. A series of decisions may clarify the general class of legislation which will, or will not, give rise to such liability.<sup>91</sup> Of course this will leave some claims as uncertain at the outset- but it is suggested that there is less uncertainty where the proper question is being asked, rather than the trackless wilderness of “excuses” which justify behavior seen to be contrary to the legislation.<sup>92</sup>

### ***(b) NPS and the Question of “Duty”***

Another factor tending to show that the prevailing NPS theory is unsatisfactory, is the way that the cases deal with the fundamental issue of “duty of care”.

If the common NPS view is adopted, then in theory all that the statute does is to determine the issue of breach, and the question of whether the defendant owed the plaintiff a *duty* of care ought to be decided on the other common law principles governing this question. But in most of the NPS cases the duty issue seems to be completely elided. Indeed, if the R3 §14 view is adopted, while in theory the question to be resolved is whether “an actor is negligent”, the questions used to resolve the question include whether the statute was “designed to protect against the type of accident the actor’s conduct causes”, and whether the “victim is within the class of persons the statute is designed to protect”. If a court finds in favour of a plaintiff on these points, can it be doubted that they would find a duty of care between the plaintiff and the defendant? It seems that the most common understanding of “duty” is simply to base it on foreseeability, in which case, if there is a statute providing protection for a class of victims, it would be impossible to claim that such harm was unforeseeable.

Note that Dobbs, in his analysis of the law of negligence, deals with the issue of duty of care in a brief paragraph before turning at length to breach:

§115 It sounds surprising, but there are cases in which the defendant literally owes the plaintiff no duty that bears on the harm suffered. In the ordinary case, however, the defendant does owe a duty of care. The only question about the duty in such cases is whether the care owed is some especially high care or whether it is more modest...<sup>93</sup>

The Third Restatement looks at first glance as though it contains a substantial discussion of “Duty” in §7, but in effect it is very minimal:

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<sup>91</sup> Such as the line of cases in the Commonwealth, previously noted, declining to make traffic regulations civilly actionable.

<sup>92</sup> See also H. Miles Foy, III “Some Reflections On Legislation, Adjudication, And Implied Private Actions In The State And Federal Courts” (1986) 71 *Cornell L Rev* 501-585 which undertakes an excellent review of the history of the action for negligence *per se* (as well as the area of implied federal rights of action) and makes a very persuasive case for a return to something very similar to the Commonwealth BSD approach.

<sup>93</sup> Similarly, in a more modest student-oriented text, Diamond et al in ch 3 open their discussion by defining “duty” as “a legally recognized relationship between the parties” (at 45) but almost immediately move on to discussion of the “standard of care” and other breach issues.

- (a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.
- (b) In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.<sup>94</sup>

While in many ways this resembles the Commonwealth approach, it provides a much stronger presumption and ends up ignoring the duty question in all but the most unusual cases. As the Comment to §6 notes:

Ordinarily, an actor whose conduct creates risks of physical harm to others has a duty to exercise reasonable care. Except in unusual categories of cases in which courts have developed no-duty rules, an actor's duty to exercise reasonable care does not require attention from the court.<sup>95</sup>

Some discussion of this duty question is offered in the old, but still valuable, article by Linden,<sup>96</sup> who discusses the question under the heading of "Breach of Legislation which Creates New Duties Where None Existed at Common Law" from 41ff. He discusses in particular a series of cases where statutes requiring a driver to stop and provide assistance to a pedestrian hit by his or her vehicle were breached, and civil liability was found. The main case he cites is *Brooks v E J Willig Transport Co.*<sup>97</sup> The court held that the statute would be breached even if the driver concerned were not careless in any way in causing the collision, and ruled that this would create civil liability. In effect, as Linden notes, this is not simply crystallizing a *standard* of care, but creating a new *duty* of care to those who have been, without one's own carelessness, hit by one's vehicle. (Incidentally the case in my view illustrates again that the Commonwealth BSD analysis is preferable here- rather than forcing this situation into the law of negligence, it would be better to conduct an analysis of the statute under the BSD approach and, if the view were taken that the legislative intention was to give a civil right of suit to those injured by the breach, to say so directly.)

Apparent confusion between the duty and breach questions can be seen in the most careful of discussions. In an oft-cited article reviewing the NPS area, Leonard comments that the effect of applying the majority NPS view is:

That the **duty of care** which would have governed the case at common law (if indeed the common law would have prescribed any duty at all) is completely supplanted by the **standard of care** implicit in the criminal statute adopted by the legislature.<sup>98</sup> (emphasis added)

To the Commonwealth eye, this seems at first hopelessly confused. Surely NPS deals with the *breach* question, not the *duty*? But when it is noticed that in the second half of the sentence what "supplants" the duty at common law is "the standard of care" prescribed by the statute, it seems that the phrase "duty of care" when first occurring must be a reference to something like "the standard of the reasonable person implied by

<sup>94</sup> *Third Restatement: Torts- Liability for Physical and Emotional Harm*, as adopted May 16, 2005; 2010 edition, p 77.

<sup>95</sup> *Ibid*, at p 67.

<sup>96</sup> A M Linden, "Tort Liability for Criminal Nonfeasance" (1966) 44 *Can Bar Rev* 25-65.

<sup>97</sup> (1953) 40 Cal 2d 669, 255 P 2d 802.

<sup>98</sup> Above, n 84, at 448.

the common law duty of care”. In other words, the word “duty” is being used as a shorthand way of referring to what a more formal analysis would call “breach”. At least that is one way of understanding the discussion that means that it makes sense.

In contrast to some of the other approaches noted above, what seems to be a more principled analysis can be found in *Sorensen v. State Farm Auto. Ins. Co.*<sup>99</sup> There the question arose whether an insurance company could sue a driver who had failed to maintain insurance on her vehicle. The company had been unable to recover (by way of subrogation) damages it had to pay out to clients who had been injured by the uninsured driver. Kite CJ for the Supreme Court of Wyoming, in over-turning a lower court decision that breach of the statute requiring vehicle owners to take out insurance was civilly actionable, said:

The difficulty with the district court's approach is that it determined the statute established the **standard** of care without first determining that a **duty** existed. The concepts of standard of care and duty are not synonymous. *Hamilton v. Natrona County Educ. Ass'n*, 901 P.2d 381, 384 (Wyo.1995). Before a statute can be said to establish a standard of care, there must be a legal duty to which the statutory standard of care can be applied. Thus, in deciding the issue presented, we address first whether § 31–4–103 should be construed to establish a common law duty actionable in negligence for failure to maintain liability insurance. Stated more broadly, we consider whether such a relationship exists between members of the public and a vehicle owner that the law will impose a duty actionable in negligence on the latter to maintain insurance for the protection of the former.<sup>100</sup> {emphasis added}

The Court ruled that no duty of care existed, and hence that the statutory standard was not relevant.<sup>101</sup>

### **(c) Federal/State issues as further complications in NPS**

A further difficulty that faces US State courts in applying the classic NPS view (that the statutory standard provides conclusive evidence of breach) is the fact that statutes in a Federal system emanate from more than one source. In particular, how is a State court in a common law negligence action to treat a statutory standard laid down by the Federal Congress?

