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# Reforming the action for Breach of Statutory Duty in the 21st century: reconsidering the "section of the public" rule

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# Reforming the action for Breach of Statutory Duty in the 21st century: reconsidering the "section of the public" rule

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The common law action for breach of statutory duty allows an intersection between private law and systems of public regulation, by allowing an individual to sue where rights created by statute have been infringed. One of the most controversial elements of the action, however, is the requirement that the relevant legislation protect a "section of the public", and not the public at large. This paper explores the origins and nature of this rule, and suggests that it may be time to abolish this requirement as a part of the tort action.

The tort action for breach of statutory duty has a long history of being used to provide compensation for breach of private rights given by legislation.[2] The courts have begun to accept the list of 6 elements of the tort provided in the 10th edition of *Fleming's The Law of Torts* as a convenient summary of the action:

> 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.[3]

While all 6 elements are well established in the authorities, one of these elements has been the subject of much criticism. Element (b) requires that the relevant duty be imposed for the benefit of a "limited class" of the public, rather than for the public at large. As noted later, while there is some doubt, this rule seems to apply even if element (a) has been satisfied, when it has already been established that Parliament had intended to allow a civil action for the benefit of the class of persons involved. In other words, element (b) apparently adds an arbitrary limit to the intention of Parliament, in an action the very rationale of which is to implement that intention.

This paper will argue that the "limited class" rule, if viewed as a separate element of the tort apart from its relevance to Parliamentary intention, is irrational and contrary to the logic of the reasons that have been offered for the existence of the tort. It is argued that, despite the high authority supporting the rule, when the occasion arises a court with authority to do so should remove this blemish from the law. It will also be argued that doing so will not, as supporters of the rule have suggested, "open the floodgates" to a tide of

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[2] For a review of some of this history, see N Foster, "Breach of statutory duty and risk management in occupational health and safety law: New wine in old wineskins?" (2006) 14 *Tort Law Review* 79, esp at 80-82; for a defence of the continuing usefulness of the action see N Foster, "The Merits of the Civil Action for Breach of Statutory Duty" (2011) 33 *Sydney Law Review* 67.

[3] "The Tort of Breach of Statutory Duty", ch 18 in C Sappideen and P Vines (Eds), *Fleming's The Law of Torts*, 10th ed, Lawbook Co, Pyrmont, 2011, 423 at 424. This statement of the elements of the tort action has been approved in *Alcoa of Australia Ltd v Apache Energy Ltd* [2012] WASC 209 at [80] per Le Miere J, and in *Matton Developments Pty Ltd v CGU Insurance Limited (No 2)* [2015] QSC 72 at [261] per Flanagan J.

expensive litigation based on minor regulatory provisions; rather, the other elements of the tort will provide sufficient limits to ensure that actions stay within appropriate bounds.

## 1. The existence of the "Limited Class" rule

One of the cases which is cited in support of the "limited class" rule is the decision of the English Court of Appeal in *Phillips v Britannia Hygienic Laundry Co, Ltd* [1923] 2 KB 832.[4] On closer analysis, however, the decision is quite ambiguous on the point.

The facts involved a motor accident- the axle of a lorry owned by the Laundry Company broke, leading to a wheel flying off and striking a van owned by the plaintiff Phillips. The reason for the incident seemed to be a careless repair job that had been conducted some weeks' prior by Messrs Thornycroft, a reputable firm of motor car repairers who had got it wrong on this occasion.[5] As a result there was no case in negligence against the owners of the lorry.

Phillips was relying, however, on the fact that the incident arguably amounted to a breach of a road rule, art II, cl 6 of the *Motor Cars (Use and Construction) Order*, 1904, requiring that a car on the highway "shall be in such condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway".[6]

Bankes LJ denied liability in reliance on a version of the "limited class" principle. His Lordship started, at 838, with a principle which he articulated as a presumption against civil liability for breach of statute "where a specific remedy is given by a statute", citing *Pasmore v Oswaldtwistle Urban Council* [1898] AC 387, per Lord Halsbury at 394. But in that decision Lord Macnaghten noted that there are "exceptions" to this rule, recognition of which "must depend on the scope and language of the Act which creates the obligation and on considerations of policy and convenience" (at 397).

Here there was of course a fine for breach of the relevant regulation. It may be noted in passing, however, how odd it is to call a penal fine for breach of a criminal statute, a "remedy" for a private wrong committed to the victim of that breach. The language of "remedy" was appropriate for the *Pasmore* case, which involved an attempt by a business to get an order of mandamus requiring a local authority to expand the sewer services. But the word does not

[4] See eg H H Glass & M H McHugh *The Liability of Employers in Damages for Personal Injury* (1st ed; Sydney: Law Book Co, 1966)at 127 n 12. It should be noted, however, that the authors almost immediately, on the same page, go on to quote the decision of Atkin LJ, noted in the text below, and say that "some statutory duties owed to the public at large may nonetheless be created for the benefit of each individual member of the public".

