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The neglected tort — Breach of statutory duty and workplace injuries under the Model Work Health and Safety Law

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The tort of 'breach of statutory duty' (BSD) operates at the intersection of private and public law by providing a civil remedy for those whose injuries were sustained as a consequence of a statutory breach. One of the areas where the tort has clear relevance is the area of work health and safety, with the courts almost invariably holding that the breach of a statute primarily designed to protect workers from injury will provide them with a civil remedy as well as having criminal law consequences. The tort continues to be recognised in this area at the highest judicial level in most common law jurisdictions, including Australia. Despite judicial recognition, the BSD action has been neglected by practitioners and criticised by some academics. This article argues that BSD should be revisited and restored to the lawyers' toolkit as a viable alternative action for compensation for some work health and safety injuries. In the past 25 years, the law of work health and safety in Australia has undergone a number of dramatic shifts culminating in the introduction of national model legislation in most Australian jurisdictions in 2012. The article also examines the impact of the introduction of harmonised model legislation on the BSD tort.

Introduction

The tort action for breach of statutory duty (BSD) provides one of the classic 'intersections' between private and public law. It provides a civil remedy to a claimant who has been injured as a result of a breach of a public statute. While its relevance as a modern tort has been questioned in recent years, one area where its continued operation is usually conceded (even by its most ardent critics) is in the sphere of work health and safety (WHS) law.

The purpose of this article is to examine how the tort has been utilised in recent workplace injury cases in various Australian jurisdictions. It will also assess its potential to survive as a viable tort action for seriously injured workers in the context of the model Work Health and Safety Act (WHS Act) adopted by most of the Australian state jurisdictions.¹ The judicial determination of the occurrence of a statutory breach where the regulatory

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¹ See further n 20 below. Where specific references are made to the WHS Act, they should be assumed to be to the Work Health and Safety Act 2011 (NSW) unless otherwise noted or the context otherwise indicates; but there is so far very little divergence between the versions adopted by those jurisdictions which have done so.

standard is informed by the non-prescriptive ‘risk management’ approach is also analysed.²

The tort action for BSD has been neglected by many Australian practitioners and criticised by academics for some years. Academic attacks have focused on the unpredictability of the tort, arguing that similar fact situations often lead to different results. However, an examination of cases cited to support this criticism reveals that this conclusion has been overstated.³ The reasons for BSD’s unpopularity and neglect are not clear. It might be linked with a phenomenon that has recently been noticed — a reluctance on the part of common law trained lawyers to analyse legislative provisions.⁴ Practitioner neglect may also have its origins in the pre-‘insurance crisis’ era, when the tort of negligence seemed to be adequate to cover the field and its ‘imperial march’ disposed of various alternative actions.⁵ For academics who prefer the neat ‘taxonomy’ of private law under its various components, the complexity introduced by statutes may seem overwhelming and intellectually untidy.⁶ The task of teaching law subjects in decreasing time frames may provide another reason why BSD has either been dropped completely or is only given token attention in the torts law curriculum.

Despite its neglect in the tort curriculum and general civil practice, BSD has continued to be utilised in the field of WHS injuries by well-informed and experienced practitioners. While it is most commonly pleaded together with common law negligence, there are a number of decisions where liability for BSD has been made out even in the absence of a finding of negligence. For example, the Victorian Court of Appeal in *Veljanovska v Verduci*⁷ rejected an appeal from a jury finding that dismissed a negligence claim, but upheld the appeal for BSD based on the same facts. The court commented:

2 A more detailed analysis would be possible, as noted below, by reference to a large body of UK decisions applying the risk management model to civil liability. This analysis could be based on the judicial approach prior to the commencement of the Enterprise and Regulatory Reform Act 2013 (UK), which amended s 47 of the Health and Safety at Work etc Act 1974 (UK) to remove the availability of a BSD action in relation to WHS Regulations. Such an analysis is beyond the scope of the current article, although it does illustrate the point made below that, unless specific exclusionary decisions are made, WHS law will normally provide a civil action.

3 See N Foster, ‘The Merits of the Civil Action for Breach of Statutory Duty’ (2011) 33 *Syd LR* 67.

4 See the trenchant criticisms of this approach in M Leeming, ‘Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room’ (2013) 36 *UNSWLJ* 1002; see, eg, at 1002: ‘statutes are an under-appreciated component in the academic literature on the Australian legal system’. See also K Barker, ‘Private Law: Key Encounters with Public Law’ in *Private Law: Key Encounters with Public Law*, K Barker and D Jensen (Eds), Cambridge University Press, Cambridge, 2013, at p 6.

5 See Brennan J in *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 570; 120 ALR 42; 68 ALJR 331; BC9404607, who referred to the ‘imperial expansion’ of the law of negligence absorbing other torts, such as in that case (according to the majority, though not according to Brennan J himself) the *Rylands v Fletcher* tort. Later references to the concept often use the phrase ‘imperial march’: see, eg, *Astley v Austrust Ltd* (1999) 197 CLR 1; 161 ALR 155; 73 ALJR 403; BC9900546 at [48].

6 Cf Leeming, above n 4, at 1003–4.

7 [2014] VSCA 15; BC201400614.

While there will be cases where it can be said that the establishment of a breach of a manual handling regulation causing injury must, on the relevant facts, also lead to the conclusion that the relevant defendant was negligent, this is not one of those cases . . . [A] duty expressed in [the terms set out in the relevant regulation] sets a higher standard than that required by an employer to discharge his or her obligation to take reasonable care in respect of the safety of an employee.⁸

The court also cited its previous decision in *Pasqualotto v Pasqualotto*⁹ as support for the proposition that a finding of BSD may be made consistently with a finding of ‘no negligence’.

The decision of the UK Supreme Court in *McDonald v National Grid Electricity Transmission plc*¹⁰ is another example of an appellate court ruling that a civil statutory action may be successful even if a negligence claim is not made out. Mr McDonald claimed compensation for lung disease resulting from exposure to asbestos at a power plant in the 1950s. He was a lorry driver for a company that collected pulverised fuel ash as a by-product of the power plant operations. The part of the plant where the fuel ash was collected did not contain asbestos. However, while waiting for his load to be prepared, Mr McDonald also visited other areas of the plant where asbestos dust was generated as a result of the use of asbestos powder in a mix to ‘lag’ pipes. His claim against his employers in common law negligence was not successful at trial or on appeal, as he failed to establish that his limited exposure to asbestos created a foreseeable risk at the time.¹¹ However, a claim against the ‘occupier’ of the power plant based on BSD for breach of the Asbestos Industry Regulations 1931 (UK) reg 2(a) was successful in the Court of Appeal.¹² The Supreme Court dismissed an appeal by the occupier, with the majority supporting a broader proactive interpretation of the regulations giving effect to the need to protect all workers, including visitors.¹³ This approach can be contrasted with the minority judgment, which focused on a narrower technical construction of the regulations in light of their ‘penal’ nature.¹⁴

The possible availability of a BSD action in relation to a WHS injury expands the situations where liability may be established. The elements of the BSD action may make a claim easier to establish than in negligence and this greatly increases the chances that the claim will settle in a way that advantages an injured worker. This does not mean that BSD provides a universal panacea for the problems associated with seeking compensation for WHS injuries. The statutory monetary limits and thresholds applying to a negligence claim by an employee against an employer will usually also apply to a BSD claim arising out of the same circumstances.¹⁵ However, where the person controlling the workplace is not the employer of the injured worker, a BSD claim may be

8 Ibid, at [28] per Osborn and Beach JJA and Sifris AJA.

9 [2013] VSCA 21; BC201300597 at [216].