Dobbs notes that State courts are “free to adopt” a standard prescribed by Federal law in deciding a State tort case. If the question were one of statutory interpretation, of course, then it would better be framed as, “did Congress assume that a State court in a tort case would apply this as a standard for breach?”<sup>102</sup>

<sup>99</sup> 2010 WY 101, 234 P.3d 1233 (Wyo. 2010).

<sup>100</sup> *Sorensen v. State Farm Auto. Ins. Co.*, 2010 WY 101, 234 P.3d 1233, 1240 (Wyo. 2010).

<sup>101</sup> There was also a discussion of the question whether the statutory prohibition itself created a civil cause of action, and this was also rejected- see paras [13]-[18]. Interestingly the old UK decision of *Monk v Warby* [1935] 1 K B 75 held that similar legislation requiring insurance *did* create an actionable duty.

<sup>102</sup> Nevertheless, it has to be said that a Commonwealth court would probably not feel free to “expand the scope” of a statute beyond persons who were actually covered, as Dobbs suggests a US court would be able to do in §136, p 322 under the heading “Expanding a Statute’s Scope”. Conceptually the Commonwealth courts still insist they are following Parliament, not simply choosing a standard that the judge thinks appropriate.

In an important article, Kritchevsky argues at length that the practice of State courts of adopting standards set by Federal law for negligence *per se* actions is wrong.<sup>103</sup>

The first premise is, as noted previously, that there is no US federal common law of tort. This flows from the decision noted above in *Erie RR v Tompkins*,<sup>104</sup> that the Federal Congress has no specific power over tort law in the States.

Kritchevsky then argues that the generally accepted rationale for NPS actions today is “institutional comity”- that a State court should not “second guess” the State legislature in a negligence action by allowing a jury to conclude that behavior which is contrary to State law is “reasonable” behavior. But, she says, this rationale does not exist where the Federal legislature had no direct power to pass laws on the question of tort liability in the State; and hence State courts should not apply those Federal rules where they have not otherwise been made the law of the State.<sup>105</sup>

Dobbs refers as an example of the application of Federal law, to *Coker v. Wal-Mart Stores, Inc.*, where violation of a federal statute prohibiting sale of guns to a minor was considered NPS.<sup>106</sup> There was no real debate in that decision on the application of the statute. However, Congressional intent was taken into account in discussion of what sort of “proximity” of connection was required between the illegal sale and the harm (occasioned by subsequent use of the illegally purchased gun in a robbery):

Relying on legislative intent articulated by the United States Supreme Court in *Huddleston v. United States*, 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974), the third district concluded that the “risk of harm” Congress meant to prevent by enacting 18 U.S.C. § 922 was just the “type” of conduct which occurred in the case before it. The court noted the Supreme Court’s extensive quotation in *Huddleston* from the legislative history of the Gun Control Act and, in particular, the fact that “ ‘Congress determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States.’ ” *Id.* at 286. As the third district observed, the *Huddleston* ruling underscores the principal purpose of the legislation: to prevent those deemed too dangerous or irresponsible due to age, criminal background, or incompetency from obtaining firearms and ammunition. To accomplish that purpose, Congress chose to control the initial dissemination of firearms and ammunition, and not simply to prohibit the subsequent possession of them. *Id.*

The argument that legality of possession is pivotal to the issue of proximate causation under these circumstances entirely defeats the congressional purpose of the Act and renders its provisions a nullity. For the same reason, the proposition that *criminal* acts resulting from the unlawful sale of firearms or ammunition should be treated differently under a proximate causation analysis from negligent acts is equally unavailing (some footnotes omitted.)<sup>107</sup>

Interestingly, in a similar Commonwealth decision, the Supreme Court of Queensland held in *Pask v Owen*<sup>108</sup> that a provision making it illegal to supply a fire-arm

<sup>103</sup> Barbara Kritchevsky, “Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation” (2010) 60 *Am U L Rev* 71-132.

<sup>104</sup> 304 US 64, 78 (1938).

<sup>105</sup> Kritchevsky recognizes, of course, that Federal law may “pre-empt” State law on an area if valid, or a State may have chosen to adopt Federal standards voluntarily- see 128-129, nn 379-383. But outside these circumstances State courts should not adopt Federal laws if the State legislature has not done so.

<sup>106</sup> Following the earlier decision in *Decker v. Gibson Products Co. of Albany, Inc.*, 679 F.2d 212 (11th Cir.1982)- see *Coker v. Wal-Mart Stores, Inc.*, 642 So. 2d 774, 775 (Fla. Dist. Ct. App. 1994).

<sup>107</sup> *Coker v. Wal-Mart Stores, Inc.*, 642 So. 2d 774, 777-78 (Fla. Dist. Ct. App. 1994).

<sup>108</sup> [1987] 2 Qd R 421.

to a minor created civil liability. The plaintiff, a 13-year-old boy, had accidentally shot himself after being given a gun by the defendant's son (aged 15), who had been given it by the defendant. The Court of Appeal all agreed that the legislation prohibiting supply of a firearm to a minor created civil liability; as Thomas J put it:

it is a provision which sets out to prescribe certain precautions for the safety of others, and ... no contrary intention appears. I therefore conclude (as did the learned trial judge) that the legislature has prescribed certain duties which add to the general duties imposed by the law.<sup>109</sup>

The legislation in question was State, not Federal, law, but the facts of the cases are obviously similar. In the Queensland case, of course, the statute was given direct effect as a "breach of statutory duty", rather than as part of the law of negligence.

## 2 Statutory Breach as Evidence of Negligence Breach or Presumptive Breach

To return to the US situation, Dobbs notes that there is some variation among the States, some treating the statutory standard as simply creating a "rebuttable presumption" of breach in a negligence action, or as evidence of the matter.<sup>110</sup> He argues that the difference in outcome between these States and those that apply the negligence *per se* analysis is minimal, especially given that NPS includes as part of its definition the word "unexcused". But on general principles it would seem to more conceptually satisfactory to provide from the outset that, when approached as part of the law of negligence, the statutory breach is only one of a number of factors that may lead to a finding of breach (a position, it should be noted, shared across the common law world, including Canada)<sup>111</sup>, rather than to impose what often look like fairly arbitrary "excuses".

In fact, Dobbs concludes that the "evidence of negligence" rule is more flexible and preferable to the NPS approach, although he notes that in doing so he of course has to differ from the respected Cardozo J in *Martin*<sup>112</sup>. While *Martin* contains comments about the importance of not allowing the jury to "dispense with" a legislative requirement at their whim,<sup>113</sup> it is ironic that (as previously noted) in fact the *ratio* of the case was applied, not to a breach of law by the defendant, but as a matter of contributory negligence because the plaintiff's buggy was not carrying lights. In effect the impression

<sup>109</sup> [1987] 2 Qd R 421 at 434. Thomas J expressed some hesitation (unlike the other two members of the Court of Appeal) as to whether the son who had been supplied with the gun was himself "using" it at the time of the incident- but eventually concluded that his act of allowing his friend the plaintiff to play with the gun, was in effect a "use" of it by the 15-year-old, and hence that the damage was within the area covered by the statute.

<sup>110</sup> Dobbs, §134(1)(b), at p 316.

