BREACH OF STATUTORY DUTY AS A REMEDY AGAINST PUBLIC AUTHORITIES

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In any examination of the legal obligations of public authorities, legislation is bound to play an influential role. Unlike a private individual or corporation, the public authority, if not a creature of statute, is at least subject to statutory provisions which circumscribe its (or his) conduct in any given sphere of government activity. The fact that legislation plays so prominent a role as creator and regulator has not meant that a public authority's liability lies exclusively within the control of the statutory provisions which goern it. Public authority liability has largely been a matter of subjecting such authorities to causes of action available against private individuals. That one such cause of action should be known as breach of statutory duty is due to its dependence on statutory provisions but not necessarily those regulating functions of government. The idea of a breach of statutory duty providing the basis of a claim for damages owes its current prominence if not its original impetus to the industrial context not to any branch of public law.[1]

1. The Action for breach of statutory duty in general

Although the prime object in the present context is to discover how the action has been used for the purpose of attaching liability to public authorities, the answer to this enquiry demands an understanding of the features of an action for breach of statutory duty of general application.

In the process of finding some order amongst the perplexing variety of judicial explanations and rationalisations it is hoped that some principles of particular relevance to public liability will be discovered.

(a) *Statutory Negligence and Negligence per se*

The most fundamental challenge to the enunciation of a separate cause of action founded on breach of statutory duty is the suggestion that there is no separate cause of action at all.

In *Lochgelly Iron & Coal Co.* v. *M'Mullan*[2] the pursuer claimed damages for the death of his son, a miner employed by the defenders. The claim relied on an alleged breach of s. 49 of the Coal Mines Act, 1911, which provided that the roof of every working place be made secure. The defenders argued that such an action was excluded by s.29(1) of the Workmen's Compensation Act, 1925 which permitted a claim to be made independently of the Act only where such claim was based on the "personal negligence or wilful act" of the employer. The House of Lords, rejecting

1. Glanville Williams claims that "industrial legislation is well nigh the only area in which penal legislation has been held to create statutory torts, at any rate during the present century". (1960) 23 *M.L.R.* 233, at 244. Some leading text books devote a separate section to employer's liability for breach of statutory duty. See for example *Winfield and Jolowicz,* on *Tort* 9th ed., at 158 to 167.
2. [1934] A.C.1.; 149 L.T. 526.

the defender's arguments, reached the conclusion that the defender's failure to discharge what amounted to a non delegable duty imposed by the Coal Mines Act was correctly described as "personal negligence". Lord Wright referred to a breach of such a duty as "statutory negligence"[3]. This phrase appears to impose on the statutory provision a function approximating that fulfilled by the American concept of negligence *per se.*

According to thee latter the statute has the effect of conclusively determining whether a breach has occurred, but only as part of the ordinary common law action in negligence "... the unexpected violation of such a statutory standard is negligence *per se,* that is, negligence as a matter of law (to be ruled by the Court)"[4].

The standard of the reasonably prudent man which involves a jury in value judgment as well as fact finding is replaced by a specific standard predetermined by statute which leaves the tribunal of fact no value judgment to make and may entitle the judge to withhold the determination of breach of duty from the jury altogether where the relevant facts are not in doubt.[5]

Despite Lord Wrights' use of the phrase "statutory negligence" and its apparent similarity to the concept of negligence *per se,* his Lordship's choice of language is not typical of English and Australian Courts. In fact it was Lord Wright himself who in a later case was to emphasise the distinction between an action in negligence and one for breach of statutory duty.[6] Professor Fleming in the third edition of his text on the law of torts implied that the difference between the American view on the one hand and the English and Australian view on the other was one of rationale only.[7] In the latest edition, a footnote discloses a reluctant concession to the argument that the difference is more fundamental.[8] Negligence *per se* and, it has been suggested, Lord Wrights' "statutory negligence", are based on the premise that the role of a statutory provision in striking a required standard of conduct is to supply one element of an action in negligence. By contrast in England and Australia there is ample support, both judicial and legislative[9] for the argument that "breach of statutory duty" is a description of the commission of a tort quite separate and distinct from the tort of negligence. It is unfortunate, for reasons elaborated later, that the existence of a separate cause of action should be seen as depending on what has been described as "the received doctrine"[10] of presumed legislative intent.

The artificiality of attributing a fabricated intention to a piece of legislation which, if anything, suggests a contrary intention has been frequently attacked.

> ... in most cases it is carrying construction pretty far to read provisions for civil liability into a statute which actually omits them while expressly providing for criminal punishment, especially when it is such an easy and familiar thing to insert civil recovery provisions when they are wanted.[11]

3. [1934] A.C.1., at 23. Cf. The support for this approach in Glanville Williams *op. cit.*
4. Harper and James, *The Law of Torts,* Vol. 2, at 997.
5. Morris, "The Relation of Criminal Statutes to Tort Liability", (1933) 46 *Harv. L. Rev.* 453 to 455.
6. *Upson* v. *London Passenger Transport Board* [1949] A.C. 155 at 168–169.
7. Fleming, *The Law of Torts,* 3rd ed., at 126. Cf. the discussion of rationale, *infra.* (b).
8. Fleming, *The Law of Torts* 4th ed., at 122 (footnote 22)
9. See, Moroson, Sharwood and Phegan, *Cases on Torts* 4th ed., at 701. One view would go so far as to suggest that it is wrong to describe an action for breach of statutory duty as a "tort" at all. Cf. Fullager J. in *Darling Is. Stevedoring Co. Ltd.* v. *Long* (1956–1957) 97 C.L.R. 36, at 56.
10. Fleming, 4th ed., at 122.
11. Harper & James, *op. cit.* s.17.6, p. 995. See also: Thayer, "Public Wrong and Private Action" (1914) 27 *Harv. L.R.* 317 at 320. *Prosser on Torts,* 3rd ed. at 193; Fleming, *op. cit.* at 123.

