

BREACH OF STATUTORY DUTIES

THE IMPORTANCE OF DISCOVERING PARLIAMENT'S INTENTION

If a person suffers damage due to the breach of a statutory duty s/he may be able to bring an action for breach of statutory duty *simpliciter*. The careless performance of a statutory duty will not give rise to a cause of action unless there exists a right of action for breach of statutory duty *simpliciter* or a common law duty of care in negligence (*X (minors) v Bedfordshire CC* [1995] 3 All ER 353).

Some statutes expressly create a right of action for breach of their terms whereas others expressly exclude a civil action for breach of statutory duty. Examples can be found in *Winfield & Jolowicz*, p249 fn.16, or *Textbook on Torts*, p404.

In most cases however, a statute will not indicate whether contravention will be actionable or not. In such cases where the statute is silent the courts attempt to 'discover' the intention of Parliament using the rules of statutory interpretation and certain presumptions (see below). However, the result is a number of contradictory statements making it impossible to forecast how the courts will deal with a particular statute in a certain set of circumstances.

Note that duties can now arise under directly applicable European Union legislation. The ECJ held in the joined cases of *Brasserie du Pecheur SA v Federation of Republic of Germany* and *R v Secretary of State for Transport, ex parte Factortame Ltd (No. 4)* [1996] 2 WLR 506, that governments were liable for financial loss suffered as a result of their breach of EU law. Community law gave the right to compensation provided that three conditions were met. These were: (a) the rule of Community law infringed must be intended to confer rights on individuals; (b) the breach must be sufficiently serious; and (c) there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties. It is debatable whether such actions are actions for breach of statutory duty, but they do allow private law claims for damages following breach of obligations under European Law.

See further *Winfield & Jolowicz*, p253-5 or *Textbook on Torts*, p415-6.

IS THE BREACH ACTIONABLE?

THE GENERAL RULE LAID DOWN BY LORD TENTERDEN

Lord Tenterden CJ in *Doe d Bishop of Rochester v Bridges* (1831) 1 B&Ad 847, 859 laid down the general rule that 'where an Act creates an obligation, and enforces the performance in a specified manner ... that performance cannot be enforced in any other manner'.

LORD DIPLOCK'S EXCEPTIONS

However, Lord Diplock in *Lonrho Ltd v Shell Petroleum Co* [1981] 2 All ER 456, recognised two exceptions to this general rule. First, where the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, and secondly, where the statute creates a public right and an individual member of the public suffers 'particular damage'.

INITIAL PRESUMPTIONS

- (1) The first initial presumption is that if the Act provides for a penalty this is the only remedy.
- (2) In some cases the availability of another common law remedy is regarded as significant.
- (3) Thirdly, the fact that the defendant is a public utility which might be subject to extensive liability is sometimes considered to be relevant.

The Act provides a remedy or other means of enforcement

Where a statute imposes a duty and provides an adequate remedy for its breach, or some other means of enforcement, there is a presumption against conferring a common law action for breach of statutory duty:

Wentworth v Wiltshire County Council [1993] 2 All ER 256
Issa v Hackney LBC [1997] 1 All ER 999
O'Rourke v Camden LBC [1997] 3 All ER 23.

Conversely, where the statute does not provide a remedy the assumption is that there will be a right of action for a breach of the duty:

Cutler v Wandsworth Stadium Ltd [1949] 1 All ER 544
Reffell v Surrey County Council [1964] 1 All ER 743.

The availability of another common law remedy

It has been said that the court should not admit an action for breach of statutory duty where the claimant's existing common law remedies would be sufficient redress. For example, see:

Phillips v Britannia Hygienic Laundry [1923] 2 KB 832
McGall v Abelesz [1976] QB 585

The availability of an alternative common law remedy has never been a decisive consideration. The existence of an action in negligence for breach of an employer's non-delegable duty did not preclude the employee's action for breach of statutory duty established by:

Groves v Lord Wimborne [1898] 2 QB 402

Conversely, the absence of a common law remedy has not necessarily persuaded the courts to allow an action for breach of a statute: *Issa v Hackney LBC* [1997] 1 All ER 999.

Another approach to existing remedies is to say that an action for breach of the statute should be allowed where it would supplement the common law rule, but not if it would undermine the common law. Contrast the following:

Monks v Warbey [1935] 1 KB 75
Richardson v Pitt-Stanley [1995] 1 All ER 460
Quinn v McGinty (1998) Rep LR 107 (Scotland)

Public utilities which might be subject to extensive liability

There is no specific presumption that applies to public utilities, but it is clear that the courts are reluctant to infer a civil action where it would lead to extensive liability:

Atkinson v Newcastle Waterworks Co (1877) 2 ExD 441
(cf. *Read v Croydon Corporation* [1938] 4 All ER 631)
Clegg Parkinson & Co v Earby Gas Co [1896] 1 QB 592, 594

BENEFIT OF A CLASS

Where the statute was passed for the benefit of an ascertainable class of individuals the presumption is that an action will lie:

Solomons v Gertzenstein Ltd [1954] 2 All ER 625.

This has been criticised by Atkin LJ on the basis that 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 which is owed to the public at large cannot be so enforced’ (*Phillips v Britannia Hygienic Laundry* [1923] 2 KB 832, 841). Nevertheless, it was accepted as a specific exception by Lord Diplock.