10 [2014] All ER (D) 257 (Oct); [2015] 1 All ER 371; [2014] 3 WLR 1197; [2014] UKSC 53 (*National Grid Electricity Transmission*).

11 *McDonald v Department for Communities and Local Government* [2014] PIQR P7.

12 Ibid, at [99]–[101] per McCombe LJ and [119] per Lord Dyson MR.

13 *National Grid Electricity Transmission*, above n 10, at [66] per Lord Kerr. Also note the comments of Baroness Hale at [101].

14 Ibid, at [158] per Lord Reed, Lord Neuberger concurring.

15 See, eg, Workers Compensation Act 1987 (NSW) s 151E(1), which applies its limiting

more likely to succeed and more worth making than a claim in negligence.

The article begins by providing a brief overview of the current regime for WHS law in most Australian state jurisdictions. It then explains how the most contentious elements of the tort have been applied in the context of BSD claims relating to WHS laws. This review of Australian case law underpins the argument that academics and practitioners should pay greater attention to BSD, particularly in relation to WHS injury claims.

The evolution of Workplace Health and Safety Law in Australia

Early WHS laws in Australia adopted a prescriptive approach to regulation and focused either on particular places (such as ‘factories’) or particular types of work (such as ‘construction work’).¹⁶ These laws created criminal liability for failure to take specific precautions in the workplace, and were administered and enforced by a specialist body of inspectors.

In the 1980s, each of the Australian states adopted new WHS laws mirroring the United Kingdom’s law reforms and following the recommendations of the 1972 Robens Report.¹⁷ The Robens Report recommended a less prescriptive model of WHS regulation in all workplaces based on the application of a generalised duty of care to various workplace participants and increased worker consultation. The legislative model was reviewed by most states in the late 1990s or early 2000s to augment a risk management approach to health and safety regulation, and to introduce detailed regulations and codes of practice to support the risk management framework.¹⁸

The latest development in Australia has been the national harmonisation of WHS laws. As the Commonwealth Constitution does not provide a specific legislative head of power dealing with this area, it has always been regarded as a matter for each state. While it could be argued that the Commonwealth has some power to pass national legislation on WHS using the ‘corporations’ power, the various governments have opted for ‘co-operative federalism’ based on the adoption of an agreed uniform model WHS Act.¹⁹ Legislation

provisions to claims based on ‘negligence or other tort of the worker’s employer’, which will sweep up BSD claims as well as those based on the tort of negligence. More detailed comment on the application of the limits imposed by the Civil Liability Act 2002 (NSW) (CLA) will be found below.

16 For a slightly more detailed overview of these developments, see N Foster ‘Breach of Statutory Duty and Risk Management in Occupational Health and Safety Law: New Wine in Old Wineskins?’ (2006) 14 *Tort L Rev* 79 at 87–8.

17 Committee on Safety and Health at Work, chaired by Lord Robens, *Safety and Health at Work: Report of the Committee, 1970–1972*, Cmnd 5034, Her Majesty’s Stationery Office, London, 1972 (Robens Report).

18 For example, in NSW, the Occupational Health and Safety Act 1983 (NSW), later replaced by the Occupational Health and Safety Act 2000 (NSW); in Queensland, the Workplace Health and Safety Act 1989 (Qld), later replaced by the Workplace Health and Safety Act 1995 (Qld).

19 Following an election commitment by the incoming Federal Labor government in 2007, and two reports of a national occupational health and safety review in 2008 and 2009. For copies of the reports and of the intergovernmental agreement on the issues, see Safe Work

commenced in most jurisdictions on 1 January 2012.²⁰

Elements of BSD and the WHS Act

Fleming's The Law of Torts 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.²¹

This summary of the elements of the action has since been judicially adopted in *Alcoa of Australia Ltd v Apache Energy Ltd*.²²

This section of the article will focus on the first two elements of the BSD tort and provide an analysis of recent decisions in various state jurisdictions involving the application of previous WHS legislation. The analysis then considers how these decisions might impact on future BSD claims under the WHS Act. The final part of the article briefly addresses some issues arising under the element of 'breach'.

Intention of parliament

The preliminary question in any application of the BSD tort is whether it can be plausibly said to have been the intention of parliament to allow a civil action where the statutory provision is breached. Sometimes this is spelled out clearly in the positive, as, for example, it is in s 236 of the Australian Consumer Law:²³

- (1) If:
 - (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
 - (b) the conduct contravened a provision of Ch 2 or 3;

Australia, *Model WHS laws: Harmonisation — Background*, at <<http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/background/pages/background>> (accessed 4 April 2015).

²⁰ For an overview of the status of adoption of the legislation as at 1 January 2012, see N Foster, *Workplace Health and Safety Law in Australia*, LexisNexis Butterworths, Chatswood, 2012, [7.15]–[7.18]. Since then, South Australia has also passed its version of the law, on 1 November 2012. Of the nine Australian jurisdictions, the WHS Act commenced on 1 January 2012 in five (Queensland, New South Wales, the Australian Capital Territory, the Northern Territory and the Commonwealth), on 1 January 2013 in two (Tasmania and South Australia), and has not (at the time of writing) been adopted by Western Australia or Victoria.

²¹ C Sappideen and P Vines (Eds), *Fleming's The Law of Torts*, 10th ed, Lawbook Co, Pyrmont, 2011, p 424.

²² [2012] WASC 209 at [80] per Le Miere J. See also *Matton Developments Pty Ltd v CGU Insurance Limited (No 2)* [2015] QSC 072; BC201502597 at [261].

²³ The Australian Consumer Law is contained in Sch 2 to the Competition and Consumer Act 2010 (Cth).

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

On the other hand, parliament may make it clear that it does *not* intend to allow a separate BSD action. An example can be seen in s 32(1)(a) of the former NSW Occupational Health and Safety Act 2000 (OHS Act):

Nothing in this Part is to be construed . . . as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of this Part.