However the negligence *per se* solution introduces an artificiality of a different kind. Many statutory offences which provide the standard of conduct to replace that of reasonable care are stated in terms which are free from any element of fault. Typical is factory legislation requiring dangerous machinery to be fenced. The House of Lords has displayed no hesitation in applying absolute liability even where compliance would render the machinery unusable.[12]

To argue that such a function is simply part of the law of negligence is to resort to a contradiction in terms which appears to have gone unnoticed in some American decisions. In *Andrew* v. *White Line Bus Corporation*[13] it was held on appeal that a direction to the jury that the defendants were not negligent if they observed a traffic ordinance "in so far as it was possible to do in the exercise of reasonable care under the circumstances" was in error. The ordinance in question required vehicles making a right hand turn to keep to the right of the centre of the intersection at all times. The defendants' bus was so wide that it was impossible to comply with the ordinance. It was nevertheless held that where strict conformity was impossible the defendants violated the ordinance "at their own risk".[14] Other American cases have displayed an uneasiness with this unnatural union of negligence and liability without fault.[15] The result has been the emergence of various qualifications by which non-observance of the statutory requirement has been excused. To take just one example:[16] a number of American Courts have had to consider the alleged negligence (or contributory negligence) of a driver in breach of an ordinance prohibiting overtaking at an intersection. Despite the unqualified language of the ordinance it has been construed as subject to a proviso excusing the driver where there was no reason to know of the existence of the intersection at the relevant time.[17] More ambitious than such *ad hoc* solutions has been the attempt to formulate a comprehensive qualification in the form of "legal excuse",[18] or "justifiable violation".[19] According to this qualification proof of failure to comply with a standard of care fixed by statute or ordinance is sufficient to get the case to the jury "in the first instance".[20] However the defendant may offer proof excusing his failure to observe such standard. He may rely on:

1. Anything that would make it impossible to comply with the statute or ordinance.
2. Anything over which the . . . (defendant) has no control . . .
3. . . . an emergency not of his own making . . .[21]

By this approach it would seem that the effect of a statute or ordinance imposing an absolute standard is therefore not to eliminate the element of fault but to effect a shift in the onus of proof from plaintiff to defendant. The ultimate question of liability still rests on the defendant's failure to exercise reasonable care.

In any case, it would be a gross oversimplification of American decisions to

12. *John Summers & Sons* v. *Frost* [1955] A.C. 740, esp. per Lord Reid at 769–770. Glanville Williams *op. cit.* challenges the use of "absolute liability" in this context at 238, although he goes on to cite at least one case in which the statutory duty was absolute: *Galashiels Gas Co.* v. *Millar* [1949] A.C. 275.
13. (1932) 115 Conn. 464; 161 A. 792.
14. 161 A. 792, at 793.
15. Prosser merely explains the use of "negligence per se" in such contexts as "habit". See *Prosser on Torts* 3rd ed. at 199.
16. A great variety of casesare cited in this context in American text books. See e.g. Prosser, *op. cit.* at pp. 199–201.
17. *Hullander* v. *McIntyre* (1960) 78 S.D. 453; 104 N.W. 2d. 40; *Wermeling* v. *Shattuck* (1950) 366 Pa. 23; 76 A. 2d. 406.
18. *Kisling* v. *Thierman* (1932) 214 Iowa 911; 243 N.W. 552.
19. Harper & James, *op. cit.* at 1008–1011.
20. 243 N.W. 552, at 554.
21. *Ibid.*

suggest that all, or even most, can be explained in terms of this doctrine of "justifiable violation". Reference has already been made to cases in which a literal interpretation of a strict statutory standard has been insisted upon. The doctrine of "justifiable violation" is, in a sense, a retreat from this position.

An alternative use of a statutory provision still within the confines of an ordinary negligence claim is to treat it, not as a substitute (conclusive or otherwise) for the standard of the reasonable and prudent man, but merely as evidence of the defendant's failure to comply with that standard. If this alternative is developed to the point where the breach of the statutory standard becomes *prima facie* evidence of negligence,[22] it meets on common ground with the doctrine of justifiable violation.[23]

The use of statutory provisions as evidence of negligence is not unfamiliar to English and Australian lawyers.[24] It is the role to which traffic regulations have been committed almost universally.[25] However it is not suggested that where so used they affect the onus of proof. Why all industrial safety regulations have not been similarly treated, is not an easy question to answer, except in terms of certain presumptions which will be challenged later.

(b) *Breach of statutory duty as a separate tort – the search for a rationale*

While use has been made of statutory standards for purely evidentiary purposes certain statutory provisions have commanded a more conclusive role. While American Courts have accepted statutory standards as a substitute for the standard of reasonable care in negligence actions, English (and Australian) Courts have gone further and drawn from the relevant enactment a cause of action separate and distinct from the tort of negligence.