<sup>111</sup> In *Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, Dickson J for the Court noted that even though the doctrine of BSD would be abolished in Canada, "the violation of the statute should be evidence of negligence on the part of the defendant"- at [38]. For an application of this approach (although finding that the particular standards in question were not applicable) see *Street v. Ontario Racing Commission* (2005) CarswellOnt 4540; (Ontario Superior Court of Justice, 2005) at [125] ff.

<sup>112</sup> Dobbs, on p 317.

<sup>113</sup> "A statute designed for the protection of human life is not to be brushed aside as a form of words, its commands reduced to the level of cautions, and the duty to obey attenuated into an option to conform"- at 126 NE 816.

is given that Cardozo J himself “dispensed with” a proper consideration of the breach of the law by the defendant.

A description of how the doctrine operates in a State where a presumption applies can be found in a recent decision on the law of California:

In California, negligence *per se* is “a presumption of negligence [that] arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm which the plaintiff suffered as a result of the violation of the statute.” *See, e.g., Hoff v. Vacaville Unified Sch. Dist.*, 19 Cal.4th 925, 80 Cal.Rptr.2d 811, 968 P.2d 522, 530 (1998) (citations omitted); *Quiroz v. Seventh Ave. Ctr.*, 140 Cal.App.4th 1256, 45 Cal.Rptr.3d 222, 244 (2006); *Peart v. Ferro*, 119 Cal.App.4th 60, 13 Cal.Rptr.3d 885, 901 n. 11 (2004). However, “‘it is the tort of negligence, and not the violation of the statute itself, which entitles a plaintiff to recover civil damages.’” *California Serv. Station & Auto. Repair Ass’n v. Am. Home Assur. Co.*, 62 Cal.App.4th 1166, 73 Cal.Rptr.2d 182, 190 (1998) (quoting *Sierra-Bay Fed. Land Bank Ass’n v. Super. Ct.*, 227 Cal.App.3d 318, 277 Cal.Rptr. 753, 761 (1991)).

To ensure that the presumption of negligence arises when appropriate, “the Legislature ... codified this presumption with the adoption of Evidence Code 669.” *Hoff*, 80 Cal.Rptr.2d 811, 968 P.2d at 530 (citations omitted); *see also Rosales v. City of Los Angeles*, 82 Cal.App.4th 419, 98 Cal.Rptr.2d 144, 151 (2000). Accordingly, because negligence *per se* is simply a codified evidentiary doctrine, “the doctrine of negligence *per se* does not establish tort liability.” *Quiroz*, 45 Cal.Rptr.3d at 244 (italics added). In other words, even when the requirements of Evidence Code section 669 are satisfied, “this alone does not entitle a plaintiff to a presumption of negligence *in the absence of an underlying negligence action.*” *Id.* (alteration in original); *accord Rios v. City of Fresno*, 2006 WL 3300452, at \*21 (E.D.Cal. Nov. 14, 2006). Thus, “to apply negligence *per se* is not to state an independent cause of action” because “[t]he doctrine does not provide a private right of action for violation of a statute.” *Quiroz*, 45 Cal.Rptr.3d at 244 (italics added).<sup>114</sup>

### ***B Implied Rights of Action***<sup>115</sup>

Rather than incorporating statutory obligations into the law of negligence, statutes can create “implied rights of action” simply by virtue of the statutory scheme. The similarity between the principles operating in this area, and those applied in the NPS cases, seems to be disguised to the US lawyer because there is a strong tendency to deny that civil liability created by implication from a statute can be called a “tort”. Yet on most general definitions of the term adopted in the Commonwealth literature, as a civil wrong, classifying the action in this way seems unexceptionable. Indeed, it is interesting that some of the more recent US writers are moving in this direction.<sup>116</sup>

R3 §14 recognises that a statute may create an “implied cause of action” in addition to the operation of the negligence *per se* doctrine:

<sup>114</sup> *People of California v. Kinder Morgan Energy Partners, L.P.*, 569 F. Supp. 2d 1073, 1087 (S.D. Cal. 2008).

<sup>115</sup> While there seems, surprisingly, to be no monograph devoted to this topic, there are many discussions in journal articles (a number of which are cited below) and some reviews of the area in texts devoted to legislative interpretation generally. One of the most helpful recent overviews is the material in C Nelson, *Statutory Interpretation* (Foundation Press, 2011) at 653-689, under the heading “The Case of Federal Causes of Action”.

<sup>116</sup> See Goldberg & Zipursky, above n 68, at 30 discussing the scope of their introductory review of tort law: “we will also have occasion to consider interests and invasions... that are recognized and protected through modern statutory schemes... These statutorily defined legal wrongs are torts in structure and functions.”

The court, relying on ordinary principles of legislative interpretation, may in appropriate cases infer from the statute a cause of action for damages against the violator. In cases involving conduct that causes physical or emotional harm, courts have not often exercised the authority referred to in this Comment; no doubt this is because the longstanding recognition of the common-law rule affirmed in this Section reduces the significance of an implied statutory cause of action.<sup>117</sup>

The “common-law rule” referred to is the negligence *per se* doctrine.

Sherman notes that in the early days of the Supreme Court the decision in *Texas & Pacific Railway v Rigsby*<sup>118</sup> adopted a rule which seemed to favour implied liability.<sup>119</sup> Indeed, as noted previously, the rule sounds very similar to late 19<sup>th</sup> century formulations in the BSD area in the UK, from which it is explicitly supported:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law expressed in 1 Comyn's Dig. title, ‘Action upon Statute’ (f), in these words: ‘So, 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.’ (*Per Holt, Ch. J., Anonymous, 6 Mod. 26, 27.*) This is but an application of the maxim, *Ubi jus ibi remedium*. See 3 Bl. Com. 51, 123; *Couch v. Steel*, 3 El. & Bl. 402, 411, 23 L. J. Q. B. N. S. 121, 125, 2 C. L. R. 940, 18 Jur. 515, 2 Week. Rep. 170.<sup>120</sup>

Stabile correctly points out that, while *Rigsby* is often regarded as the main early decision in favour of an “implied right of action”, a number of previous cases (including the seminal *Marbury v Madison*<sup>121</sup> itself) had relied on the general principle that where there is a right, there must be a remedy.<sup>122</sup>

Noyes analyses the *Rigsby* decision in some detail to determine its impact on more recent decisions concerning implied rights of action.<sup>123</sup> He concludes with some justification that it was a “common law” decision, rather than one based on the federal issues, following the UK precedents.

In general the story that is commonly told in the literature about the implication of rights of action from Federal statutes is that in the 19<sup>th</sup> and early part of the 20<sup>th</sup> centuries implication was possible applying the broad *Rigsby* analysis. But following the New Deal, there was a “rush” of Federal legislation, which led to the Supreme Court “tightening up” the criteria for implication. The case that is seen as starting this trend was *Cort v Ash*.<sup>124</sup>

There the law in question was a federal law prohibiting companies from making political donations. A shareholder wanted to seek damages against the company directors

<sup>117</sup> R3, p 155 of the 2010 edition.

<sup>118</sup> 241 US 33 (1916).

<sup>119</sup> P Sherman, “Use of Federal Statutes in State Negligence Per Se Actions” (1992) 13 *Whittier L Rev* 831-908, at 864.