Problems with this principle:

- Employees suing for breach of industrial safety legislation constitute such a class as do visitors to premises which in breach of fire regulations do not have an adequate fire escape: *Solomons v Gertzenstein Ltd*, but not a fireman electrocuted to death by faulty switches: *Hartley v Mayoh & Co* (below).
- The public using the highway is not a class, ‘it is the public itself and not a class of the public’ (per Bankes LJ in *Phillips v Britannia Hygienic Laundry*), but pedestrians using a pedestrian crossing apparently do constitute a class: *London Passenger Transport Board v Upson* [1949] 1 All ER 60.
- In *Cutler v Wandsworth Stadium Ltd* [1949] 1 All ER 544, it was held that the Betting and Lotteries Act 1934 was intended for the benefit of the public who visited the track, not bookmakers.
- The fact that a statute was unquestionably passed for the protection of a specific class of individuals is not conclusive, for example, child protection legislation: *X (minors) v Bedfordshire CC* [1995] 3 WLR 152 (per Lord Browne-Wilkinson at pp. 180-1).

PUBLIC RIGHTS

Lord Diplock’s second exception to the general rule in *Lonrho v Shell* was where the statute creates a public right and an individual member of the public suffers ‘particular damage’. Lord Diplock described a public right as ‘a right to be enjoyed by all those of Her Majesty’s subjects who wish to avail themselves of it’.

This is similar to the rule for actions by individuals for public nuisance.

A mere prohibition on members of the public generally from doing what it would otherwise be lawful for them to do is not enough to create a public right. See:

Lonrho Ltd v Shell Petroleum Co Ltd [1981] 2 All ER 456

BREACH OF STATUTORY DUTY AND NEGLIGENCE

There are three versions of so-called 'statutory negligence':

- In *Lochgelley Iron & Coal Co v M'Mullan* [1934] AC 1 the House of Lords came close to equating an action for breach of statutory duty with an action in negligence – see Lord Atkin at p9.
- In some American jurisdictions that breach of a statutory duty constitutes negligence *per se*. If legislation is designed to prevent a particular mischief in respect of which the defendant is already under a duty at common law, the statute will be actionable. Failure to meet the prescribed statutory standard is then treated as unreasonable conduct amounting to negligence. Where there is no existing common law duty, then, unless expressly stated, breach of the statute will not give rise to an action, because damages may greatly exceed the penalty considered appropriate by the legislature.
- The Supreme Court of Canada has decided that breach of a statute is *prima facie* evidence of negligence. The defendant may argue that in spite of his contravention of the statute, nonetheless he acted reasonably in the circumstances and therefore should not be held liable in negligence.

The doctrine of statutory negligence has not taken root in English law. There are 'fundamental differences' between breach of statutory duty and negligence. According to Lord Wright:

"The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty.... It is not a claim in negligence in the strict or ordinary sense." (*London Passenger Transport Board v Upson* [1949] AC 155, 168.)

See further *Winfield & Jolowicz*, p247-9 or *Textbook on Torts*, p416-9.

THE AMBIT OF THE STATUTE

Where it seems that breach of the statute is actionable, the circumstances in which the claimant sustains harm must fall within the terms of the defendant's statutory duty. See, for example:

Chipchase v British Titan Products [1956] 1 All ER 613
Hartley v Mayoh & Co [1954] 1 All ER 375
Knapp v Railway Executive [1949] 2 All ER 508.

In addition, the damage suffered by the claimant must be of the kind that the statute was intended to prevent. See:

Gorris v Scott (1874) LR 9 Ex 125
Nicholls v F. Austin Ltd [1946] AC 493
Close v Steel Co. of Wales [1961] All ER 953

Provided the damage is of the type that the statute was meant to prevent, it is irrelevant that the precise manner in which it occurred was not envisaged:

Donaghey v Boulton & Paul Ltd [1968] AC 1

These latter two rules are identical to *The Wagon Mound* and *Hughes v Lord Advocate* (see Negligence – Remoteness).

CAUSATION AND DEFENCES

CAUSATION

The claimant must establish that the defendant's breach of statutory duty caused the damage: see *McWilliams v Sir William Arrol & Co* [1962] 1 WLR 295.

The breach need not be the sole cause provided that it materially contributed to the damage: *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.

Where it is the claimant's own wrongful act which puts the defendant in breach of statutory duty, the defendant will not be liable, provided the claimant is the sole cause of his own loss:

Ginty v Belmont Building Supplies [1959] 1 All ER 414
Boyle v Kodak Ltd [1969] 2 All ER 439

However this does not apply if the defendant's breach contributed in part to the claimant's damage, in which case the defence of contributory negligence may apply:

McCreesh v Courtaulds plc [1997] PIQR P421

DEFENCES

Volenti non fit injuria is not a defence to an action for breach of statutory duty brought by an employee against his employer, subject to the limited exception admitted in:

ICI Ltd v Shatwell [1964] 2 All ER 999.

There is some disagreement as to whether *volenti* will apply in other cases of breach of statutory duty (*Winfield and Jolowicz*, - yes; *Salmond and Heuston*, - no).

Contributory negligence is a defence, but special considerations operate in the case of an action by an employee against his employers:

Caswell v Powell Duffryn Associated Collieries Ltd [1939] 3 All ER 722, per Lord Wright

As a general rule a person subject to a statutory duty cannot delegate responsibility for its performance to someone else. See:

Whitby v Burt [1947] KB 918.

MISFEASANCE IN A PUBLIC OFFICE

This separate tort is sometimes coupled with an action for breach of statutory duty. See *Winfield & Jolowicz*, p265-7. It was reviewed in:

Three Rivers District Council v Bank of England (No 3) [1996] 3 All ER 558

EXAM QUESTIONS

Analyse the circumstances in which, and the principles upon which, the courts provide a remedy for breach of statutory duty.

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