[5] The report does not make it clear why the plaintiff did not sue Messrs Thornycroft, given that the county court judge actually made a finding of negligence against this firm (see Bankes LJ at 837); but perhaps the simplest answer is that they did not know who the repairers were when the action was commenced.

[6] Interestingly no argument was raised that the clause, which seems to be directed at personal injury rather than the property damage suffered here, could not be relied on, under the *Gorris v Scott* (1874) LR 9 Ex 125 principle that the harm suffered must be the *sort* of harm, to which the statutory prohibition was directed. That would perhaps have been another reason for denying liability. Since a flying wheel was, of course, "likely to" cause harm to persons, there seems however to have been a breach.

really describe the result of a criminal penalty being imposed for breach of a traffic rule, which will of course be of no benefit on its own to a person injured by such breach.

Nevertheless, adopting this starting point, Bankes LJ went on to consider whether the detailed set of traffic rules was intended to allow a civil action for breach. One example given by his Lordship was clearly not to the point- his claim that the position argued for by the plaintiff would mean that if, under one of the other traffic rules, a red light was not showing at the rear of a vehicle, then a pedestrian run down by the vehicle could recover damages simply because the vehicle was in breach of the rule. This argument was clearly a "straw man"- on any plausible account of the BSD action, causation of harm is required which links the breach to the actual harm suffered.[7]

But in his concluding words on the question, his Lordship introduced the "limited class" consideration as, apparently, a separate rule for denying recovery. The passage is worth quoting precisely:

> The injury here was done to the appellant's van; and the appellant, a member of the public, claims a right of action as one of a class for whose benefit cl 6 was introduced. He contends that the public using the highway is the class so favoured. I do not agree. In my view the public using the highway is not a class; it is itself the public and not a class of the public. The clause therefore was not passed for the benefit of a class or section of the public. It applies to the public generally, and it is one among many regulations for breach of which it cannot have been intended that a person aggrieved should have a civil remedy by way of action in addition to the more appropriate remedy provided, namely a fine. ([1923] 2 KB, at 840.)

The inappropriate use of the word "remedy" to describe a criminal fine has already been noted. It is also not entirely clear whether the fact that the law does not deal with a "class or section of the public" is a special rule denying civil actionability, or whether it is merely one of a number of factors related to the over-arching issue of "Parliamentary intention".

The notion here that a BSD action will only be available to a "limited class" may have found its origin in this case in counsel for the appellant's submission that a cause of action will be available where an obligation has been imposed "for the benefit of a class of persons" (see counsel's submissions noted at 835). This phrase was used in the decision in *Groves v Lord Wimborne* [1898] 2 QB 402, where Vaughan Williams LJ noted:

> Where a statute provides for the performance by *certain* persons of a *particular* duty, and some one belonging to a *class of persons* for whose benefit and protection the statute imposes the duty is injured by failure to perform it, prima facie, and there be

[7] As noted in *Fleming's* (10th ed), above n 3, at 430: "In actions for breach of statutory duty, no less than for common law negligence, it is incumbent on a claimant to prove on a balance of probabilities that his injury would not have happened but for the defendant's transgression". In the nearby context, at fn 57, the comments of Bankes LJ in *Phillips* are described as "false reasoning". (These passages were also present in the 9th edition of *Fleming's*, at p 144). For recent reaffirmation of the need for causation of harm, see Digby AJA in *Deal v Kodakkathanath* [2015] VSCA 191 (24 July 2015) at [328]: "The causation test to be applied in cases of breach of statutory duty is whether or not the breach of the duty has caused or materially contributed to the injury", with citation of prior authority; and in England *West Sussex County Council v Fuller* [2015] EWCA Civ 189 (12 March 2015) per Tomlinson LJ at [13]: liability for breach of statutory duty requires "proof of a causal link between the breach and the injury suffered".

> nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty (emphasis added.)[8]

But while the phrase "class of persons" is used here, along with delimiting phrases referring to the possible defendant ("certain persons") and the possible obligation ("particular duty"), there is no stress placed on "limiting" the class so designated. That is, the delimiting words "class", "certain" and "particular" do not lay particular emphasis on the size of the relevant group of persons, or indeed the extent of the obligations.

Reading in a requirement of "limited class", then, is by no means obviously necessary, and this can be seen in the judgment in *Phillips* of the renowned jurist, Lord Atkin, then Atkin LJ.[9] While concurring in the result, that the traffic regulation in question was not such as to give rise to a civil action if breached, his Lordship based his decision, not on an artificial "limited class" rule, but on the broader ground of Parliamentary intention.