To return to a question touched upon earlier, why should any civil consequences be attached to a legislative prescription more often than not accompanied by criminal sanction? The answer is easy enough if specific provision is made in the statute for civil liability. If however the statute is silent on the matter, surely the most obvious conclusions are either that the legislature gave no thought to it or, having done so, deliberately ruled it out or at least avoided the issue. Nonetheless, English Courts have repeatedly justified the determination of the existence of an action for breach of statutory duty in terms of presumed legislative intent. In a passage frequently quoted in this context, Dixon J. commented:

> ... an interpretation of the statute, according to ordinary canons of construction, will rarely yield a necessary implication positively giving a civil remedy. As an examination of the decided cases will show an intention to give, or not to give, a private right has more often than not been ascribed to the legislature as a result of presumptions or by reference to matters governing the policy of the provision rather than the meaning of the instrument. Sometimes it almost appears that a complexion is given to the statute upon very general considerations without either the authority of any general rule of

22. i.e. by raising a rebuttable presumption thus shifting the onus of proof.
23. Harper & James, *op. cit.*, at 1011. Cf. Morris, "The Role of Criminal Statutes in Negligence Actions" (1949) 49 *Col. L. Rev.* 21, at 35.
24. See for example *Tucker* v. *McCann* [1948] V.L.R. 222.
25. Glanville Williams (1960) 23 *M.L.R.* 233 provides other examples of the use of statutory duties as evidence of negligence. He goes even further and suggests that a statutory provision to which the courts make frequent reference becomes an integral part of the common law standard of reasonable care. Courts then rely on them as evidence of negligence without specific reference to them and in contexts to which the statutes do not necessarily apply (at 250–251).

law or the application of any definite rule of construction.[26]

The pursuance of this "will-o'-the-wisp of a nonexistent legislative intention"[27] has had its critics on both sides of the Atlantic. In an article described by more than one writer as the "classic on the subject" Professor Thayer[28] discounted the resort to presumed legislature intent as a contradiction of the "deliberate choice of the legislature" which the court "has no right to disregard".[29] Such a view explains the refusal of American Courts to acknowledge the existenoe of a separate cause of action. Professor Thayer went on to defend the use of the statutory provision as a substitute for the "reasonable man" in a negligence claim by arguing that the reasonable man is also law abiding and therefore the Courts are justified in accepting as a conclusive indicator of a reasonable man's conduct a standard which has been prescribed by the legislature.[30] He disapproved of the use of statutory standards as evidence since in so using the statute the courts

> . . . are doing no less than informing that body (i.e. the jury) that it may properly stamp with approval, as reasonable conduct, the action of one who has assumed to place his own foresight above that of the legislature.[31]

Although to maintain consistency Thayer had no alternative but to discount any other use being made of the statute, at least one writer has challenged the conclusion that the existence of a statute entitles the judge to take the question of breach of duty away from the jury.[32] The fact is, as stated earlier, that American Courts have attached a variety of roles to statutes from treating them as a substitute for reasonable care to giving them evidentiary effect of a more or less conclusive nature[33] to denying them any relevance at all.[34] In its own way the "received doctrine" of Thayer is as incomplete as that derived fromEnglish decisions. It is true that the concept of imputed legislative intent is flexible and therefore admits of the possibility of rejecting the relevance of the statutory provision in question or at least subjecting it to a secondary (evidentiary) role. Thayer, on the other hand, simply refuses to concede flexibility. But neither aid predictability; the former because it rests on such an elusive and artificial premise; the latter because it does not encompass alternatives actually employed by the Courts.

The elusiveness of the unexpressed legislative intent is soon discovered upon close examination of the so-called presumptions which guide its determination.

> . . . it is not altogether clear which of two diametrically opposed initial presumptions actually prevails. According to one view "prima facie a person who has been injured by the breach of a statute has a right to recover

26. *O'Connor* v. *S.P. Bray Ltd.* (1937) 56 C.L.R. 464 at 477–478. The search for legislative intent was described as "more or less fatuous" by Davidson J. in *Haylan* v. *Purcell* (1948) 65 W.N. (N.S.W.) 228.
27. Harper and James, *The Law of Torts* Vol 2, at 995. For a discussion of this concept against the background of general rules of statutory interpretation, see Linden A. M. "Tort Liability for Criminal Non-feasance" (1966) 44 *Can. Bar Rev.* 25 at 34 – 35.
28. See Thayer n.ll *supra.* The word "classic" is used by both Harper and James, *op. cit.* and Morris (1933) 46 *Harv. L. R.* 453. Other complementary terms such as "pioneering" and "seminal" have been used. As to the latter, see Fleming, *Law of Torts* 4th ed. at 122.
29. Thayer, *op. cit.* at 320.
30. *Id.*, at 322.
31. *Ibid.*
32. i.e. in the sense of taking from the jury any opportunity to evaluate the conduct of the defendant in terms of what they regard as reasonable. Lowndes, "Civil Liability Created by Criminal Legislation" (1932) 16 *Minn. L. Rev.* 361.
33. Morris, "The Role of Criminal Statutes in Negligence Actions", (1949) 49 *Col. L.R.* 21, at 34 – 35.
34. Prosser, *op. cit.* at 192 – 198.