<sup>120</sup> *Texas & P. Ry. Co. v. Rigsby*, 241 U.S. 33, 39-40, 36 S. Ct. 482, 484, 60 L. Ed. 874 (1916).

<sup>121</sup> 5 US 137 (1803).

<sup>122</sup> S J Stabile, “The Role of Congressional Intent in Determining the Existence of Implied Rights of Action” (1995-96) 71 *Notre Dame L Rev* 861-912, at 864 n 15.

<sup>123</sup> J E Noyes, “Implied Rights of Action and the Use and Misuse of Precedent” (1987-88) 56 *U Cin L Rev* 145-191.

<sup>124</sup> 422 US 66 (1975).

for a breach of the statute, constituted by press advertisements paid for during the 1972 Presidential election. By the time the case came to the Supreme Court, of course, the election was over, but the questions remained whether injunctive relief could be sought for the future, and whether damages could be awarded for any previous breach.

In fact the action for an injunction was doomed because, although no enforcement mechanism had been provided when the Act came into force, by the time the matter reached the Supreme Court an elaborate scheme for enforcement (by creation of a Federal Election Commission, and detailed rules governing complaints) had been put into place by statutory amendment. Hence Brennan J ruled that, since the Court had to decide the matter in accordance with the circumstances prevailing *at the time of the decision*, there was clearly no case for saying that Congress intended to allow a private civil action.<sup>125</sup>

Nevertheless, the Court went on to discuss the question whether, as enacted in 1972, the statute allowed a private action for damages. Brennan J summarized the considerations that the court would take into account in “determining whether a private remedy is implicit in a statute not expressly providing one” (effectively the common law BSD issue, though as we shall see in the unique US Federal context). These factors were said to be:

1. Whether the plaintiff is a member of a limited class for whose “especial benefit” the statute was enacted. This was very interestingly paraphrased as “does the statute create a federal right in favor of the plaintiff”?
2. Is there any indication of legislative intent either way?
3. Would it be consistent with the purposes of the legislative scheme to imply such a remedy?
4. Is the cause of action one “traditionally relegated to state law”, so that it would be inappropriate to infer a cause of action based on federal law?<sup>126</sup>

To the Commonwealth lawyer’s eye this is a tantalizingly similar set of criteria to those adopted in BSD cases, yet oddly arranged. Item 2, “legislative intent”, would seem to logically be the first on the list- yet here it comes in second place to the interests of the plaintiff. Item 3 looks like simply a part of item 2. And item 4 has a particular Federal flavour that would be called in Australian terms a “State reserved powers” approach. This was a way of reading the Australian Constitution which was abandoned by the High Court of Australia in the constitutional sphere with the *Engineers* case<sup>127</sup> many years ago- the question in Australia now not being, “is this a matter for the States?”, but “can it fairly be seen to fall within the Commonwealth legislative power in s 51?” If the answer is “Yes” to the second question, then the fact that “traditionally” it was a matter of State power should not be a barrier to Federal lawmaking. Clearly the US Federal context was quite different on this point, at least in 1975.

Other elements of this decision are similar to common law BSD jurisprudence. So Brennan J goes on to say: “provision of a criminal penalty does not necessarily *preclude*

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<sup>125</sup> 422 US 66 at 76.

<sup>126</sup> See 422 US 66, at 78.

<sup>127</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

implication of a private cause of action for damages".<sup>128</sup> This is precisely the rule adopted by the common law courts in BSD cases.<sup>129</sup> But in the end an examination of this statute led to the view that it was not intended to provide a civil right to shareholders as:

- The statute was aimed at combating corruption in the election process as its primary purpose, not protecting the interests of shareholders;
- There was no explicit discussion of private remedies in the "legislative history";
- A private remedy after the fact would not assist the purpose of preventing corruption;
- In general corporations are governed by State law and in an appropriate case the shareholders may still have a State remedy.

The subsequent history following *Cort v Ash* reveals what can probably best be described as a continued narrowing down of the grounds for legitimate implication of a civil action. In *Cannon v University of Chicago*<sup>130</sup> the Court found that federal legislation prohibiting discrimination on the basis of sex in admission to federally funded education, implied a personal civil right on an applicant so excluded. Powell J delivered a strong dissent, claiming that applying the *Cort* principles was a usurpation of legislative power by the court.

In *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*<sup>131</sup> a differently constituted Supreme Court ruled against civil liability for breach of a Federal statute, and applied the *Cort v Ash* criteria. But the majority suggested that not all the criteria were always relevant, the most important question being Congressional intent. In dissent in that case, White J (joined by Brennan, Marshall and Stevens JJ) applied the *Cort* questions and found in favour of a tort action. The authority of *Cort* itself was not directly questioned, but clearly there could still be a difference of opinion about intent.

In *Middlesex County Sewerage Authority v National Sea Clammers*<sup>132</sup> the court as a whole ruled against a private civil action being available in relation to particular provisions of legislation aimed at preventing pollution. But Powell J, now in the majority, stressed that Congressional intent *alone* was the test; whereas Stevens J, who joined in the result, adhered to the need to consider a range of factors above any explicit statements by Congress. He referred to the "traditional common law analysis" and conducted a general application of the *Cort* factors. He ruled against actionability on the basis of a lack of intent to benefit a specific section of the public (a part of the classic BSD reasoning.)

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<sup>128</sup> 422 US 66 at 79, para [9].

<sup>129</sup> See *Groves v Lord Wimborne* [1898] 2 QB 402, where the statute which was found actionable not only provided a criminal penalty but also gave a discretion to an officer to pay some of the fine to the injured worker. But since the fine was so small the court still implied a separate civil action. See comment on the decision in N Foster, "Breach of Statutory Duty and Risk Management in Occupational Health and Safety Law: New Wine in Old Wineskins?" (2006) 14 *Tort Law Review* 79-104, at 81.

<sup>130</sup> 441 US 677 (1979) ; extracted in W D Popkin *Materials on Legislation* (5<sup>th</sup> ed; Foundation Press, 2009) at 777-784.

<sup>131</sup> 444 U.S. 11, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979).

<sup>132</sup> 453 US 1 (1981); extracted in Popkin, above n 130, at 784-786.

In *Merrill Lynch, Pierce, Fenner & Smith Inc v Curran*<sup>133</sup> the majority of the Court upheld a private action related to securities fraud. Even Stevens J now affirmed that the focus must be on legislative intent, but found such an intent in the fact that private actions in relation to the statute had been upheld by federal courts for many years, and that Congress must be taken to have been aware of this. Powell J dissented on the basis, effectively, that Congress must be taken only to have said what it actually said. Within the Court there was a division growing between those who took the view that Congress, except in very rare cases, can only have expressed an “intent” about an action in plain words, and those who were prepared to address the issue of Congressional intent more broadly.

In *Central Bank of Denver v First Interstate Bank of Denver*<sup>134</sup>, the majority upheld the continued availability of a civil action in relation to s 10(b)-5 of the *Securities Exchange Act* 1934 (on the basis of the prior recognition of such an action) but refused to extend the action against those who aided and abetted the breach. Stevens J in dissent objected, partly on the basis that in 1934 courts were much more willing to imply causes of action, and hence the Court ought to be prepared to find an intent based on that view.