As he put it, the question "depends on the construction of the Act and the circumstances in which it was made and to which it relates" (at 841). But in particular he noted that he did not base his decision on a "limited class" rule:

> [T]he question is not to be solved by considering whether or not the person aggrieved can bring himself within some special class of the community or whether he is some designated individual. The duty may be of such paramount importance that it is owed to all the public. It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot. (at 841)

This view was said to be contrary to that of McCardie J, the Divisional Court judge below; his Lordship did not stress the point, but the view was also clearly contrary to that taken by Bankes LJ. Atkin LJ notes that it seems to have been readily accepted in previous cases that a wide-reaching obligation could be the subject of a civil action, referring to comments of Kelly CB in *Gorris v Scott* (1874) LR 9 Ex 125 at 128 assuming that an obligation owed to members of the public to maintain a gate across a railway level crossing, would be civilly actionable.[10]

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[8] [1898] 2 QB at 415-416; see the more detailed discussion of *Groves* in Foster (2006), above n 2 at 81-82.

[9] Lord Atkin, of course, was the principal architect, when later elevated to the House of Lords, of the landmark decision in *Donoghue v Stevenson* [1932] AC 562. It is interesting to note, as a mark of the impact that his Lordship had on the law, that Lord Neuberger, in his speech reviewing the 15 "top cases" reported in the official Law Reports in the last 150 years, "Reflections On The ICLR Top Fifteen Cases" (6 Oct 2015), http://www.iclr.co.uk/assets/media/Transcript_Lord_Neuberger.pdf , comments at [16] that Lord Atkin was one of only two judges to have featured in 3 of the 15 cases (Lord Walker being the other). The three cases were *Donoghue, Woolmington* and *Liversidge*, and of those Lord Atkin was in dissent in *Liversidge* but later acknowledged to have been correct- see Lord Neuberger's paper at [59]. This paper is arguing that, in a similar way, if indeed Atkin LJ's remarks here were in the minority, his Lordship's approach in *Phillips* should now be acknowledged to be the correct one.

[10] For a later decision also assuming that general members of the public who had been injured by the failure of a level crossing gate, could recover in a BSD action, see *Knapp v Railway Executive* [1949] 2 All ER 508, where Singleton LJ commented at 514 that "the protection was intended to be for users of the highway". (In that case this meant that the plaintiff, who was suing in relation to harm caused to a driver of a train injured by a gate being left unlocked, did not succeed. But the court had no doubt that a member of the wider class of public road users could have recovered.)

So how, then, did his Lordship conclude that the regulation was not actionable? He did so by applying a range of statutory interpretation techniques to the question whether Parliament would have intended a breach to give rise to civil liability. (In terms of the outline of the elements of the tort noted above, his Lordship relied on element (a), not element (b).) He considered the different sorts of obligations imposed by the clauses, a number more concerned with maintenance of the road rather than safety; the varying importance of the different obligations; the question whether it can have been supposed that Parliament intended a subordinate regulation-making body to impose provisions of absolute civil liability. These are all important questions that need to be considered in the overall mix of matters bearing on Parliamentary intention.

The conclusion that this mixed bag of traffic rules was not intended to give rise to civil liability seems plausible. Indeed, it seems sensible that as a general category "traffic regulations" are a poor candidate for finding an intention to create civil liability.[11] But the fact that this is the case stems, for Atkin LJ, not from an artificial "limited class" rule, but from the primary question of statutory interpretation.

Finally in this review of *Phillips*, Younger LJ concurred in the decision of the other members of the court that the relevant regulation did not create civil liability, but notably did not express a preference for the approach of either Bankes LJ or Atkin LJ on the "limited class" issue. Indeed, since his Lordship in his brief comments concluded on this issue by stressing that the question was a matter of the "scheme of the Act",[12] it seems that in fact he should be counted as a vote against the adoption of the "limited class" analysis adopted by Bankes LJ, viewed as a test distinct from the general "Parliamentary intention" test.

Whether viewed as a separate rule, or as a factor which invariably leads to a negative answer to the "Parliamentary intention" question, the issue of "limited class" later continued to be offered as a reason against finding civil liability for breach of a statutory duty.