> damages from the person committing it unless it can be established by considering the whole of the Act that no such right was intended to be given". According to the other view, however, "where an Act creates an obligation, and enforces the performance on a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner". The second of these views has the greater measure of acceptance today but which ever is preferred, it must at once be qualified by the statement that it is subject to a large number of exceptions.[35]

If "specified manner of performance" means the imposition of some criminal penalty,[36] it is easy to discredit the second view. In industrial legislation, the most prolific source of actions for breach of statutory duty, criminal penalties are commonly imposed for breach of safety requirements. However it is not difficult to find other modes of performance which have effectively displaced a possible common law action based on a breach of statute. The most obvious is where the statutory provision itself contains or is accompanied by statutory machinery enabling the recovery of damages for its breach. Alternatively and of particular relevance to the liability of statutory authorities are those statutes in which provision is made for complaint of a breach to be made, for example, by way of appeal to a Minister.[37]

There is another equally suspect presumption which relies on the adequacy of pre-existing common law rather than remedies provided by the statute itself. In *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.*[38] Atkin L.J., referring to regulations under the Locomotives on Highways Act, 1896, remarked:

> It is not likely that the Legislature, in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new cases of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring vehicles upon highways.[39]

His Lordship's conclusion may well be reliable enough so long as it is restricted to motor traffic regulations.[40] It could hardly be further from the truth if applied to industrial regulations.[41]

The basis of one presumption which has been more consistently adhered to can be found in the following observations of Romer L.J. in *Solomons* v. *R. Gertzenstein Ltd.*:[42]

> . . . It appears to me to be of cardinal importance in considering whether a civil suit lies for breach of statutory duty, to see whether, on a broad view, that duty has been imposed for the general welfare on the one hand or in the interests of individuals or of a defined or definable class of the public on the other.[43]

35. *Winfield and Jolowicz on Tort*, 9th edition at 130 – 131. As is commented by the author in footnoting the extracted passage the conflicting presumptions can be found supported even in different parts of the same judgment. (Greer L. J. in *Monk* v. *Warbey* [1935] 1 K.B. 75.) See also Glanville Williams (1960) 23 *Mod. L. Rev.* 233, at 244.
36. *Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398 per Lord de Parq at 411.
37. See 2(a), *infra.*
38. [1923] 2 K.B. 832.
39. *Id.* at 842.
40. See for example *Tucker* v. *McCann* [1948] V.L.R. 222.
41. See further discussion of this point in Glanville Williams, *op. cit.* at 246.
42. [1954] 2 Q.B. 243.
43. *Id.*, at 265. See also *Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398.

The presumption flowing from this distinction is that an action based on a duty of the second kind is available to the individual or member of a definable class while duties imposed for the general welfare are never actionable at the suit of the individual. Even this presumption lacks universal support. Preceding his discussion of the importance of existing common law remedies Atkin L.J. in *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* said:

> It would be strange if a less important duty which is owed to a section of the public, may be enforced by action, while a more important duty owed to the public at large cannot.[44]

In referring to his Lordship's opinion at least one leading textwriter prefers it "as a matter of principle".[45]

The universality of this presumption is the more suspect because of its part in relegating traffic regulations to an evidentiary role. The dubious distinction between traffic and industrial regulations is at least in part sustained by arguments of the kind used by Bankes L.J. in *Phillips* v. *Britannia Hygienic Laundry Co:*

> . . . The public using the highway is not a class; it is itself the public and not a class of the public. The clause (s.6 of the Locomotives on Highways Act, 1896) . . . was not passed for the benefit of a class of the public.[46]

By contrast it is said that the factory worker is a member of a limited class with whose protection industrial safety statutes are clearly concerned.[47]

Highway users have however been held to constitute a class in other circumstances. In *Knapp* v. *Railway Executive*[48] the protected class to which the duty was held to be owed was described as "users of the highway".[49] In that case, a gate which closed across the roadway at a level crossing had not been securely fixed in accordance with the Act under which it had been erected. The result was that it swung back in the path of an oncoming train when a car rolled slowly into it from a stationary position about a car length from the gate. It was held that since the provision of a gate was for the protection of road users, no action for breach of statutory duty could be brought by the engine driver injured when his train crashed into the gate. Apparently there was (or would have been in the case of injury) a duty to roadusers. There would have been no duty to someone travelling as a passenger in the train. In other words the duty was owed to members of the public who happened, at the relevant time, to be using the road rather than the railway line.

In *London Passenger Transport Board* v. *Upson*[50] a bus driver was held in breach of a statutory duty when he failed to stop in time to avoid striking the plaintiff on a pedestrian crossing when she emerged from behind a stationary taxi-cab into the path of the bus. Not one of their Lordships in the House of Lords appears to have been embarrassed by the presumption which they had effectively displaced without any acknowledgement of its existence.

In what Glanville Williams describes as "one of the rare instances of a statutory tort outside this (i.e. industrial) field",[51] the Court of Appeal in *Monk* v. *Warbey*[52]

44. [1923] 2 K.B. 832, at 841.
45. Winfield & Jolowicz, *op. cit.* at 131.
46. [1923] 2 K.B. 832, at 840.
47. *Groves* v. *Wimborne* [1898] 2 Q.B. 402; *Black* v. *Fife Coal Co. Ltd.* [1912] A.C. 149.
48. [1949] 2 A11 E.R. 508.
49. *Id.*, per Singleton, L.J. at 514. Jenkins L.J. in the same case used the phrase "road-using public", at 515.
50. [1949] A.C. 155.
51. (1960) 23 *M.L.R.* at 247.
52. [1935] 1 K.B. 75.