By 1999, in a trial decision, Kennedy J in *Kramer v. Sec’y of Def.*, held that the effect of the later treatment of *Cort* was that

the Court has continued to find all four *Cort* factors relevant, but has shifted the emphasis among these factors to focus on legislative intent.<sup>135</sup>

However, his Honour noted that another view had been taken of *Cort* by Scalia J, concurring in the later decision of *Thompson v. Thompson*:

It could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-576, 99 S.Ct. 2479, 2488-2489, 61 L.Ed.2d 82 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18, 100 S.Ct. 242, 246, 62 L.Ed.2d 146 (1979), converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence. Compare *Cort v. Ash*, *supra*, 422 U.S., at 78, 95 S.Ct., at 2088, with *Transamerica*, *supra*, 444 U.S., at 23-24, 100 S.Ct., at 249.<sup>136</sup>

Still, the majority position represented in *Thompson* was that the four-factor test is still applied.<sup>137</sup>

Of course one clear pointer to a civil right of action will be if the court has previously ruled in favour of actionability. In recent times the actionability of a securities fraud statute was supported on this basis in *Janus Capital Group, Inc. v. First Derivative Traders*, per Thomas J for the majority (although not very enthusiastically):

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<sup>133</sup> 456 US 353 (1982).

<sup>134</sup> 511 US 164 (1994).

<sup>135</sup> *Kramer v. Sec’y of Def.*, 39 F. Supp. 2d 54, 57 (D.D.C. 1999).

<sup>136</sup> *Thompson v. Thompson*, 484 U.S. 174, 189, 108 S. Ct. 513, 521, 98 L. Ed. 2d 512 (1988). Note that this was the judgment quoted in the High Court of Australia by Gleeson CJ and Gummow & Hayne JJ in *Slivak v Lurgi (Australia) Pty Ltd* [2001] HCA 6; 205 CLR 304 at [28]. (Note also that in n 11 in that para, their Honours also cite with approval the dissenting judgment of Powell J in *Cannon* noted above.)

<sup>137</sup> See the comments of Molloy DJ in the 9<sup>th</sup> Circuit: “Nevertheless, we still find the four-factor test helpful in determining whether a statute provides a private right of action.”- *First Pac. Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1122 (9th Cir. 2000).

Although neither Rule 10b–5 nor § 10(b) expressly creates a private right of action, this Court has held that “a private right of action is implied under § 10(b).” *Superintendent of Ins. of N.Y. v. Bankers Life & Casualty Co.*, 404 U.S. 6, 13, n. 9, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971). That holding “remains the law,” *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, 552 U.S. 148, 165, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008), but “[c]oncerns with the judicial creation of a private cause of action caution against its expansion,” *ibid.*<sup>138</sup>

Perhaps the most recent authoritative summary of this area comes from the following comments of Ginsburg J writing for the Supreme Court in 2011:

“[R]ecognition of any private right of action for violating a federal statute,” currently governing decisions instruct, “must ultimately rest on congressional intent to provide a private remedy.” *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1102, 111 S.Ct. 2749, 115 L.Ed.2d 929 (1991). See also *Stoneridge Investment Partners, LLC v. Scientific–Atlanta, Inc.*, 552 U.S. 148, 164, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008); *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001).<sup>139</sup>

In Part A of this paper I argued that an important part of the BSD approach is the question of “legislative intent”. But intent can be found in a variety of ways, and what we find in the US Supreme Court jurisprudence is a shift towards an intense focus on the precise terms of the statute. The shift towards a greater focus on the exact words of the text itself can also be illustrated in cases dealing with the question of what might be called “ancillary” issues that arise even if an intention to create civil liability has been found. That is, even if there is civil liability, issues arise as to the relevant parties (to whom does the liability attach?), the extent of damages available, statutes of limitations, and a myriad of other issues.

Popkin notes that one approach to the question was found in *Franklin v Gwinnett County Public Schools*,<sup>140</sup> where it was held that, once the court has decided that a civil remedy is available, the question of *which* civil remedy is completely at large and does not itself need to be justified by the legislation concerned.<sup>141</sup> Hence an order for damages may be made even if Congress has not addressed its mind to the question.

However, in the later decision in *Gebser v Lago Vista Independent School District*<sup>142</sup> the majority (Stevens J dissenting) held that there was no vicarious liability for breach of the implied civil action. The legislation in question was the sex discrimination legislation found actionable in *Cannon*.<sup>143</sup> In *Gebser* a student had been the victim of sexual harassment (actually seduction and sexual activity) by a teacher, and the question was whether the school district could be held vicariously liable.

It is interesting that the facts of the case are so similar to those of the major Commonwealth common law cases dealing with (and ruling in favour of) vicarious liability for sexual assault by caregivers: *Basley v Curry*<sup>144</sup>, *Lister v Hesley Hall*<sup>145</sup>,

<sup>138</sup> *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2301-02, 180 L. Ed. 2d 166 (2011).

<sup>139</sup> *Astra USA, Inc. v. Santa Clara County, Cal.*, 131 S. Ct. 1342, 1347, 179 L. Ed. 2d 457 (2011)

<sup>140</sup> 503 US 60 (1992).

<sup>141</sup> See Popkin, above n 130 at 793-795.

<sup>142</sup> 524 US 274 (1998).

<sup>143</sup> Above, n 130.

<sup>144</sup> 1999 Can LII 692 (SCC); [1999] 2 SCR 534.

<sup>145</sup> [2002] 1 AC 215.

*Lepore v NSW*.<sup>146</sup> Yet here the decision was based on principles relating to federal funding of schools, and the majority found that there was no liability.<sup>147</sup>

The “shrinking” of implied Federal civil liability can also be illustrated from the interpretation of another provision. Popkin notes how the “implied right of action” becomes relevant under 42 USC §1983.<sup>148</sup> That legislation gives a civil action to someone:

- (1) Deprived of a “right” secured by the Constitution or the laws of the United States (ie a right given by Federal statute),
- (2) By the action of someone purporting to act under a State law.

There was initially some doubt as to whether a “right” secured by Federal law had to be a fully-blown implied civil right, or whether something less than that could be protected under §1983. However, the decision of the Supreme Court in *Gonzaga University v Doe*,<sup>149</sup> now holds that the “right” under Federal statute must be one which would satisfy the rules for existence of an “implied right of action”. There are then comments by Rehnquist CJ suggesting that the test is whether Congress has created rights “in clear and unambiguous terms”.<sup>150</sup> All this means that the remedy provided by the provision has been made much harder to access.

Similarly, the recent jurisprudence on implied *Constitutional* rights of action also demonstrates this trend. The decision in *Bivens v Six Unknown Federal Narcotics Agents*<sup>151</sup> held that there would be a civil action against a Federal government official who violates a Constitutional right of the plaintiff. But Popkin notes that in recent years this action has been interpreted narrowly, no action being available, for example, against a private corporation contracted to perform services for the Federal government.<sup>152</sup>

The more recent approach of the Supreme Court, then, to implied rights of action is summed up as follows by Wright & Miller:<sup>153</sup>

Long ago, it might have been appropriate to assume that Congress intended that courts would routinely provide other remedies to persons injured by a violation of the substantive rule. As complex regulatory and social engineering schemes have proliferated, however, this assumption is no longer appropriate.<sup>154</sup>

<sup>146</sup> [2003] HCA 4; 212 CLR 511.