Whether all the cases cited as authority for this rule really provide a good basis for the rule may be doubted. For example, in one textbook the case of *Atkinson v The Newcastle & Gateshead Waterworks Company* (1877) 2 Ex D 441 is cited as authority for the proposition that:

> The tort was only to be inferred if the statute could be construed as intended to benefit a defined class of persons as opposed to the public as a whole.[13]

Yet on closer examination that reason was by no means the main basis for the decision of the Court of Appeal that a statutory obligation to keep

[11] Later decisions around the Commonwealth have confirmed this approach in relation to traffic regulations- see *Hopewell v Baranyay* [1962] VR 311; *Tucker v McCann* [1948] VLR 222; *Abela v Giew* (1965) 65 SR (NSW) 485; *Bowling v Weinert* [1978] 2 NSWLR 282 (concerning water traffic regulations); *Gardiner v McManus* [1971] NZLR 475. These cases are noted, and the approach in the United States contrasted, in N Foster, "Statutes and Civil Liability in the Commonwealth and the United States: A Comparative Critique", in SGA Pitel, JW Neyers and E Chamberlain, *Torts Law: Challenging Orthodoxy* (Oxford: Hart, 2013) 169-213, at 181.

[12] Citing Lord Cairns in *Atkinson v Newcastle Waterworks Co* (1877) 2 Ex D 441 at 446.

[13] K Stanton, P Skidmore, M Harris, J Wright *Statutory Torts* (London: Sweet & Maxwell, 2003) at 18, para 2.002.

water pressure at a sufficient level to allow proper fire-fighting, was not actionable at the suit of a householder whose property was burned down due in part to a breach of that obligation. Lord Cairns LC refers in passing at 446 to the breadth of the obligations that the private water-company would have accepted, if the duty were found to be civilly actionable. But his Lordship's main reason for finding the obligation not to be such, was that it was contained in a list of four obligations, two of which explicitly created civil recovery for an affected ratepayer, and two of which (the water pressure obligation being one of them) did not. Cockburn CJ agreed, and noted the difference between this case and the previous decision of *Couch v Steel* (1854) 3 E & B 402, 118 ER 1193 as being that the water-works arrangements were more in the nature of a "private legislative bargain", which would mean that:

> [S]uch an Act of Parliament as this is liable to a much more limited and strict interpretation than that which can be put upon one which is applicable to all the subjects of the realm. (at 449)

In other words, Cockburn CJ implies that an Act that was intended to benefit "all the subjects of the realm" would be *more* likely to be found civilly actionable than the one being dealt with in *Atkinson*. This, it is submitted, is by no means a resounding endorsement of a "limited class" rule as a criterion for testing actionability.

Whatever criticisms can be made of the way that the early decisions were read, by the time we come to the influential comments of Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173, the "rule" seems to be established. There his Lordship referred to what he described as "exceptions" to the general rule that an act that is penalised by a criminal sanction cannot be sued upon in a civil suit:

> The first [exception] is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of *a particular class of individuals*, as in the case of the Factories Acts and similar legislation (at 185; emphasis added).

In articulating this rule, Lord Diplock cited the decision of Lord Kinnear in *Butler (or Black) v Fife Coal Co Ltd* [1912] AC 149, 165, that in the case of such a statute:

> There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute . . . We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of *particular persons* there arises at common law a correlative right in those persons who may be injured by its contravention (emphasis added.)

The later restatement of the elements of the tort of BSD, which was provided by the final courts of appeal in the UK and Australia in the mid-1990's, seem at first glance to support this rule as a part of those elements. In *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 Lord Browne-Wilkinson referred at 731 to the need for a duty to be "imposed for the

protection of a limited class of the public". In *Byrne and Frew v Australian Airlines Ltd* (1995) 185 CLR 410 Brennan CJ, Dawson and Toohey JJ at 424 referred to an obligation "for the protection or benefit of a particular class of persons".

More recently, those same courts have continued to affirm the existence of the rule, or at any rate something like it. In *Brodie v Singleton Shire Council* [2001] HCA 29, (2001) 206 CLR 512 the High Court of Australia by majority over-turned a long-standing "immunity" previously enjoyed by roads authorities in relation to "non-feasance" (failure to repair roads.) The decision itself was squarely based on the law of negligence, not the action for breach of statutory duty. In an *obiter* remark, however, Hayne J commented that the fact that no action would lie in BSD, supported his views that no action should lie in negligence:

> [326]…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 non-performance. 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.
> [327] The conclusion that a particular statute does not provide for a private action for failure to perform some statutory duty is itself a powerful reason for pausing before finding that there is a common law duty to exercise that power. The several considerations which may lead to the conclusion that no private action should lie for breach of statutory duty seem to me to suggest in many, perhaps most, cases that there is not that degree of particular contemplation of the position of individuals, of whom the injured plaintiff is one, which should be necessary before finding that there is a common law duty of care.

A number of points should be made about this comment. First, it does not support a special "limited class" rule, distinct from the issue of Parliamentary intention- it simply notes that there is a "general" correlation between the width of the class of person who will benefit from a statute, and the "likelihood" that the statute was intended to provide a civil action to individuals. Such a correlation can be accepted, of course, simply viewed as an issue of interpretation, among other issues to be weighed up. The reference to a scheme dealing with "infrastructure" not being civilly actionable is consistent with the decision of the House of Lords in *X*, noted above. Second, despite the fact that this comment has been subsequently cited with approval,[14] his Honour was in dissent on the outcome of the proceedings, and the issues in the case were not directly related to the BSD action. As a result, the authority of the remark is quite limited.