allowed the driver of a motor coach to recover against the owner of a car which collided with the coach as a result of the car driver's negligence. The driver was uninsured and it was held that the defendant, in allowing the car to be driven by an uninsured person, was in breach of s. 35 of the Road Traffic Act, 1930. In reaching this conclusion both Greer and Maugham, L.JJ. rejected the presumption in favour of membership of a defined class and referred with approval to the observations of Atkin, L.J. in *Phillips* v. *Britannia Hygienic Laundry Co.* It is not surprising that Glanville Williams should remark:

> It is impossible to say why the court should have felt itself able to find for the plaintiff . . . when in so many other cases no statutory tort had been recognised.[53]

Recent cases have failed to adequately resolve this inconsistency. In *Tan Chye Choo* v. *Chong Ken Moi*[54] the Privy Council chose to ignore the difficulties created by these cases. The case involved an alleged breach of a rule under a Malaysian traffic ordinance that motor vehicles should be in such a condition that no danger was caused to any other road user. Penalties for contravention were prescribed in the ordinance. *Phillips* v. *Britannia Hygienic Laundry Co.* was applied. *Monk* v. *Warbey* was referred to, but only to suggest that the general approach of the Court of Appeal in that case was consistent with that applied in earlier cases and with which their Lordship's agreed.[55] As to *London Passenger Transport Board* v. *Upson,* a consideration of such pedestrian crossing cases failed to lead their Lordships' to "any different conclusion".[56] No further explanation was forthcoming. In *Coote* v. *Stone*[57] Davies L.J. asserts that in the two last mentioned cases the successful plaintiffs were plainly members of a class for whose protection the legislation was enacted.[58] "Plain" it may be to his Lordship. But its obviousness escaped the notice of all those who delivered judgments in the cases concerned. There is no suggestion that in Upson's case their Lordships were guided by the suggestion of Davies, L.J. that "pedestrians" constitute a class for whose protection the legislation was passed.

Such anomalies can only weaken the presumption and in turn the distinction between traffic and industrial regulations which it is seen to support.

The fate of this presumption is of special relevance to the use of the action for breach of statutory duty against public authorities. Unless the public authority is acting in some private capacity, the very nature of responsibilities imposed by statute is likely to involve protection of the public at large. To exclude any private right of action on this ground would severely restrict the usefulness of this cause of action as a remedy against such authorities.

If the concept of presumed legislative intent and the presumptions called upon to assist in its determination are in turn artificial and unreliable, can the existence of a private remedy based on some statutory obligation be justified?

G.M. Fricke[59] finds authority for at least two other possible justifications. The first he describes as the "private informer" rationale.[60] The private action gives the victim an incentive to sue and so facilitates the enforcement of the criminal law. Needless to say such a rationale fails to explain the private action based on a statutory provision unaccompanied by penal sanction. Furthermore the reasoning

53. 23 *M.L.R.* at 247.
54. [1970] 1 W.L.R. 147.
55. *Id.*, at 152–3. Particular emphasis was given to *Cutler* v. *Wandsworth Stadium Ltd. op. cit.*
56. *Id.*, at 154.
57. [1971] 1 W.L.R. 279.
58. *Id.*, at 283.
59. "The Juridical Nature of the Action upon the Statute" (1960) 76 *L.Q.R.* 240.
60. *Id.*, at 251–253.

found in authorities quoted by Mr. Fricke[61] suggesting that a token penalty should be made more effective by adding civil consequences can be challenged by the opposite assumption that a token penalty is reason for attaching minimal significance to the precaution in question.[62] As Mr. Fricke himself concludes

> ... this rationale, while it may have influenced the thinking of judges who developed the action upon the statute, is an unsatisfactory indication of the limits of the action.[63]

While acknowledging the absence of English authority to support it Fricke turns for the second rationale to two eminent Americant jurists[64] and summarises it in the following terms:

> In a democratic community, the legislative product is a broad reflection of the spirit of the people and as such should be used as a springboard for judicial analogies.[65]

Chief Justice Stone refers in his article to statutes "as starting points for judicial law making",[66] and as "a premise for legal reasoning".[67]

Mr. Fricke sees in these concepts a possible basis for a doctrine of the "equity of the statute".

> The judiciary is paying its respect to the legislature, which is more representative and has better opportunities for investigation before framing general rules.[68]

Such observations as those of Chief Justice Stone can be seen not only as an attempt to give legislation a more influential role in judicial law making but also as a continuing recognition of the ultimate creative function of the judges. It is this which brings us closest to what the courts have actually been doing in providing civil actions for breach of statutory duty. While conceding, and actually giving effect to, the significance of a legislative pronouncement affecting the defendant's conduct, the courts have created common law actions by asserting a duty of an extent defined by the statute, owed by the defendant to the plaintiff.

The repeated attempts to cover this piece of judicial initiative with the veneer of legislative interpretation lead only to verbal gymnastics which fall dramatically apart under Hohfeldian analysis.[69] The words "duty", "liability" and "right" are joined in the most unnatural of unions primarily because the courts refuse to admit that the individual's right to sue is the correlative of a duty of their own creation not the legislature's.