It is important to note that this express limitation was confined to Pt 2 of that Act (which contained the ‘general duties’ of employers, self-employed persons, occupiers and manufacturers); it did not prevent civil action being taken in relation to other parts of the Act or under the regulations.²⁴

Parliament may have taken the view that to allow a civil action for breach of these general duties would simply duplicate the duty of care contained in the law of negligence, although there is an interesting question as to whether this was the case. Under the NSW legislation as it stood until 7 June 2011, the explicit duty was expressed in ‘absolute’ terms. For example, s 8 of the OHS Act read: ‘an employer *must ensure* the health, safety and welfare at work of all the employees of the employer’. In a criminal prosecution under the legislation, the onus of proof lay with the accused employer to establish the defence of ‘reasonable practicability’ under s 28 of the Act. This defence was effectively equivalent to the question of ‘reasonable care’ at common law. However, as we will see below, it is possible that a court might have ruled that the s 28 defence could not have been used in a civil action based on s 8, were such possible. If so, a *civil* action based on the ‘general duties’ provisions would have brought many benefits to an employee seeking compensation.

It is not clear whether this was a reason for parliament’s exclusion of former Pt 2 duties from the BSD action or not. In any event, the discussion is moot in relation to events occurring after 7 June 2011. Between the commencement on 7 June 2011 of the Occupational Health and Safety Amendment Act 2011 (NSW) and 1 January 2012, when the WHS Act commenced, each of the general duties provisions was directly qualified by the words ‘so far as is reasonably practicable’. There seems no doubt that this was intended to effectively equate the statutory duties with the law as to breach in a common law negligence action. From 1 January 2012, the general duties in the Work Health and Safety Act 2011 (NSW) are also all qualified by the phrase ‘reasonably practicable’. And, as will be noted below, none of the provisions of the Act itself (as opposed to the regulations made under that Act) can in any event be used as a direct basis for a BSD action.

In the context of the WHS Act, parliament has expressed its intention *not* to allow a separate BSD action in relation to *any* of the provisions of the Act in s 267(a):

nothing in *this Act* is to be construed as: (a) conferring a right of action in civil proceedings in respect of a contravention of a provision of this Act (emphasis added).

24 See OHS Act s 32(2).

However, in s 267(c) it is made clear that its intention to limit civil actions *does not* extend to the model regulations made under the WHS Act (WHS Regulations), where it states that the Act is not to be taken as:

affecting the extent (if any) to which a right of action arises, or civil proceedings may be taken, with respect to breaches of duties or obligations imposed by *the regulations* (emphasis added).

In the Australian Capital Territory and Queensland, the effect of s 267 of the WHS Act is to expressly restore the right to a BSD action for breach of the WHS Regulations, where such a right had arguably been removed under previous legislation.

In *Edwards v Woolworths Ltd*,²⁵ Master Harper held that civil actions under the Occupational Health and Safety Act 1989 (ACT), and also under the regulations made under the Act, were excluded by s 223. The fact that this was applicable to the regulations was said to flow from s 104 of the Legislation Act 2001 (ACT), which provides that ‘a reference to an Act includes a reference to statutory instruments made under the Act’.²⁶ It could be argued that an implication from general interpretative legislation ought not to override the usual presumption of actionability in this area, although there was some legislative history noted in this particular case that provided stronger grounds for this decision.²⁷

Section 37A of the Workplace Health and Safety Act 1995 (Qld) explicitly removed civil BSD actions in relation to at least some of the provisions of the Queensland legislation. The amendment was introduced by s 44 of the Workers’ Compensation and Rehabilitation and Other Legislation Amendment Act 2010 (Qld).²⁸ The Explanatory Notes issued in relation to this provision were ambiguous on this point:

While the amendment removes a worker’s right of action under the [Act], it does not affect any other cause of action the worker may have in relation to his or her injury, such as a breach of a duty of care in tort (negligence) or contract.²⁹

It might still have been open to argue that ‘any other cause of action’ might have been an action for BSD based on the regulations, especially as the regulations were not explicitly mentioned.

In the absence of explicit statutory exclusions of the sort noted above, the historical treatment of WHS legislation in common law jurisdictions is to allow a civil action based on such laws and regulations. The impact of the seminal High Court decision of *O’Connor v SP Bray Ltd*³⁰ was summarised in the decision of *Byrne v Australian Airlines Ltd*:

25 (2009) 226 FLR 459; 178 IR 239; [2009] ACTSC 4; BC200900328 at [15].

26 Note that from 1 July 2009 there was newer legislation in the Territory, the Work Safety Act 2008 (ACT), but s 225 of that Act was in the same terms as s 223 of the previous Act, so presumably the situation as to civil liability was unaltered.

27 See *Edwards v Woolworths Ltd*, above n 25, at [13]–[14], referring to former s 95 of the ACT legislation, which explicitly excluded actions based on the regulations.

28 Effective from 1 July 2010.

29 Explanatory Notes, Workers’ Compensation and Rehabilitation and Other Legislation Amendment Bill 2010 (Qld), State of Queensland, 2010, at 18.

30 (1937) 56 CLR 464 at 478; [1937] ALR 461; (1937) 11 ALJR 29; BC3700027.

One generalisation that can be made is that where the persons upon whom the statutory obligation is imposed are under an existing common law duty of care towards the persons whom the statute is intended to benefit or protect, the statutory prescription of a higher or more specific duty of care may, in the absence of any indication of a contrary intention, properly be construed as creating a private right.³¹

As noted, though, some legislation (including the current WHS Act) treats obligations created under statute differently from obligations created by regulations.

The implications of the bifurcation of civil liability between the head statute and the subsidiary regulations under the WHS Act are best considered in the context of the former NSW provisions, which, as noted above, also excluded 'general duties' actions under the head legislation but allowed such action under the regulations.³² To make it clear that the executive might choose to exclude some regulations from being actionable, s 39A of the NSW OHS Act 2000 provided:

The regulations may provide that nothing in a specified provision or provisions of the regulations is to be construed:

- (a) as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of the provision or provisions, or
- (b) as conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings, but the failure of the regulations to so provide in respect of a provision is not to be construed as conferring such a right of action or defence.

The effect of this provision seems reasonably clear, given the interpretative background already noted. Section 39A was not a general exclusion of civil liability under the regulations; instead, it allowed the NSW government to make regulations exempting *specific* regulations from being a source of a civil action for breach of statutory duty. There was a passing comment on s 39A by Basten JA in *Fox v Leighton Contractors Pty Ltd*³³ rejecting the suggested view that it 'precludes civil liability by a breach of the regulations'.³⁴

However, there were some curious comments about the effect of former s 39A made in the decision in *Minogue v Rudd*.³⁵ This case involved a worker falling through a loose board in a house that was being constructed at the time of the incident. While the case mostly seems to have been resolved against the plaintiff because he could not prove how his fall occurred, Adamson J also considered whether cls 36 or 39 of the Occupational Health and Safety Regulation 2001 (NSW) (OHS Regulation) might be used as the basis for a BSD action. In doing so, her Honour referred to the High Court decision of *Leighton Contractors Pty Ltd v Fox*³⁶ and made the following comments:

31 (1995) 185 CLR 410 at 424; 131 ALR 422; 69 ALJR 797; BC9506439.