<sup>147</sup> Dobbs at §335, pp 916-917 cites opposing views among State courts as to whether there can be vicarious liability for sexual assault of children in care: *Stropes v Heritage House Childrens Ctr of Shelbyville Inc* 547 NE 2d 244 (Ind 1989) holding that there can be, *Niece v Elmview Group Home* 131 Wash 2d 39, 929 P 2d 420 (Wash 1997) saying not.

<sup>148</sup> See Popkin, above n 130, at 797-801.

<sup>149</sup> 536 US 273 (2002).

<sup>150</sup> Perhaps not surprisingly, though, where there has been a clear finding that an implied right of action exists, a §1983 action will often be available as a supplementary remedy: see *Fitzgerald v Barnstable School Committee* 555 US 246 (2009).

<sup>151</sup> 403 US 388 (1971).

<sup>152</sup> Popin, above n 130, at 802, citing *Correctional Services Corp v Malesko*, 534 US 61 (2001).

<sup>153</sup> Wright & Miller et al, *Federal Practice and Procedure* (2011 update) vol 13A, §3531.6 (3<sup>rd</sup> ed) at 163; the text of the following footnote is from that work.

<sup>154</sup> “All of the justices agreed in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v Curran*, 456 U.S. 353, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982), that it has become appropriate to reduce the former hospitality to implied claims. See 456 U.S. at 374–379, 102 S. Ct. at 1837–1839 (opinion of the Court), 456 U.S. at 399 n. 5, 102 S. Ct. at 1850 n. 5 (Powell, J., dissenting).”

Chemerinsky sums up the situation in this way:

The law in this area is difficult to summarize because there are a great many cases that are not completely consistent either in their methodology or in their results. The trend has been for the Supreme Court to be less willing to create private rights of action.<sup>155</sup>

All the above discussion relates to Federal statutes. It is clear that a State court may also grant a remedy under a State statute without fitting it into the “negligence per se” framework. See, for example, the following comments from a recent decision of the Illinois Appellate Court:

Four factors are to be considered in determining whether a private right of action may be implied from a statute:

“Implication of a private right of action is appropriate if: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff’s injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute.” *Fisher v. Lexington Health Care, Inc.*, 188 Ill.2d 455, 460, 243 Ill.Dec. 46, 722 N.E.2d 1115, 1117–18 (1999).

Courts will imply a private remedy where a clear need to effectuate the purpose of a statute exists. *Abbasi v. Paraskevoulakos*, 187 Ill.2d 386, 393, 240 Ill.Dec. 700, 718 N.E.2d 181, 185 (1999).<sup>156</sup>

Nevertheless, where the doctrine of negligence *per se* is available, litigants at the State level may prefer to rely on that, which (as noted above) does not at the moment involve an investigation of legislative intent.

### III. General Issues

There are a number of general matters that arise from the preceding review.

#### A. *Methods of Statutory Interpretation*

One set of issues has to do with statutory interpretation. The question to what extent courts may find a Congressional intent when it has not been explicitly spelled out, is fundamentally linked to the controversial issues that continue to arise in US Constitutional jurisprudence about the “original meaning” of the text of the Constitution, and the appropriate role of judges in statutory interpretation.

Eskridge et al, for example, describe in some detail a shift in techniques of statutory interpretation during the 20<sup>th</sup> century.<sup>157</sup> The “Legal Process Era” from 1940-1973 saw a time when the legal system as a whole was seen as being shaped by each of the participants, and where courts were justified in furthering what they saw as legislative

<sup>155</sup>E Chemerinsky, *Federal Jurisdiction* (5<sup>th</sup> ed, Wolters Kluwer, 2007) §6.3 at 393-394.

<sup>156</sup> *Citizens Opposing Pollution v. ExxonMobil Coal U.S.A.*, 404 Ill. App. 3d 543, 556, 936 N.E.2d 181, 193 (Ill. App. Ct. 2010); note that leave to appeal has been granted by the Illinois Supreme Court, 239 Ill. 2d 551, 943 N.E.2d 1099 (2011), but at the time of writing the appeal has not been heard.

<sup>157</sup> W N Eskridge Jr, P P Frickey & E Garrett *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (4<sup>th</sup> ed; Thomson, 2007).

purpose in the way they read statutes.<sup>158</sup> However, a shift seemed to take place in the 1970's and 1980's into an era of what has been called the "New Textualism", stressing the need, on "separation of powers" and "institutional competency" grounds, for courts to pay close attention to what statutes actually say, and to move away from the temptation to imply rights and duties.<sup>159</sup> The most prominent judicial voice in this movement is, of course, Justice Scalia.<sup>160</sup> While there is an ongoing debate about whether the theory of "textualism" is still authoritative or not,<sup>161</sup> there is no doubt that it has had a significant influence on the way that US courts approach statutes.

The intense debates about statutory interpretation techniques conducted in the United States have not really been replicated in the Commonwealth. Of course there are differences of opinion over interpretation, and sometimes those differences have been very stark.

For example, the decision of the High Court of Australia in *Commissioner of Taxation v Ryan* [2000] HCA 4, (2000) 201 CLR 109 involved the expiry of a "limitation period" after which a taxpayer's return could not be revised by the Taxation Office. Section 170(3) of the *Income Tax Assessment Act 1936* (Cth) provided:

Where a taxpayer has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an **assessment is made** after that disclosure, no amendment of the assessment increasing the liability of the taxpayer in any particular shall be made after the expiration of 3 years from the date upon which the tax became due and payable under that assessment." [emphasis added]

The majority of the High Court found that a notice (despite being labeled "assessment"), that specified a zero amount of money due, was not within the terms of the Act an "assessment". Kirby J in dissent registered outrage at what he saw as "literalistic" reading of the legislation that paid no attention to the overall purpose of the provision. He commented that:

[61] [T]here is an alternative construction of the relevant provisions of the Act. That construction is to be preferred because it promotes the purpose for which the Parliament enacted s 170(3). It avoids the bizarre and clearly unjust consequences which would flow from the construction urged for the Commissioner.

Despite this occasional tension, overall it seems that the High Court of Australia today is happy to describe the authoritative approach to interpretation as one which both pays high respect to the words that Parliament has used, but also is prepared where necessary to apply the "purposive" approach of considering what Parliament intended.<sup>162</sup>

<sup>158</sup> They cite as an example *Moragne v States Marine Lines, Inc* 398 US 375 (1970) where the Supreme Court was prepared to develop the law of compensation to seamen to provide an action for wrongful death which had not been explicitly given in the Jones Act, 46 USC §688.

<sup>159</sup> See Eskridge et al, above n 157 at 765 ff.

<sup>160</sup> See A Scalia, *A Matter of Interpretation* (Princeton, 2007).

<sup>161</sup> Eskridge et al, above n 157 at 793, citing eg J Molot, "The Rise and Fall of Textualism" (2006) 106 *Colum L Rev* 1.