Supposing such an admission could be extracted, what then? The Courts would no longer have the crutch of legislative intent to prop up their conclusions either for or against the existence of a private right of action in any given case. One risk would be that to allow self-confessed creativity to be pursued on an entirely *ad hoc* basis would lead to as arbitrary a collection of decisions as does the present reliance

61. e.g. Isaac J. in *Cofield* v. *Waterloo Case Co. Ltd.* (1924). 34 C.L.R. 363.
62. Cf. Morison, Sharwood and Phegan *op. cit.* at 704.
63. 76 *L.Q.R.* at 253.
64. Roscoe Pound, "Common Law and Legislation" (1908) 21 *Harv. L.R.* 383. Harlan F. Stone, "The Common Law in the United States" (1936) 50 *Harv. L.R.* 4.
65. 76 *L.Q.R.* at 242.
66. Stone, *op. cit.*, at 12, n. 12.
67. *Ibid.*
68. 76 *L.Q.R.* at 254–255. Cf. Linden, *op. cit.* at 42.
69. See for example the analysis of the judgments of the Australian High Court in *Sovar* v. *Henry Lane Pty. Ltd.* (1967) 116 C.L.R. 397 in Morison, Sharwood and Phegan *op. cit.* at 701–703.

on unexpressed legislative intent.

One starting point would be a rule that any statutory provision imposing obligatory prescriptions in the interests of the safety and welfare of others creates a duty. A breach of that duty becomes actionable where such breach causes injury to person or property. The availability of a right of action in a person suffering "special" damage as a result of a public nuisance is a ready made analogy fashioned by the common law. This analogy received brief attention in Glanville Williams' article,[70] where he cited *Couch* v. *Steel*[71] as authority for the proposition that where the Act was passed for the benefit of the public at large, a plaintiff could sue for breach of statutory duty if he suffered particular damage over and above that suffered by the rest of the public. His reference to *Couch* v. *Steel* however was immediately followed by the observation:

> But the later cases reject this criterion of particular damage.[72]

Such a peremptory dismissal is not unusual and has recent case law to support it. Whether the decision deserves such treatment is another matter.

Couch v. *Steel* was caught in a period of fluctuating attitudes. The case itself was concerned with the alleged failure on the part of a ships' master to keep on board a proper supply of medicines as required by statute. Lord Campbell C.J., observing that the statute in question made no provision for compensation to a person sustaining special damage continued:

> Nor are there any words taking away the right which the injured party would have a common law to maintain an action for special damage arising from the breach of a public duty.[73]

Subject to doubts expressed about the interpretation given to the particular statutory provision in question, *Couch* v. *Steel* can be seen as no more than an example of the use of breach of statutory duty by the servant against the master. The more sweeping proposition of Lord Campbell is not necessarily to support the result of that case. As to this proposition Lord Cairns in *Atkinson* v. *The Newcastle and Gateshead Waterworks Co.*[74] expressed "grave doubts" as to whether the authorities cited by Lord Campbell justified it. His Lordship's doubts should not however go unchallenged and it is regrettable that his rejection of *Couch* v. *Steel* was not subjected to closer scrutiny in later cases. The only decision expressly relied on by Lord Campbell in *Couch* v. *Steel* was *Rowning* v. *Goodchild*[75] and support can be found in that case for his "broad general proposition". The defendant in *Rowning* v. *Goodchild* was the deputy postmaster of Ipswich where the plaintiff lived. It was alleged that the defendant had received letters addressed to the plaintiff and had detained them in his office for ten days. By statute the postmaster general was under a duty to "receive dispatch send and *deliver* all letters and packets . . . " It was held that the detention of the letters addressed to the plaintiff was a breach of this duty which entitled the plaintiff to an action at common law.

Lord Campbell was not alone in enunciating his general proposition. Five years later, in proceedings on demurrer before the Court of Common Pleas, no less a judge than Willes, J. expressed the law in the following terms:

70. 23 *M.L.R.* at 245.
71. (1854) 3 E & Bl. 402; 118 E.R. 1193.
72. 23 *M.L.R.*, at 245.
73. 3 E & Bl. 402, at 414.
74. (1877) 2 Ex. D. 441, at 447.
75. (1773) 2 W.Bl. 906; 96 E.R. 536.

> There are three classes of cases in which a liability may be established by statute. There is that class where there is a liability existing at common law and which is only re-enacted by the statute with a special form of remedy, the plaintiff has his election of proceeding – either under the statute or at common law. Then there is a second class, which consists of those cases in which a statute has created a liability, but has given no special remedy for it; there the party may adopt an action of debt or other remedy at common law to enforce it. The third class is where the statute creates a liability not existing at common law and gives also a particular remedy for enforcing it.[76]

Assuming that his Lordship intended by "liability" what is more properly described as "duty", his "second class' is described in similarly unqualified terms to those used by Lord Campbell.

To suggest that the existence of a duty expressed in a statute coupled with particular damage sustained by the plaintiff in its breach should entitle the plaintiff to a common law claim for damages, does not mean that such a basic principle should operate without exception. Experience has already shown that certain statutory provisions (e.g. traffic regulations) are better relegated to an evidentiary role within the ordinary rules of negligence, particularly in areas where the law of negligence has been especially active. For the sake of consistency industrial regulations could be added although such a step would require a departure from existing authority. But once the "benefit of class or individual" presumption is abandoned, no support is left for this quite arbitrary distinction between motor traffic regulations and industrial regulations concerned as they are with the two areas in which personal injury is most frequently sustained and where consequently the principles of liability in negligence are most frequently applied.