32 Occupational Health and Safety Act 2000 (NSW) s 32(2).

33 (2008) Aust Torts Reports ¶81-937; 170 IR 433; [2008] NSWCA 23; BC200801334.

34 *Ibid*, at [36]. The later High Court reversal of this decision made no substantive comment on the BSD issues.

35 [2012] NSWSC 305; BC201202047.

36 (2009) 240 CLR 1; 258 ALR 673; [2009] HCA 35; BC200908002.

Section 39A, which was inserted into the OHS Act by the Workers Compensation Legislation Amendment Act 2003, relevantly commenced on 1 August 2003. The relevant legislation was summarised by the High Court in the footnote³⁷ as follows:

‘Section 32(1) of the Occupational Health and Safety Act 2000 (NSW) provides that nothing in Pt 2 is to be construed as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of any provision of Pt 2; s 46(2) provides that a person is not liable to any civil or criminal proceedings by reason only that the person has failed to observe an approved industry code of practice. [Section 39A of the Act] makes *provision for the regulations to provide* that nothing in a specified provision or provisions of the regulations is to be construed as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of the provision or provisions but that *the failure of the regulations so to provide is not to be construed as conferring a right of action . . .*’ (emphasis added).

Section 39A remained in force until 30 June 2005 when it was repealed by the Statute Law (Miscellaneous Provisions) Act 2005. Accordingly it was in force at the time of the plaintiff’s accident. I reject the plaintiff’s submission that he has a private action based on breach of statutory duty in respect of Regulation 39. It is not open to the plaintiff in light of s 39A of the OH&S Act.³⁸

As there was nothing expressed in the regulations generally, or anything specifically said in cl 39, to exclude a civil action in respect of a contravention of that particular clause, it is suggested that the conclusion reached by her Honour is not supported by the High Court decision in the *Leighton Contractors* case. As the passage quoted from the High Court accurately notes, ‘s 39A makes *provision for the regulations to provide*’ that ‘specified’ regulations will not give rise to civil liability. It does *not* provide that none of the regulations will do so and clearly leaves it up to the judiciary to ascertain, in accordance with general principles, the relevant parliamentary intention in relation to the clause under consideration.³⁹

The drafting of s 39A suggests that its purpose was to allow room for rare situations where civil liability for breach of a specific regulation might have been potentially so large or so inappropriate that it should be expressly ruled out. This view is strongly supported by the fact that there was only ever one regulation expressly made pursuant to s 39A. Clause 175E(2) of the OHS Regulation exempted the operators of ‘major hazard facilities’ from civil liability in relation to a breach of their duty under cl 175E(1) to ensure that all persons (including members of the public) are not exposed to risks to their health and safety arising from a major accident occurring at the facility.⁴⁰ There were no doubt seen to be good policy reasons for exempting major hazard facility operators from what would potentially have been ‘no-fault’ liability for possible explosions.

While it seems clear that, even in the absence of a precise analogue to former s 39A, there would be power to provide for a specific exclusion of one

³⁷ Ibid n 60.

³⁸ *Minogue v Rudd*, above n 35, at [73]–[74].

³⁹ It has to also be said that her Honour’s assertion that s 39A was repealed in 2005 is completely unsupported by fact. Section 39A remained in force until the whole NSW OHS Act was repealed as from 1 January 2012 by the Work Health and Safety Act 2011.

⁴⁰ This clause was contained in Pt 6B, inserted by the OHS Amendment (Major Hazard Facilities) Regulation 2008 (NSW) cl 2.

or more regulations from civil liability, no such provisions seem at first glance to have been included in the WHS Regulations.⁴¹ Whether or not a civil action may be based on the provisions of the regulations is not specified by parliament, but is to be left open to the courts in interpreting the law in accordance with long-established principles.

The NSW courts have held over a number of years that the former regulations created civil liability. There is a strong case for arguing that this will continue under the WHS Regulations. There have been, for example, a number of NSW District Court cases where the provisions of the OHS Regulation were relied on for a BSD action. In *Macey v Macquarie Generation*,⁴² it was held that a BSD claim would lie under cl 34–6 of the OHS Regulation. In *Irwin v Salvation Army (NSW) Property Trust*,⁴³ there was an excellent analysis by Hungerford DCJ, holding that, in general, a BSD claim was available in relation to the OHS Regulation.

At the NSW Supreme Court level, in *Sujuk v Ilvari Pty Ltd*,⁴⁴ while the application of the regulations to the facts was denied, it was generally accepted that the regulations were actionable.⁴⁵ The availability of such a claim was also generally assumed in the Court of Appeal in *Estate of Mutton v Howard Haulage Pty Ltd*.⁴⁶ However, while Spigelman CJ accepted the availability of a civil action, and Hodgson JA did not question it, Ipp JA remarked:

The respondent conceded at trial and on appeal that a breach of cl 45(a) gave rise to a civil cause of action. It is inappropriate to examine whether that concession was properly made and I proceed on the assumption that it was correct. I would merely note that it is arguable that where a criminal penalty is imposed and there is no express reference to a private civil cause of action, an inference may be drawn that the statute did not intend to confer such a private cause of action: see Halsbury's Laws of Australia (Sydney: LexisNexis Butterworths, 2007) at [415-1365] and the cases cited therein. That would particularly be the case where an absolute obligation is imposed with which it might not be reasonably practicable to comply.⁴⁷

This comment, with respect, runs contrary to the extensive history of criminal industrial health and safety statutes being used as the basis of BSD actions, and certainly did not form part of the ratio of the decision of the court.

There was a more recent comment by Master Harper in *Fischetti v Classic Constructions (Aust) Pty Ltd and Vero Insurance Ltd*⁴⁸ in the ACT Supreme Court that may cause some doubt about the BSD actionability of regulations made under the WHS Act:

41 For example, the obligation imposed on a licensed operator of a major hazard facility under the WHS Regulation cl 566 to 'implement risk control measures' to avoid a major incident occurring would seem to be one that might be sued on as a matter of civil liability if not complied with.

42 (2007) 168 IR 292; 6 DCLR (NSW) 45; [2007] NSWDC 242; BC200740397 at [57] (*Macey*).

43 (2007) 168 IR 292; 6 DCLR (NSW) 45; [2007] NSWDC 242; BC200740397 at [104]–[108].

44 [2010] NSWSC 354; BC201005076.

45 *Ibid*, at [189]–[205].

46 [2007] NSWCA 340; BC200710677 (*Mutton*).

47 *Ibid*, at [210].