<sup>162</sup> For example, in one of the most controversial decisions of the Court in recent years, *Plaintiff M70/2011 v Minister for Immigration and Citizenship; Plaintiff M106 of 2011 v Minister for Immigration and Citizenship* [2011] HCA 32 (31 August 2011) the Court by majority ruled that a Ministerial decision to expel unauthorized entrants to Australia to Malaysia, pursuant to an agreement with that country, was

### ***B. Negligence Per Se and Implied Rights of Action- comparison***

How does the US law on “implied rights,” then, relate to the law on negligence *per se*? Sherman’s perceptive article points out how similar the two questions of “implied right of action” (from Federal statutes) and “negligence per se” (as an issue of State law) are in fact.<sup>163</sup> One may note, as has been done above, that *both* doctrines have their roots in the common law BSD jurisprudence. But as Sherman notes, in states where the “majority” NPS approach is in place (a breach of the statutory standard is automatically a breach for the law of negligence) the courts have “retained, in large part, the doctrine of implied remedies which existed at common law”.<sup>164</sup> He goes on to suggest that they have “replac[ed] the duty and breach elements of negligence with the concept of statutory violation”.

This remark brings out something that was noted previously. The classic statements of the majority position simply refer to the *breach* standard being replaced. But when it is noticed that a pre-condition for this happening is that the statute be designed to protect a person in the situation of the plaintiff, what we have in effect is also a replacement of the *duty* issue. If this judgment is made about the statute, then we are in effect finding that a duty to obey the statute (the equivalent of a general “duty of care”) is owed to the plaintiff.<sup>165</sup>

Once this is realized, then, as Sherman says, “it is difficult to distinguish the cause of action for negligence *per se* from an implied cause of action”.<sup>166</sup> If the statute in question is a federal statute, “[t]he effect is exactly the same as it would be if a state court determined that an implied right of action was created by a federal statute”.<sup>167</sup>

Similarly, Stabile comments (in the context of discussing negligence per se cases applying federal statutory standards):

Although the negligence per se claim is not the same as an implied cause of action- in the former the cause of action is a state law tort claim, whereas the latter is a federal statutory cause of action- the two claims get the plaintiff to the same place.<sup>168</sup>

One may note, however, that in light of the discussion above of the NPS jurisprudence there will be one major difference: that in finding that there is liability, the State court will have by-passed the question of legislative intention to create civil liability.

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invalid. The issues in the case were fundamentally to do with how the legislation was to be interpreted. Yet all members of the Court were generally agreed as to how to approach the matter: as French CJ put it at [13]: “The Court, however, must look to the text, context and purpose of the relevant statutory provision.” This included, as one of the other majority judgments said at [85] “close attention to the relevant statutory text.” But it also permitted, as a supplement to this, consideration of the broader purposes of the legislation (to allow Australia to accede to international conventions dealing with refugees) and discussion of the “legislative history”- [96].

<sup>163</sup> Sherman, above n 119.

<sup>164</sup> Sherman, above n 119 at 889.

<sup>165</sup> See the quote from Cardozo J in *Martin*, above at n 75: “the duty that one traveler on the highway owes under the statute *to another*” (emphasis added).

<sup>166</sup> *Ibid.*

<sup>167</sup> Perhaps the only difference would arise in states where a large menu of “excused violation” rules were in place, which would not be drawn from the statute.

<sup>168</sup> Stabile, above n 122 at 865 n 19.

Sherman seems to sum the situation up well when he notes:

[T]here has been a radical shift in the approach taken by the Supreme Court toward implied rights of action that has not been mirrored in the state courts. State rules of negligence *per se* and implied causes of action are descended from the old common law concept of implied remedies. However, the federal approach as reflected in *Cort v Ash*, has concentrated on a mixture of legislative intent and federalism issues; the state approach has run the gamut of approaches within the broad rubric of negligence.<sup>169</sup>

The complexity of the whole area can be illustrated by the problem Sherman wrestles with in the final part of his article. Suppose a federal court has ruled that a particular federal statute does not create an implied cause of action. A state court is then asked to decide whether a breach of this statute can be used as the basis for a “negligence *per se*” suit. Should the state court automatically defer to the decision of the federal court? The problem is not simply one of judicial comity, because on the prevailing analysis, the federal court was asked a *different* question to that facing the state court. On current theory, the state court should presumably be free to make up its own mind on the issue.

The obvious solution adopted by the court whose decision is discussed, in *RBJ Apartments v Gate City Savings & Loan Assn*,<sup>170</sup> is criticized by Sherman, as he is correct to do on the current analysis. The *RBJ* court, in holding simply that where there is no implied federal right of action, there can be no state action in negligence *per se*, does indeed “equate implied remedies with negligence *per se*”.<sup>171</sup> One response would be: so they should, and US courts should align the two bodies of law!

## Conclusions

It is hoped that this review of the US law in comparison to, and its development in the context of, the “traditional” common law tort of “breach of statutory duty”, has provided some illumination about features that are common to both systems. In both contexts, where a question arises as to whether a provision of a statute provides a civil remedy, the courts will address important questions as to whether the statute in question was designed to protect the interests of the person concerned (rather than simply to be addressed to everyone in the community), and whether the type of harm that it aims to avoid was the type of harm suffered by the plaintiff. Cases from each system on specific statutes may illuminate decision-making in the other system where similar issues arise.

But it has also been concluded that there are some genuine difficulties and conceptual problems with the US law on these issues at the moment, and with some

<sup>169</sup> Sherman, above n 119 at 888-889. A question which is beyond the remit of this paper is also raised of the appropriate venue for determination of civil liability under Federal law. In the US Federal system this matters because there is a limited jurisdiction enjoyed by the Federal courts, and it becomes important to know whether determination of the issue is a “federal issue”. Sherman, above n 119 at 884 ff discusses *Merrell Dow Pharmaceuticals Inc v Thompson* 478 US 804 (1986), where the ultimate finding was that it was not a matter of “federal jurisdiction” for a state court to be asked to apply a federal statute in a negligence *per se* case. (Hence the case could not be removed from a state court into a federal court.) The majority concluded that because there was no direct implied remedy under the Act, it was not a matter of “federal jurisdiction”, and hence the case could continue in a State court.

<sup>170</sup> 315 NW 2d 284 (ND 1982).

<sup>171</sup> Sherman, above n 119, at 900.

diffidence it is suggested that US lawmakers should consider seriously whether a better approach is possible, taking into account the solutions reached by common law courts around the Commonwealth on the BSD action.

In the area of “**negligence *per se***” actions, the approach that is taken in the majority of States follows the guidance given by the influential Cardozo J in *Martin v Herzog*, of treating the statutory breach as part and parcel of a negligence action, rather than a separate civil action. While this approach opens up the possibility of a wide range of claims by victims of harm, it has been the subject of a number of convincing critiques.<sup>172</sup> Perhaps the key issue is the fact that nowhere in the judgment in *Martin* is there any consideration of whether the legislator intended the statutory standard to be applied *as part of a civil action* in this way. The fact that application of statutes to civil claims is then opened up so widely, has led to both the appearance of injustice in those few cases where a defendant has been held liable for a large award of damages based on breach of a fairly “trivial” provision, or more commonly to the fairly unprincipled development of a wide range of judicially crafted “excuses”. This has in turn cut away any hope that the blanket application of statutes as part of the negligence action would create more certainty in comparison to the open-ended “breach” question at common law. Ironically, it has also led to increased institutional tension between the courts and the legislature, as it appears that courts are taking it on themselves, not merely to apply a standard which the legislature has not directed to be applied, but then to arbitrarily dispense with that standard when it seems it will not achieve justice in a particular case.