To strip the determination of the availability of an action for breach of statutory duty of the search for non-existent legislative intent to that effect, does not exclude consideration of the purposes which the statute seeks to serve. A proper, but realistic, line of enquiry would involve examination of the interests which the statute was concerned in protecting. If the safety of the plaintiff or his property fell clearly outside these interests, the Court could justifiably reject the claim, not because no intention to provide a remedy could be found but because the interests protected by the statute were not affected. In the context of public authority liability in particular the process of elimination could be extended to examine wider questions of policy: available resources; competing responsibilities and ultimate cost (loss distribution). The systematic examination of the structure and powers of the Board of Fire Commissioners under the New South Wales Fire Brigades Act by Holmes, J. A. in *Bennett and Wood Ltd.* v. *Council of the City of Orange*[77] provides an example of what judges have already been prepared to do. It is true that this was a judgment which ultimately relied on the established formulae[78] and there is a twist of irony in the fact that such an analysis lends more credibility to the reliance on presumed legislative intent. It is hardly sufficient on the other hand to excuse its patent artificiality.

What is being suggested therefore is an approach based on a general proposition of the kind originally enunciated in *Couch* v. *Steel*.[79] Such an approach does not

76. *The Wolverhampton New Waterworks Company* v. *Hawkesford* (1859) 28 L.J.C.P. 242, at 246.
77. (1967) 67 S.R. (N.S.W.) 426, at 435 – 437 and again at 439. Cf. the judgmen of the Full Court of the Supreme Court of New South Wales in *Board of Fire Commissioners* v. *Rowland* [1960] S.R. (N.S.W.) 322, at 327 – 328.
78. (1967) 67 S.R. (N.S.W.) 426, at 437 – 439.
79. Not all subsequent decisions have rejected Lord Campbell's proposition. See *Glossop* v. *Heston and Isleworth Local Board* (1879) 12 Ch. D. 102, per Brett L. J. at 121; *Maguire* v.

advocate usurpation by the judiciary of the proper role of the legislature, for the courts must look to statute for an enunciation of the duty. That some measure of judicial control should be exercised in supplying the individual's right to sue would seem to involve both the ordinary processes of statutory interpretation coupled with a legitimate exercise of judicial initiative. As to the latter, it is undoubtedly being practised in the search for non-existent legislative intent, even if thinly disguised.

But whatever be the means of answering the question: Can a cause of action for breach of statutory duty be shown to exist? an affirmative answer leads to further questions: Is the plaintiff's injury within the scope of the duty? Has a breach of that duty been established? Was the plaintiff's injury caused by the breach? Before turning to thee application of this cause of action to public authorities, at least brief consideration needs to be given to the factors involved in providing an answer to these questions.

(c) *Defining the scope of the duty*

The plaintiff must belong to the class of persons protected by the statute

A fireman attending a fire in a building cannot rely on safety regulations concerning electricity switches passed for the benefit of persons employed in the building[80] nor can a sub-contractor necessarily rely on building regulations not being a "person employed" under the enabling Act.[81]

In *Knapp* v. *Railway Executive*[82] the plaintiff failed because as an engine driver he fell outside the "class" of road-users protected against the faulty level-crossing gates.

It is true that if the presumption in favour of membership of a defined class is discredited, this first requirement ceases to exist. It is no longer necessary to determine whether the plaintiff belongs to the protected class but more generally whether the plaintiff is protected. This poses a question almost indistinguishable from that raised by the next matter to be determined in defining the scope of the duty.

The plaintiff must have suffered damage within the class of injury to which the statute is directed

To illustrate this requirement *Winfield and Jolowicz on Tort*[83] cite *Monk* v. *Warbey*.[84] In that case, "the very purpose of the section was to provide protection against uninsured drivers".[85] In a recent case referred to earlier,[86] Davies, L.J. preferred to explain *Monk* v. *Warbey* on the grounds of duty to a class,[87] namely persons injured by motor-vehicles. Apart from his Lordships' dubious use of the word "class", such an explanation demonstrates the often narrow line between protected class of person and protected class of injury.[88]

Liverpool Corporation [1905] 1 K.B. 767, per Vaughan Williams L.J. at 794; *City of Vancouver* v. *McPhalen* (1911) 45 S.C.R. 194.

80. *Hartley* v. *Mayoh & Co.* [1954] 1 Q.B. 383.
81. *Herbert* v. *Harold Shaw Ltd.* [1959] 2 A11 E.R. 189.
82. [1949] 2 A11 E.R. 508.
83. 9th ed., at 132.
84. [1935] 1 K.B. 75.
85. *Winfield* v. *Jolowiczz, op. cit.*, at 132.
86. *Coote* v. *Stone* [1971] 1 W.L.R. 279.
87. *Id.*, at 283.
88. They are both part of what Linden, *op. cit.*, describes as the "protective legislative umbrella."

One, perhaps clearer and certainly popular, illustration of the present requirement can be found in *Gorris* v. *Scott.*[89] In that case the plaintiff claimed for the loss of sheep which had been swept overboard while being shipped by the defendant from Hamburg to Newcastle. The plaintiff alleged a breach of an order under the Contagious Diseases (Animals) Act, 1869 requiring pens of specified size to be supplied on deck to accommodate the sheep. Hardly having to go beyond the name of the Act, the Court of Exchequer was able to state that even if the supply of such pens would have prevented the sheep being washed overboard no action for breach of statutory duty could be based on provisions which had as their aim not protection from the perils of the sea but prevention of the spread of disease. An even finer distinction was made in *Sparrow* v. *Fairly Aviation Co. Ltd.*[90] A lathe operator injured his finger when a tool he was using caught against the jaws of the lathe and his hand was thrown against the lathe. It was held that he had no action under s.14(1) of the Factories Act, 1937 requiring dangerous machinery to be fenced. The section was concerned only with injury caused by contact of the operator with dangerous parts of the machinery and not with injury caused by contact between the machinery and a tool that he was holding.