48 [2013] ACTSC 210; BC201313721 (*Fischetti*).

A failure to comply with the Regulation is pleaded as a particular of negligence, rather than the independent tort of breach of statutory duty. The latter tort is not available — the Occupational Health and Safety Act 1989 provided to that effect: see now Work Health and Safety Act 2011, s 267.⁴⁹

The comment, as well as being *obiter* (in fact it seems from the report that BSD was not even pleaded) is clearly not correct. The ACT situation under the 1989 Act was discussed previously.⁵⁰ As explained above, there are reasons to question the interpretation of s 223 of the 1989 Act in *Edwards v Woolworths Ltd*.⁵¹ But regardless of whether or not this decision was a correct view of the law at that time, it cannot apply automatically to a differently worded new statute. The WHS Act, as noted previously, explicitly allows a possible action under the regulations under s 267(c).⁵²

Plaintiff within the ‘limited class’

The second element of the BSD tort is represented by the rule that, to be civilly actionable, the provision in question must not be legislation intended to benefit the ‘public’ at large, but rather has to be intended for the benefit of some limited class of people. The rule is one supported by high authority. In *Brodie v Singleton Shire Council*, Hayne J commented:

Ordinarily, the more general the statutory duty and the wider the class of persons in the community who it may be expected will derive benefit from its performance, the less likely is it that the statute can be construed as conferring an individual right of action for damages for its nonperformance. In particular, a statutory provision giving care, control and management of some piece of infrastructure basic to modern society, like roads, is an unpromising start for a contention that, properly understood, the statute is to be construed as providing for a private right of action.⁵³

In WHS legislation, it is usually not too difficult to show that not only employees, but also others regularly employed on a worksite, belong to a limited protected class.⁵⁴ However, in Queensland in *O’Brien v T F Woollam & Son Pty Ltd*,⁵⁵ the Supreme Court held that ss 30 and 31 of the Workplace Health and Safety Act 1989 (Qld) (imposing liability on head contractors for injuries to those present in the workplace) were not based on any ‘historically accepted’ form of civil action, and thus did not create civil liability.

This decision was criticised in *Henderson v Dalrymple Bay Coal Terminal*⁵⁶

⁴⁹ Ibid, at [82].

⁵⁰ *Edwards v Woolworths Ltd*, above n 25. This case was also a decision of Master Harper.

⁵¹ Ibid, at [15].

⁵² It may also be noted that that the incident in *Fischetti* happened in 2005, well before the WHS Act commenced on 1 January 2012, which also supports the view that the comments were *obiter*.

⁵³ (2001) 206 CLR 512; 180 ALR 145; [2001] HCA 29; BC200102755 at [326].

⁵⁴ See *Quilty v Bellambi Coal Co Pty Ltd* [1966] 2 NSW 742. However, some doubts have been expressed in the past about a casual self-employed worker (*Herbert v Harold Shaw Ltd* [1959] 2 QB 138; [1959] 2 All ER 189; [1959] 2 WLR 681; (1959) 57 LGR 185) or a rescue worker temporarily on site (*Hartley v Mayoh & Co* [1954] 1 QB 383; [1954] 1 All ER 375; [1954] 1 WLR 355).

⁵⁵ [2001] 1 Qd R 622 (*O’Brien*).

⁵⁶ [2005] QSC 124; BC200503029 at [22].

and in *Wilkinson v BP Australia Pty Ltd*.⁵⁷ In *Wilkinson*, the difficulties of interpreting the legislation in light of this line of authority were illustrated by McMeekin J, who ruled that a duty owed by an employer to non-employees under s 28(3) was not actionable, but that a duty of an occupier under s 30 might have been actionable.⁵⁸ In *Griffiths v Queensland*,⁵⁹ Daubney J followed *O'Brien* to hold that s 30 had not been actionable (even prior to the introduction of s 37A of the Workplace Health and Safety Act 1995 (Qld), discussed previously). His Honour's reasons for so holding seem to be inappropriately based on an attempt to 'read back' the policy of the more recently enacted s 37A to determine parliament's intention in passing the original s 30 in 1989.

A more contentious issue is where the regulation is directed beyond workers (including independent contractors) to providing protection to members of the general public who are injured when they come onto a workplace or as a result of workplace activities. In the decision of the NSW Court of Appeal in *Wynn Tresidder Management Pty Ltd v Barkho*,⁶⁰ there was a suggestion that a BSD action would not be available where the breached regulation was directed to protecting members of the public (as opposed to workers). The plaintiff was injured when she was attempting to enter a shopping centre car park and slipped on a wet surface that had been created by rain entering the area where renovations were underway. Her claim in negligence against the owners of the shopping centre (the occupiers) succeeded at trial and was upheld by the Court of Appeal. But the appeal court doubted a claim in BSD, which had also succeeded at trial.⁶¹ The provisions of the regulations relied on were cls 34 and 36, which imposed obligations on the 'controller of premises' to identify risks and eliminate or reduce them. Probably the most directly relevant was cl 36:⁶²

- (1) A controller of premises must eliminate any risk, arising from the premises, to the health or safety of any person accessing, using or egressing from the premises.
- (2) If it is not reasonably practicable to eliminate the risk, the controller of the premises must control the risk.
- (3) A controller of premises must ensure that all measures (including procedures and equipment) that are adopted to eliminate or control risks to health or safety are properly used and maintained.

Justice McColl made a number of comments where she expressed doubt whether someone who was not an employee (but was a member of the public like the plaintiff) could use these provisions for a civil action. Her Honour commented:

57 [2008] QSC 171; BC200807388.

58 See *ibid*, at [21]–[26]; although it was not necessary to resolve the issue because the worker's action in negligence was successful.

59 (2010) 197 IR 447; [2010] QSC 290; BC201005552 at [52].

60 [2009] NSWCA 149; BC200905074 (*Barkho*).

61 For previous comment, see N Foster, 'NSW Court of Appeal: Is Public Liability Created under OH&S Legislation?' (2009) 6 *Australian Civil Liability Newsletter* 186.

62 Clause 34 seems to have been directed, given the terms of cl 34(3), to decisions made in designing premises before they were made available as a workplace, rather than to the day-by-day condition of the premises once they were occupied.