It is suggested that a return to the model of the Commonwealth BSD action may be a better option.<sup>173</sup> That model requires a decision to be taken at the outset as to whether a particular statute, when considered in light of the range of legislative construction techniques usually applied, “intends” to allow a civil action.<sup>174</sup> The difficulty of making this decision on a statute-by-statute basis is alleviated to a large extent by a course of decisions of the courts where, in effect, interpretative “presumptions” are used to deal with general classes of statute.<sup>175</sup>

If the State negligence *per se* decisions seem from the Commonwealth perspective to be too ready to create civil liability on the basis of statutes, it has to be said that it seems that the (mostly Federal) jurisprudence dealing with “**implied rights of action**” has become far too narrow. The line of decisions noted above, from *Rigsby* through *Cort* and into more recent years, seems correct in holding that the primary question should be that of Congressional intent. But those members of the Supreme Court who are committed to confining the issue of legislative intent to a myopic examination of

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<sup>172</sup> See Leonard (1983), above n 84; Sherman (1992) above n 119; Blomquist (2009) above n 78 and Dobbs (2000) above n 33 .

<sup>173</sup> See Foy (1986) above n 92.

<sup>174</sup> See the quote from Kitto J in *Sovar*, above n 72.

<sup>175</sup> So that, for example, workplace safety statutes are almost always interpreted as giving rise to civil liability unless this is clearly excluded - see a paper on the current state of workplace safety BSD actions in Australia, Neil J. Foster “Private Rights and Public Regulation: Breach of Statutory Duty and Workplace Safety”, presented at the *Conference on "Private and Public Law - Intersections in Law and Method"* (T C Beirne Law School at the University of Queensland, Brisbane; July 21-22, 2011)- available at: [http://works.bepress.com/neil\\_foster/47](http://works.bepress.com/neil_foster/47) . On the other hand, as previously noted, there is a strong Commonwealth tradition of not allowing traffic regulations to be used as the basis for BSD claims- see above, n 49.

only the words used in the confines of the one piece of legislative text, are arguably engaged in an undemocratic process under the guise of furthering democracy and the separation of powers.

The broader Commonwealth approach to legislative interpretation takes into account the fact that every text has a context- not simply the context of its immediate paragraph, or the Act within which it appears, but a context which involves a wider range of factors: the broad reasons for which the Act was passed, the shared community understanding of various concepts, the legal system into which the legislation has been placed (including the “ancillary” rules about liability of other parties, types of remedies, limits on damages, etc), and of course the previous judicial interpretation of this legislation, or of similar legislation. Even the current Supreme Court, of course, has acknowledged this in being prepared to allow implied civil enforcement of legislation that has previously been directly held to be enforceable by the Supreme Court itself.<sup>176</sup>

It is suggested that there are many reasons for the Court to return to a slightly wider vision of what legitimate statutory interpretation involves; to see the judicial task as that of furthering, not cramping by narrow reading, the purposes of Congress in conferring certain rights.

Foy puts it in this way:

But courts do provide remedies for the wrongs that the law defines. Courts do not have to be told to provide these remedies. They do it because they are courts. The idea that courts cannot provide remedies for wrongs defined by law, absent proof of an affirmative legislative intention that they should do so, is at odds with this old-fashioned conception of the judicial function.<sup>177</sup>

It may be hoped that reference to the way courts in the Commonwealth are approaching the issue of statutory civil liability may contribute to an ongoing dialogue to allow this to happen.

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<sup>176</sup> See *Janus Capital Group*, above n 138.

<sup>177</sup> Above, n 92 at 582.

### Excursus- Federal issues in BSD litigation in Australia

This paper raises an interesting question for Australia, which while a Commonwealth country of course has a Federal Constitution. Should an Australian *State* court find that a breach of *federal* legislation is actionable under a BSD analysis? So far the question doesn't seem to have arisen. Perhaps one reason for this is that, as noted, there is "one common law" in Australia, as opposed to the US.<sup>178</sup> So in theory a court of whatever stripe (Federal or State) should probably be applying the same law wherever located in Australia. Hence it would make sense for a State court to hold that, if other elements of the action were satisfied, a BSD claim in relation to Federal law would be available.

However, the State court would still have to address the issue of the "intention" of Parliament - could the Federal Parliament have "intended" that its prohibition create liability in State courts? Arguably so- the relevant intention is to prohibit certain behaviour in favour of a member of a relevant class; the right to have this duty enforceable should probably be seen to be the issue, not the forum.

Perhaps the trickier question is a State court adjudicating on a breach of legislation that was passed by *another* State. While the issue, again, does not seem to have arisen, presumably the court would need to find that on "conflict of laws" principles, the victim was entitled to the benefit of an obligation which actually bound the alleged tortfeasor. The "choice of law" rule for tort actions in Australia since *John Pfeiffer Pty Ltd v Rogerson*<sup>179</sup> is that the "place of the tort", the *lex loci delicti*, governs substantive rights and obligations. So it would seem to make sense that a court in one State would be happy to apply a statutory obligation that was imposed on a wrongdoer under the law of another State where the wrongdoer was present.

Another "federal" issue in Australia is that which seems to have been hinted at in *Byrne and Frew*<sup>180</sup> - if there is a Constitutional separation of powers, then how can a court in the judicial branch create liability based on a statute passed by the legislative branch (noting that in Australia it is not a breach of separation of powers for the Executive to pass regulations)? Gummow & McHugh JJ commented in that case:

The result would have to be that there was "arising under" a law "made by the Parliament", in the sense of s 76(ii) of the Constitution, a new species of "matter". However, where a question arises as to the creation of new rights and liabilities which will engage Ch III of the Constitution, it is to be expected that the Parliament will clearly state its will.<sup>181</sup>

The short answer to this is presumably this: that common law courts in ruling on an actionable BSD are in theory not at all legislating- they are merely spelling out the necessary implication of what Parliament has said, that a right given by Parliament can be acted on in civil proceedings. (This would preclude the view that is sometimes expressed in US academic writing, however, that the courts have "authority" to decide what statutory standard should be applied separate from any question of legislative intent.)<sup>182</sup>

<sup>178</sup> *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 203 CLR 503at [15].

<sup>179</sup> [2000] HCA 36; 203 CLR 503.

<sup>180</sup> Above, n 23.

<sup>181</sup> Above, n 23 at 203 CLR 458 (some footnotes omitted).

<sup>182</sup> It should be noted that comments about the Federal complications of the BSD analysis were made by the High Court of Australia in *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410 {at para

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[104] n 146 citing comments of Scalia J in dissent in *Pennsylvania v Union Gas Co* [1989] USSC 116; 491 U.S. 1 about “plumbing the intent” of Congress}, and in *Slivak v Lurgi (Australia) Pty Ltd* [2001] HCA 6; 205 CLR 304 {at [28] n 12 citing comments of Scalia J in *Thompson v Thompson* [1988] USSC 4; 484 US 174 at 192.} It will be noted that some members of the High Court at this stage seem to have been heavily influenced by the approach to statutory interpretation adopted by Justice Scalia. Whether this approach will be pursued in the future is not clear.