In *Morrison Sports Ltd v Scottish Power UK plc* [2010] UKSC 37, 2010 SLT 1027, Lord Rodger for the UK Supreme Court, on appeal from Scotland, supported the "limited class" rule. His Lordship at [39]-[40] identified the comments of Atkin LJ in *Phillips* as *dicta* which had been held by Neuberger J (as his Lordship then was) in *Todd v Adams and Chope (the*

[14] See *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; (2002) 211 CLR 540 at [316] per Callinan J.

*Margaretha Maria)* [2002] 2 All ER (Comm) 97; [2002] 2 Lloyd's LR 293 to be inconsistent with more recent decisions of the House of Lords.

Yet is this so? We have seen that indeed *X* in 1995 refers to a "limited class", and yet the outcome in that decision was not based on the size of the class protected, but on the wider principle that "statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large" (*X*, at 732) would normally be unsuitable candidates for a Parliamentary intention to allow a civil action. While the phrase "public at large" is used, the impression given is that the same result would have followed in the case of a general "social welfare" scheme restricted, say, to "single mothers" or "asylum seekers" or "aged pensioners".

The other decisions referred to by Neuberger J in *Todd* seem to be *Lonrho*, noted above; *R v Deputy Governor of Parkhurst Prison, ex parte Hague* [l992] 1 AC 58 at pp 170C-171A per Lord Jauncey of Tullichettle; and *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 at p 652B-E per Lord Slynn of Hadley.[15] Yet in *Parkhurst*, the cited pages do no more than repeat the comments of Lord Diplock in *Lonrho*, with no specific reference to the "limited class" rule beyond the words "a particular class of individuals". The same is true of Lord Slynn's review of the law in *Phelps*, where in fact there was clearly a "limited class" involved (as his Lordship said at 652E-F, "children with special educational needs"), but the rule itself did not need to be invoked, as actionability was rejected on other grounds.

In other words, Neuberger J's doubts about the validity of Atkin LJ's comments in *Phillips* in light of more recent decisions of the House of Lords are not based on very strong grounds. Indeed, Neuberger J himself in *Todd* said in para [20] that Atkin LJ's remarks had "considerable force", and his reluctance to adopt them stemmed from the role of the Court of Appeal in the judicial hierarchy, and the need to defer to what his Lordship regarded as binding decisions of the House of Lords. Hence in the Supreme Court in *Morrison* it was not necessary for Lord Rodger to adopt the same view.

Finally on the authority of Neuberger J's remarks in *Todd*, it must be pointed out that the later decision of a differently constituted Court of Appeal in another "fishing boat" case, *Ziemniak v EPTM Deep Sea Ltd* [2003] 2 Lloyd's Rep 214, [2003] EWCA Civ 636, expressed some doubts about the finding in *Todd.* Kay LJ indicated at [49]-[50] that he was "not entirely persuaded by all of the reasoning contained in the judgement of Mr Justice Neuberger in that case".[16]

To sum up, while support has been expressed at high levels for a formulation of the elements of the BSD tort as including a requirement that the relevant statute be aimed at the benefit of a "limited class", in most of the formulations of the rule the "limits" of the class play only a small role. As we

[15] The phrase "seem to be" is used, since Neuberger J at para [20] in *Todd* simply says that Atkin LJ's comments are inconsistent with "four recent" House of Lords decisions, without at that point naming them. But the four referred to seem pretty clearly to be the four noted in the text above, which his Lordship had previously cited in paras [17]-[18].

[16] For a more detailed comparison of *Todd* and *Ziemniak*, see Foster (2006), above n 2, at 83-84. See also *Munkman on Employer's Liability* (ed B Cotter & D Bennett, 15th ed; London: LexisNexis, 2009) at **5.21-5.24**, also contrasting and comparing *Todd* and *Ziemniak* and suggesting at 172 that "*Todd* should be treated as confined to its facts until it is the subject of consideration by a higher court". With respect, the consideration given in *Morrison* was very cursory.

will now see, there have also been a number of important judicial criticisms of the rule.

## 2. Previous judicial and academic critique of the rule

We have already seen the critique of the "rule" by Atkin LJ in *Phillips.* Other courts in the common law world have echoed this critique.

In the UK, the decision in *Monk v Warbey* [1935] 1 KB 75 involved a clear rejection of the "limited class" rule. In this case the issue was whether an injured person, who would be denied recovery if a vehicle were not insured, could sue for breach of a statutory provision requiring the owner to take out insurance. The Court of Appeal held that he could, and in doing so Greer LJ (with the concurrence of the other members of the Court) explicitly adopted the remarks of Atkin LJ in *Phillips* in preference to those of Bankes LJ- see eg [1935] 1 KB at 85.