It seems prima facie improbable that legislation whose object is to secure the health, safety and welfare of persons at work would extend to provide a private cause of action to members of the public.⁶³

Her Honour indicated that ‘substantial policy reasons’ favoured the exclusion of members of the public from enjoying an ability to sue under the regulations.⁶⁴ The policy reasons identified included the fact that the NSW Parliament had restricted the ability of ‘members of the public’ generally to take civil actions for negligence; and since BSD claims are often ‘absolute’ (not involving proof of carelessness), Pt 1A of the Civil Liability Act 2002 (NSW) (CLA) would not apply to such claims.⁶⁵ Furthermore, because members of the public injured in workplaces would be better off than those injured elsewhere, parliament cannot have intended this result. There is even a suggestion that the CLA impliedly repealed the parts of the OHS Regulation, which would have allowed such an action.⁶⁶

Even if it were accepted that a judicial perspective on policy can be used to override the clear implications of legislation, it must be queried whether these outcomes are bad public policy. Her Honour noted that the interpretation of the legislation adopted by the trial judge would lead to the result that ‘members of the public in [the plaintiff’s] position who are injured on premises which are both places where people work and places to which members of the public have access, may be in a substantially better position than [other] members of the public’.⁶⁷ Workplaces create known hazards and the commercial environment places pressure on employees to complete tasks within shorter timelines. This pressure may lead to a lack of alertness to the dangers created for others who may also enter the environment. It seems reasonable for the NSW Parliament to conclude that not only fellow workers, but also members of the public whose business brings them into proximity with workers and workplaces, should receive some protection from those hazards. The scope of the legislation left no doubt that this protection was clearly provided by the operation of the criminal law.⁶⁸ There are similarly strong policy reasons for concluding that a concurrent civil liability would reinforce the incentive given to those in charge of workplaces, to put in place proper safeguards against the risks to the public created by workplace activity.

Support for the conclusion that the former regulations were generally civilly actionable at the instance of workplace visitors may also be found in the fact

⁶³ *Barkho*, above n 60, at [91].

⁶⁴ *Ibid*, at [95].

⁶⁵ See the later discussion of the application of Pt 1A of the CLA to BSD actions based on regulations, below, in ‘Defining the Statutory Standard’.

⁶⁶ *Barkho*, above n 60, at [98].

⁶⁷ *Ibid*, at [97].

⁶⁸ See s 8(2) of the former OHS Act 2000. Criminal prosecutions under effectively identical provisions of earlier or related legislation, relating to members of the public, include such cases as *WorkCover Authority of NSW v Roads and Traffic Authority of NSW* [1994] NSWIRC 109 (concerning children playing on a railway bridge), *Whittaker v Delmina Pty Ltd* (1998) 87 IR 268 (customers at a horse-riding farm), *Department of Mineral Resources of New South Wales (McKensy) v Kembla Coal & Coke Pty Ltd* (1999) 92 IR 8 (members of the public near an closed mine) and, in the UK: *R v Board of Trustees of the Science Museum* [1993] 3 All ER 853; [1993] 1 WLR 1171; [1993] ICR 876 (visitors to a museum exposed to the risk of Legionnaire’s disease).

that obligations of ‘risk assessment’ under provisions of the NSW OHS Regulation, such as cl 9(1)(b) were only imposed in relation to ‘any other person *legally* at the employer’s place of work’.⁶⁹ The express exclusion of responsibility for trespassers in this clause did not succeed in overriding the more expansive terms of the OHS Act for the purposes of criminal prosecutions. It seems more likely that the qualifying phrase was inserted precisely because civil liability in relation to trespassers would otherwise exist (a problem not relevant to the provision in the head Act because it was not civilly actionable).

While a judicial view of the requirements of general policy may inform the interpretation of legislation where there is ambiguity, it should not curtail a liability where it has been explicitly assumed by parliament. If the policy arguments noted in her Honour’s judgment are valid, then the NSW Government had the means to respond by invoking s 39A of the NSW OHS Act and expressly excluding civil liability where a regulation imposed obligations relating to persons other than workers. It did not do so.

This question of ‘limited class’ flexibility will apply to potential BSD actions under the NSW WHS Regulation. To offer one example, cl 203 of the WHS Regulation provides as follows:

A person with management or control of plant at a workplace must manage risks to health and safety associated with plant, in accordance with Part 3.1.

Note: WHS Act-section 21 (see clause 9).

If a person has the management and control of plant in a factory and they fail to properly guard the machinery, causing a visiting member of the public to be injured, they may have breached cl 203 by not managing the risk appropriately. In response to the question, ‘was the scope of their duty intended to be for the protection of members of the public?’ s 21 of the Act (explicitly cross-referenced in the Note to the provision) provides a clear answer: s 21(2) requires that plant is to be (so far as is reasonably practicable) ‘without risks to the health and safety of *any person*’ (emphasis added).⁷⁰

The reasoning used by the House of Lords in *London Passenger Transport Board v Upson*⁷¹ to describe pedestrians as ‘road users’ rather than members of the public at large can also be applied here, so that the class of persons intended to be protected by cl 203 is not *any member of the general public at large*, but rather the clause applies to the limited class of ‘workplace entrants’ and those impacted by workplace activities. The identification of the relevant class intended to be protected against a breach will require paying close attention to the terms of the specific regulation.

⁶⁹ Emphasis added.

⁷⁰ If it is argued that the above reasoning cannot be used to impose civil liability because it contradicts s 267(a) by referring to the WHS Act to do so, the answer is also clear: it is the substantive provision of the Regulation that is imposing the obligation. Nothing in the WHS Act is being taken to confer a civil obligation. The WHS Act is simply being referred to, to allow proper interpretation of the WHS Regulation.

⁷¹ [1949] AC 155; [1949] 1 All ER 60.

The question of breach

The question of whether or not a statute has been breached lies at the heart of the BSD workplace action. It also provides one of the primary advantages of the action for plaintiffs, in comparison to the law of negligence. If a statute imposes absolute liability, then the demonstration that the statute has been breached (so long as the other criteria are satisfied) frees the plaintiff from the need to prove exactly how the defendant was careless.

A recent example may illustrate the point that some clients may be denied suitable compensation for workplace injury unless the legal profession ‘rediscovers’ the action for BSD. In *Savage v Dangan Pty Ltd*,⁷² the worker had received a serious injury to her eye while sweeping the top of a wall, when a particle of debris entered the eye. She lost 85% of her vision in that eye. A claim was brought against the employer based on both common law negligence and BSD. The negligence claim failed, as the court held that the risk of injury was so small that a ‘reasonable’ response of the employer was to do nothing. But Henry J in the Supreme Court of Queensland held that there had been a breach of the relevant Queensland legislation, which entitled the plaintiff to a verdict on that statutory count.⁷³ As his Honour noted:

The fact of the plaintiff’s workplace injury having occurred here demonstrates that the defendant did not ensure that the plaintiff was not affected by the conduct of the defendant’s business. Section 28 imposes a very high obligation, plainly much higher than that imposed on an employer at common law.⁷⁴

As illustrated by that decision, the civil action for BSD is clearly not the same as an action for breach of a common law duty of care (as in the action for negligence). In the cases where it applies, the basis is the breach of the specific duty created by the statute.⁷⁵ This was summed up well by Hollingworth J in *British American Tobacco Exports BV v Trojan Trading Co Pty Ltd*:

Breach of statutory duty is a type of tort, in which the statute creates a civil right and the common law supplies a remedy (such as damages).⁷⁶

The comments of Crennan and Kiefel JJ in the High Court of Australia in *Stuart v Kirkland-Veenstra* also support this well-established view:

72 [2012] QSC 375; BC201209483.