In *Whittaker v Rozelle Wood Products Ltd* (1936) 36 SR (NSW) 204 we have the very clear Australian rejection of a limited class rule by one of the Australia's most respected common law judges, Sir Frederick Jordan.[17] The case involved the question whether a statutory provision which prohibited the employment of someone under the age of 16, on a specific type of dangerous machine, was actionable when a boy under that age was injured working the machine. Both counsel arguing the case tried to present their claim in terms of the "limited class" rule, but Jordan CJ, citing Atkin LJ's decision in *Phillips*, rejected the rule, stating simply:

> It is not essential that the legislature should have in mind the protection of a particular class of persons (at 208.)

In *O'Connor v SP Bray Ltd* (1937) 56 CLR 464 the High Court of Australia was dealing with a case involving an alleged breach of a regulation requiring safety measures to be provided on certain lifts. Of the four members of the Court, Starke J found against the injured worker because he had received statutory workers' compensation benefits before commencing his common law claim. The other three members of the Court held that, in light of a recent decision of the Court finding to the opposite,[18] that this was not a bar to his recovery. In addressing the civil action based on the regulation, all the other members of the Court held that the regulation was civilly actionable. In particular, in so ruling Evatt & McTiernan JJ explicitly adopted the reasoning of Atkin LJ in *Phillips* and held that there was no need to show that the plaintiff was in a "limited class":

> 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

[17] One of two great State Supreme Court Justices never appointed to the High Court of Australia, whose lack of appointment was noted with regret by Sir Owen Dixon in his remarks on retirement from that Court; see (1964) 110 CLR at x-xi; the other was Sir Leo Cussen.

[18] See *Latter v Muswellbrook Corporation* (1935) 53 CLR 422, in which the majority of Latham CJ, Evatt & McTiernan JJ held that prior receipt of statutory compensation only barred later recovery of common law damages where the worker had been fully aware of the alternative rights and made an "informed election" between the two options.

> community".[19] Here the dominant consideration is prevention of danger to all persons brought into proximity to a specific peril which can easily be avoided if the regulation is observed. If the duty is not observed, we consider that persons injured as a result of such non-observance have a good cause of action against the person responsible under the regulation for the care, control and management of the lift. (at 486-487)

It is worthy of note that their Honours do not seem to consider this a question on which Atkin LJ was in dissent; they simply cite and adopt his reasoning in *Phillips* (consistently with the point previously made, that the third member of the Court of Appeal, Younger LJ, should be seen as supporting Atkin LJ's reasoning rather than that of Bankes LJ.)

The judgment of Dixon J in *O'Connor* has come to be seen as the *locus classicus* in Australian law supporting the existence and nature of the BSD tort. His Honour provided some general guidelines for determining when the tort arises, and commented as follows:

> The received doctrine is that when a statute prescribes in the interests of the safety of **members of the public or a class of them** a course of conduct and does no more than penalize a breach of its provisions, the question whether a private right of action also arises must be determined as a matter of construction (at 477) …
> Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the **safety of others** in a matter where the person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears. (at 478) (emphasis added)

While his Honour did not explicitly deny a "limited class" rule, the highlighted words clearly seem to allow "members of the public" to be an alternative group to "a class of (members)" to whom the relevant duty is owed. In the second formulation it is simply "others" to whom the duty must be owed. This decision, then, provides support for a formulation of the tort that does not involve the need to show that a "limited class" must be benefited by the duty.[20]

In the UK in more recent years there have been a number of significant decisions in which the "limited class" rule has been either rejected or significantly "watered down" in coming to the result. In *Roe v Sheffield City Council* [2003] EWCA Civ 1, [2004] QB 653 a provision requiring tram lines to be level with the surface of the road was found to be civilly actionable. A major part of the reasoning of the court was that a number of previous decisions had found, or assumed, such provisions to be actionable. In considering whether there was an exclusionary rule based on the size of the class of persons benefited, Pill LJ commented at [49]:

> As to the alleged, though in context somewhat nebulous, requirement for a limited class, road users will be very numerous but are in my judgment sufficiently a class for present purposes. In *Phillips* ***v*** *Britannia Hygienic Laundry Co* [1923] 2 KB 832,

[19] *Phillips v. Britannia Hygienic Laundry Co* (1923) 2 K.B., at p. 841.

[20] Indeed, since Evatt & McTiernan JJ, while being inclined to find in favour of the worker on the spot, decided in the end to join in the decision of Dixon J to refer the matter back for a new trial, their joint judgment should clearly be seen as part of the *ratio* of the decision. Of the three members of the Court agreeing in the outcome, they provide a clear majority in favour of the view of Atkin LJ in *Phillips*.

> Atkin LJ considered that "one who cannot be otherwise specified than as a person using the highway" met the requirement. He could bring himself within the benefit of the Act. The road user's position is in the circumstances very different from the beneficiaries of welfare legislation contemplated by Lord Browne-Wilkinson in *X (Minors)*.

The view that "road users" are a possible example of a "limited class" is clearly contrary to the comments of Bankes LJ in *Phillips*. On the other hand, it is perfectly consistent with the decision of the House of Lords in *London Passenger Transport Board v Upson* [1949] AC 155, where the House held that a regulation requiring vehicles approaching pedestrian crossings to slow down to an appropriate speed, could be used as the basis for a civil action. While the question of the actionability of the regulation was conceded, the House of Lords made no objection to the proposition that it created a civil action, the only reference to the relevant "class" of persons protected being a passing comment by Lord Uthwatt at 172 that

> the duty arising under reg. 3 was imposed with a view to protecting persons on the crossings therein referred to from the peril of approaching vehicles.

Brief mention should also be made of the decision of the Extra Division of the Inner House of the Court of Session in *Morrison Sports Ltd v Scottish Power Ltd* [2009] CSIH 92, 2010 SLT 243, where Lady Paton, delivering the opinion of the Court, stressed the primacy of the question of statutory intention:

> [39] In our view, the proper construction of the particular statutory provision is indeed the fundamental principle which should be adopted. Thus we consider it possible that a particular statute might contain clear language indicating that Parliament intended to confer private rights of action upon members of the public, even although a particular class could not be easily defined.

As noted previously, these comments were criticized, and the decision of the Inner House over-turned, on appeal in the UK Supreme Court (see [2010] UKSC 37, 2010 SLT 1027); but they provide further clear evidence of a strain of strong judicial dissatisfaction with the "limited class" rule. The ultimate finding of the Supreme Court in those proceedings did not turn on application of this rule; the Supreme Court held that the relevant regulations did not create civil liability because they were part of a scheme where other regulations did so explicitly- see [13], and because the provision read by the Inner House as creating civil liability was obscure and could not be supposed to have been intended to do so by Parliament- see [16]. In other words, the question being addressed was the standard question of Parliamentary intention- see [37], referring in summing up to the "scheme of the legislation".

In terms of academic critique of the supposed rule, it may suffice to quote the comment from *Clerk & Lindsell,* 20th ed:

> The key question, as always, is whether Parliament intended to confer private law rights on that class. Once there is sufficient evidence that Parliament intended the relevant duty to be enforceable by private action, it is suggested that it does not

> matter whether the class of persons protected by the statute embraces the public at large, or a smaller designated category of individuals. (footnotes omitted)[21]

## 3. The rule is illogical and contrary to the rationale of the BSD action

While the comments above suggest that the UK Supreme Court did not need to add a "limited class" criterion as a reason for finding in its decision in *Morrison* that the relevant regulations were not actionable, the fact is that the Court clearly did so. At [40] Lord Rodger referred to what he said would have been the "potentially far-reaching effects" of not applying such a criterion, and added that:

> These are the kinds of considerations which have led the courts to hold that 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 aim of this paper has been to show, with respect, that this view is not correct. To be clear- a court in seeking the intention of Parliament to allow civil recovery should of course take into account a range of factors bearing on such intention, including the class of persons protected. But if that process has already been addressed, and if the intention of Parliament has been determined, then it seems illogical, and contrary to the rationale of the BSD action, to apply a *separate* criterion of "limited class". It should not be a "necessary precondition".

Lord Rodger's suggested "floodgates" argument, for example, offered at [40], is that it could not be supposed that a liability relating to breach of electrical safety legislation would extend to provide compensation for the type of damage suffered by the neighbours of an electricity user whose house had to be demolished due to a breach of the legislation. (To be precise, the neighbours had to spend money on weatherproofing a wall, because, after the accident, the house where the electricity was connected had to be destroyed, and their wall was now exposed to the weather.)