73 The events in question occurred in November 2005, at a time when the Queensland legislation (as noted previously) clearly allowed civil claims for breach. As also noted above, while at a later stage the Queensland Parliament removed civil liability for breach of the relevant Act, such liability has now been restored under the new harmonised legislation, which is in force in Queensland as well as in most other Australian jurisdictions.

74 *Savage v Dangan Pty Ltd*, above n 72, at 19.

75 See Lord Wright in *London Passenger Transport Board v Upson* [1949] AC 155; [1949] 1 All ER 60 at 168: ‘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’.

76 (2010) 90 IPR 392; [2010] VSC 572; BC2010009948 at [26]. His Honour cited *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 at 52; [1957] ALR 505; (1957) 31 ALJR 208; BC5700280 per Williams J; *Downs v Williams* (1971) 126 CLR 61 at 74; 45 ALJR 576b; BC7100570 per Windeyer J.

The action for breach of statutory duty, although itself a tort, is regarded as distinct from the tort of negligence.⁷⁷

Of course, if the standard set by the statute is one of 'due care' or something similar, then recovery under statute will not be very different from recovery under the tort of negligence. So the definition of the relevant standard is a matter of some importance.

Defining the Statutory Standard

An important reason to determine whether or not a statutory or regulatory provision imposes a 'negligence' standard relates to the impact of the operation of the CLA and similar legislation in other states.

The issue arises because a case that is subject to the amendments to the common law made by the provisions of Pt 1A of the CLA may be harder to make out. Section 5A of the CLA provides that Pt 1A applies to 'any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise'. 'Negligence' is defined in s 5 of Pt 1A as 'failure to exercise reasonable care and skill'. Conversely, it can be argued that a statutory provision that imposes an obligation that is *not* based on exercising 'reasonable care and skill' is *not* one that is governed by Pt 1A of the CLA.

This was the view taken in the District Court decision of *Macey v Macquarie Generation*:

While this part of Mr Macey's claim is brought *under statute* it is not a claim for damages resulting from negligence. The claim is that Macquarie Generation failed to comply with the obligations imposed upon it by the Occupational Health and Safety Act. This part of the claim is therefore to be dealt with on the basis of the standard of care imposed by that Act and not by reference to the principles set out in Part 1A of the Civil Liability Act.⁷⁸

As attractive as this view is for plaintiffs, it may not be quite as simple as classifying a BSD action as 'not a claim in negligence'. The operation of Pt 1A seems more likely to depend on whether or not the obligation under the relevant provision of the WHS Regulation imposes a standard of care that can be equated with 'negligence' in the broad sense.

In *Macey*, one of the regulations alleged to be breached was cl 36 of the NSW OHS Regulation (noted above but repeated here for ease of reference):

- (1) A controller of premises must eliminate any risk, arising from the premises, to the health or safety of any person accessing, using or egressing from the premises.
- (2) If it is not reasonably practicable to eliminate the risk, the controller of the premises must control the risk.

It is not immediately obvious whether or not the words 'reasonably practicable' in cl 36(2) imported a 'negligence' standard (within the meaning of s 5 of the CLA) into the cl 36 duty or not. It could be argued that the relevant standard was the absolute standard in sub-cl 36(1): 'must eliminate'.

⁷⁷ (2009) 237 CLR 215; 254 ALR 432; [2009] HCA 15; BC200902940 at [130].

⁷⁸ *Macey*, above n 42 at [49]–[50] per Sidis DCJ.

Sub-clause 36(2) would then have been in the nature of a ‘defence’, and when applying criminal provisions for civil purposes, the courts sometimes hold that such defences are not applicable.⁷⁹ The alternative and stronger argument is that cl 36 was to be read as a whole and the standard of ‘reasonably practicable’ applied to the whole clause. The same reasoning would mean that any of the obligations imposed under the current WHS Regulation, which are qualified by the phrase ‘reasonably practicable’ would, in effect, be imposing a ‘negligence’ standard, and BSD actions based on those obligations would be governed by Pt 1A of the CLA. This would not apply to any ‘strict’ liability obligations under the WHS Regulation, for example, cl 208(3)(a) which imposes a duty to ‘ensure’ that machine guarding is ‘of solid construction and securely mounted so as to resist impact or shock’.⁸⁰

It should also be noted that, while Pt 1A of the CLA adds some hurdles to recovery, it is really Pt 2 of the CLA, not Pt 1A, that imposes the most onerous limits on a BSD action by restricting the *amount* of damages that can be recovered. It is clear that BSD actions for personal injury in the workplace (whether or not based on ‘negligence’) *will* be subject to the limits imposed under Pt 2.⁸¹ Section 11A(2) of the CLA provides:

This Part applies regardless of whether the claim for the damages is brought in tort, in contract, *under statute* or otherwise (emphasis added).

Determining breach of statute under a Risk Management Model

An important issue for BSD claims under the WHS Regulation is the way that the courts interpret regulations imposing ‘risk management’ obligations to ascertain whether or not there has been a breach. The earlier WHS legislation was more prescriptive, allowing a fairly straightforward resolution of issues such as whether a piece of machinery was ‘fenced’ or not. But the current WHS legislation, with an increased emphasis on management of safety through process, rather than a focus on physical characteristics of the workplace, presents more challenges for courts. The courts, however, are continuing to apply civil liability under this new form of regulation.⁸²

In *Websdale v Collins*,⁸³ it was accepted that a breach of the NSW OHS Regulation would be actionable for BSD, even though it was held on the facts that the relevant risk management provision had not been breached since, even

⁷⁹ See *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397; [1967] ALR 609; (1967) 41 ALJR 129; BC6700380 cited in *Mutton*, above n 46.

⁸⁰ Note that some related obligations under cl 208 are qualified by ‘reasonably practicable’, but this particular duty is not.

⁸¹ Except for actions taken by employees against employers, which as noted previously will be subject to the even more onerous limits imposed by the Workers Compensation Act 1987 (NSW). See s 3B(1)(f) of the CLA 2002 excluding such claims from the operation of the CLA.

⁸² As the ‘risk management’ model has been in force in the UK for some time, and often been analysed by UK decisions, those decisions provide a valuable source for comparison and persuasive precedents in this area. See the decisions noted in Foster, above n 16; for more recent developments, see M Jones and M Simpson (Eds), *Clerk & Lindsell on Torts*, 21st ed, Sweet & Maxwell, London, 2014, ch 13.

⁸³ [2009] NSWDC 30; BC200940083 at [31]–[37].

if a risk had been created, it had been appropriately controlled.

A more recent example can be found in *Griffiths v Queensland*,⁸⁴ where the Queensland Court of Appeal by majority (Muir and White JJA; Chesterman JA dissenting) held that where an employer had not properly assessed the risk of lifting a large container (as to which there had been a number of previous employee complaints), the employer was not able to demonstrate as a defence that they had 'followed the way prescribed' under s 37 of the Workplace Health and Safety Act 1995 (Qld) and were held liable. These, and other recent Queensland decisions, show a good understanding of the new structure of WHS Regulations in Australia. These decisions are particularly relevant given that a number of features of the WHS Act have been taken from the previous Queensland legislation.

One example of the Australian courts grappling (not always successfully) with the unfamiliar structure of risk management obligations is the decision in *Mutton* mentioned earlier.⁸⁵ The case involved a truck driver who sustained serious injuries when his shirt became caught in an unguarded auger when he was unloading some grain from his truck. The action was partly based on a breach of cl 45(a) of the former NSW OHS Regulation requiring an employer to 'ensure that sufficient working space is provided to allow persons to work safely' (emphasis added) and cl 136(3)(d) which provided that an employer 'must ensure . . . that if it is not possible to eliminate the risk of entanglement in plant with moving parts, persons do not operate, or pass in close proximity to, the plant unless the risk of entanglement is controlled by guarding. . . .' (emphasis added).⁸⁶

An interesting question was raised in this case as to whether the statutory defence of reasonable practicability under s 28 of the NSW OHS Act was available in a BSD action to qualify an apparently absolute obligation in the regulations.⁸⁷ Justice Ipp said that it was not necessary to decide, but Spigelman CJ offered very persuasive reasons for concluding that s 28 could *not* be relied upon in a civil action based on the regulations.⁸⁸ Section 32(1)(b) of the Act specified that no provision of Part 2 of the OHS Act (in which s 28 appeared) 'is to be construed as conferring a defence to an action in any civil proceedings'.

However, apart from the availability of a defence under s 28, the majority found that in the circumstances a breach of cl 45(a) was not established,

84 [2012] Qd R 532.

85 *Mutton*, above n 46.

86 This regulation was later renumbered reg 136A (though the content remained the same). It was an important provision, especially because it roughly corresponded to the provision in s 27 of the former Factories, Shops and Industry Act 1962 (NSW) dealing with fencing of dangerous machinery, which had a long history of decisions on its interpretation as a source of civil liability: see Foster, above n 20, at [6.14].

87 As noted previously, the former NSW legislation was later amended to remove this issue, by the insertion of 'reasonably practicable' as a qualifier in its general duties, and the removal of s 28. This is now the model followed by the WHS Act 2011. But the issue is still potentially relevant to other 'defence' provisions in the future.

88 *Mutton*, above n 46 at [24]–[28], citing the High Court decision of *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397; [1967] ALR 609; (1967) 41 ALJR 129; BC6700380; see especially Kitto J at 405–6, a decision, it should be noted, on civil liability for breach of s 27 of the Factories, Shops and Industry Act 1962 (NSW).

holding that there was ‘sufficient’ space for the work even though it was not a large area.⁸⁹ A breach of cl 136(3)(d) was also rejected on the basis that the expert evidence established that it was ‘possible’ to have eliminated the risk of entanglement.⁹⁰ It can be argued that this conclusion was based on a misunderstanding of the application of the risk management model to regulatory compliance. Chapter 2 of the OHS Regulation set out a carefully structured process that needed to be observed by those who were seeking to fulfil their obligations to ‘ensure’ safety. The process moved from hazard identification in cl 9, to risk ‘assessment’ in cl 10, and then to an obligation to ‘control’ risks in cl 11 as follows:

- (1) Subject to subclause (2), an employer must eliminate any reasonably foreseeable risk to the health or safety of:
 - (a) any employee of the employer, or
 - (b) any other person legally at the employer’s place of work, or both, that arises from the conduct of the employer’s undertaking.
- (2) If it is not reasonably practicable to eliminate the risk, the employer must control the risk.

It was only if the elimination of a risk was not reasonably practicable that, as a second-best response, it was to be ‘controlled’. That model provided the context for cl 136 as it stood at the time of the *Mutton* case:

- (1) An employer must ensure in relation to use of plant that: . . .
 - e) if it is not possible to eliminate the risk of entanglement in plant with moving parts, persons do not operate, or pass in close proximity to, the plant unless the risk of entanglement is controlled by guarding that meets the requirements of clause 90 (1) or the use of a safe system of work.

The question whether a risk could have been ‘eliminated’, then, was merely a precursor to the question of whether the risk should have been controlled. But by apparently reading the regulation in isolation, Ipp JA seems to have regarded the evidence that it was ‘possible’ to have eliminated the risk, as something akin to a defence for the employer, instead of evidence of a failure to meet its regulatory obligation. Chief Justice Spigelman disagreed with the majority about the possibility of completely eliminating the risk.⁹¹ But, more importantly, he noted the key point that if it was accepted that it was possible to eliminate the risk, then the defendant was in breach of cl 11 of the Regulation by not doing so.⁹² Justices Ipp and Hodgson seem to ignore this point on technical grounds, refusing to accept the argument because a breach of cl 11 was not pleaded. Yet cl 11 formed an essential part of the whole scheme of the Regulation, and should not have been ignored when interpreting the obligation imposed by cl 136.

Conclusion

The lack of attention given to the tort of breach of statutory duty by academics and some practitioners is surprising given its potential utility for injured

⁸⁹ Ibid, at [220] per Ipp JA; Hodgson JA agreed at [58]; Cf the dissent by Spigelman CJ at [36].

⁹⁰ Ibid, at [243] per Ipp JA.

⁹¹ Ibid, at [44] per Spigelman CJ.

⁹² Ibid, at [46].

plaintiffs in the WHS arena. The pressure of squeezing a larger number of topics into one semester tort law courses at many universities may be a reason that it has dropped off the radar of recent law graduates. Some practitioners have even expressed surprise to find that this particular tort is 'still alive'.

This article demonstrates that it is still operative, and it has continued to be used by experienced practitioners in WHS actions in the UK and Australia. The decisions reviewed indicate that, in the absence of amendments mirroring the recent UK reforms (to expressly remove the BSD action from the area of WHS), it will continue to be available in relation to breach of regulations made under the various state WHS Acts following the harmonised model, and also in those jurisdictions where the model law has not been introduced. The focus on the specific issues that arise in workplace incidents may make it an attractive option for some injured plaintiffs in comparison to a generalised action for common law negligence. The experience of courts in the UK and Australia illustrates that the civil aspect of liability has an important role to play in alerting employers and other 'persons conducting a business or undertaking' to the need to prioritise workplace health and safety over the pursuit of profits to ensure that workers (and workplace visitors) arrive home safely at the end of the day.