It may be said that this damage seems somewhat remote. But if indeed it is, then it seems likely that recovery would be denied under another limb of the BSD tort, that corresponding to item (c) in the initial statement of elements at the beginning of this paper: that the damage was not the kind of damage which the legislation was designed to prevent. The rule, usually exemplified by the decision in *Gorris v Scott* (1874) LR 9 Ex 125, is well established and,

[21] *Clerk & Lindsell on Torts* (20th ed; London: Sweet & Maxwell, 2010) at 9-16 (ed R A Buckley). See also the comment previously noted from two of Australia's most respected common law judges, writing at the time extra-judicially, in Glass & McHugh, above n 4. Curiously in the paragraph cited from *Clerk & Lindsell* the author suggests that a case favouring the "limited class" rule (the "smaller designated category") is *Attorney-General v St Ives Rural District Council*. The citation of this decision is [**1960**] 1 QB 312, not "1990" as it appears in the 20th edition; and while Salmon J at 323-324 does cite *Phillips*, it is the judgment of Atkin LJ which is quoted, not Bankes LJ. Passing reference is made to the *Groves* decision and the use of the phrase "particular class". But the decision itself was a finding that the relevant legislation was in fact passed for the benefit of a class including the plaintiffs, whose land was adjacent to some drains; so it does not represent a case in which the "limited class" criterion was used to find that no BSD action lay. Indeed, it is very difficult to find any case in which this criterion, on its own, forms the main reason for denying that a civil action is created.

unlike the "limited class" rule, is perfectly consistent with the primary focus on Parliamentary intention which guides the whole tort.

*Clerk & Lindsell* put it well:

> The requirement that the claimant's damage must fall within the scope of the statute is analogous to the rules of remoteness of damage in the tort of negligence, which provide that the damage must be of the type which was reasonably foreseeable… But if the damage is of the type that the statute was meant to prevent then, as with negligence, it is irrelevant that the precise manner in which it occurred was not foreseen. (footnotes omitted)[22]

In this case, it seems likely that one could make a good argument that electrical safety legislation is designed to prevent personal injury and frank property damage, and that the weatherproofing a wall was beyond the scope of the statute. There was no need to invoke an artificial "limited class" rule to avoid extending liability too far in this way.

The rationale of the action for breach of statutory duty is reasonably clear. The aim of the tort is to allow a private person to sue for damages if their "personal right to due observance" of a statutory provision has been denied, to use the phrase adopted by Kitto J in *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, at 404.[23] The fundamental question, as noted many years ago by Jordan CJ in *Martin v Western District of the Australasian Coal and Shale Employees' Federation, Workers' Industrial Union of Australia (Mining Department)* (1934) 34 SR (NSW) 593:

> … depends upon the intention to be extracted from the statute when read as a whole, having regard to its general scope and purview as well as to its particular provisions… No single feature- other than a provision dealing expressly with the point- can be regarded as being in all cases conclusive. (at 596)

## 4. Appropriate limits on the BSD action even if the rule is abolished

The fear that is sometimes expressed, then, that the floodgates of litigation will be opened if the "limited class" rule is abandoned, seems clearly exaggerated. As noted, the remaining elements of the tort action provide more than adequate "control mechanism" to deal with potential problems. If it is thought inappropriate that a strict BSD liability be imposed for breach of traffic regulations, the decision of Atkin LJ in *Phillips* clearly shows how such a result may be reached without an artificial limiting rule. The intention of Parliament is to be sought in a range of factors, among which will be included the question of how broad a class of persons is protected by the relevant provision. But if, after all those factors are considered, Parliament can be seen to have intended to provide a civil action for all persons adversely affected by breach of the statute, then there seems no reason to allow a court to interfere with the wishes of Parliament by making a finding that a separate limiting rule will over-ride. Viewed as an artificial limitation on Parliament's intention, the rule is "constitutionally" inappropriate, as giving a common law court a power to veto the wishes of the elected Parliament.

[22] Above, n 21, at 9-53.
[23] See brief discussion of these issues in Foster (2011), above n 2 at 70-71.

While the argument of this paper has been presented as one which requires a superior court to over-rule previous decisions on this point, in fact by the time that the decisions are examined in which the rule has been said to be articulated, a good case can be made to say that all such comments have really been *obiter dicta*. It has been seen that the apparent *fons et origo* of the rule, the decision in *Phillips*, on a proper reading supports the approach of that *doyen* of the common law, Atkin LJ, rather than the comments of Bankes LJ articulating the principle as an over-riding rule. Respected common law judges have regularly adopted the comments of Atkin LJ as best representing the law on the matter. The High Court of Australia in *Brodie* has gone no further than to say, *obiter*, that an obligation enacted for the benefit of a "wide" class of persons is "less likely" to be held to be civilly actionable. It has supported the eminently sensible view, also adopted by the House of Lords in *X*, that a general "social welfare" scheme, or one dealing with basic "infrastructure", is not likely to have been intended by Parliament to create private rights.

But on careful analysis, apart perhaps as noted from comments in *Morrison* which are also *obiter* as not necessary for the decision in the case, there seem to be few, if any, decisions of superior courts in the common law world which hinge on the existence of a separate "limited class" rule, as opposed to making reference to that issue as part of the broader question of statutory interpretation. It is to be hoped that the next time the issue returns to a court capable of doing so, that blot on the jurisprudence of the common law of breach of statutory duty will be removed.