Glanville Williams,[91] whose stated preference for "statutory negligence" accords more closely with American than English authorities, treats *Gorris* v. *Scott* as an application of the risk principle of negligence. Even if breach of statutory duty is regarded as a distinct cause of action it is still possible to transpose the concept or risk into this context. The risk is no longer defined in terms of reasonable foresight but in terms defined by the statute.

Although it is necessary to maintain a distinction between establishing a cause of action for breach of statutory duty and defining its scope, there is no doubt that the rationale used to explain the former will influence the answer to the latter. It is common amongst those who deal with the former in terms of imputed legislative intent to approach the latter in terms of "the class of person *intended* to be protected" or "the type of injury *intended* to be prevented". It does not follow however that the second avenue of inquiry ceases to exist if the rationale of legislative intent is rejected. While the language may change the substance of the inquiry does not.

In referring to the negligence *per se* alternative in America, Harper and James state:

> It is logical . . . that the Court is adopting the legislative judgment as to the standard should also adopt the legislature's judgment as to the limits of the need that brought it forth.[92]

Such an argument is equally applicable to the view which supports the continuation of a separate cause of action for breach of statutory duty while rejecting the resort to imputed legislative intent for justification. On such a view it can be argued that a statute which is used as the source of a cause of action should not be ignored on the question of the limits of its application.

The defendant must be the person upon whom the burden is imposed

The High Court of Australia demonstrated that even where the so-called vicarious liability of the master is at stake a duty imposed on a servant by statute cannot be extended to the master by the ordinary common law rules of joint

89. (1874) 9 Ex. D. 125.
90. [1964] A.C. 1019.
91. 23 *M.L.R.* 233.
92. *Law of Torts op. cit.*, at 1003. Not all American writers would agree. *Contra* Morris, 46 *Harv. L.R.* 453, at 473 – 476.

liability. In *Darling Island Stevedoring and Lighterage Co. Ltd.* v. *Long*,[93] despite differing views on the nature of the master's liability for his servant,[94] the Court was unanimous in holding that no action for breach of naviagion regulations could be sustained against the defendant stevedores where the responsibility for compliance with the regulations was imposed on the "person in charge" of loading operations. The phrase was interpreted as a reference to the person actually exercising control on the spot where the operations were being carried out and not to that person's employer. A similar conclusion had been reached by the House of Lords in an earlier case.[95] Duties imposed on a shot-firer were not duties of the mine owner.

Once the duty is shown to have been imposed on the defendant, liability cannot be escaped by showing that the actual breach was the act of another.[96] A statutory duty is, if unqualified in terms, non-delegable.

(d) *Establishing a breach of duty*

The defendant's conduct must constitute a violation of the statute

So long as a separate action for breach of statutory duty is sustained, this question rests squarely on the terms of the statute. It is only under the doctrine of negligence *per se* that some distortion may be necessary in order to escape the implications of a statutory standard in absolute terms.[97]

It is true, as Glanville Williams asserts,[98] that the word "absolute" is used too freely in this context, as it is in many others. It is, for example, not a substitute for "non-delegable". However it is difficult to agree with his use of the employer's duty to fence machinery as one standard incorrectly described as "absolute". He argues that an employer may use an unfenced machine in defiance of the statute thus committing an intentional breach. Since such a breach is accompanied by fault, it is wrong to describe the standard as absolute. But to describe a standard as absolute is not to *exclude* the possibility that its breach may be *accompanied by* fault but rather to *include* the possibility that its breach may occur *without* fault. He does go on to concede nonetheless that there are examples of "strict (or absolute) duty in the proper sense of that expression".

In some cases, the interpretation of the standard imposed by the statute involves not only an examination of the fault/no fault question but also a determination of the particular measures which the statute required and their extent. Professor Street[99] cites the case of *Cooper* v. *Railway Executive (Southern Region)*[100] in which the defendant railway was under an absolute duty to fence along their railway line. Some of the plaintiff's cows broke through the fence and were killed by a passing train. It was held that so long as the fence was strong enough to prevent cattle straying onto the line, the statute had been complied with. In this case the cows had forced their way through to reach some calves on the other side.

93. (1956 – 1957) 97 C.L.R. 36.
94. Contrast the views of Fullager J., *id.*, at 56 – 57 with those of Kitto, J. *id.*, at 60 – 65, and Taylor J., *id.* at 67 – 70.
95. *Harrison* v. *National Coal Board* [1951] A.C. 639. Despite these authorities, Professor Hogg has argued strongly in favour of applying ordinary rules of vicarious liability especially in the case of Crown servants. *Liability of the Crown* at 104 and 107–8.
96. *Lochgelly Iron and Coal Co. Ltd.* v. *McMillan* [1934] A.C.1.
97. Cf. Discussion *supra* of U.S. cases and the doctrine of "justifiable violation".
98. 23 *M.L.R.* at 238.
99. *Op. cit.*, at 271.
100. [1953] 1 All E.R. 477.

(e) *The causal connection between the defendant's breach and the plaintiff's injury*

Until 1956, the question of causation in an action for breach of statutory duty had been complicated by a variety of rules concerning burden of proof, some of which placed the burden of disproving a causal connection on the defendant.[101] Such results were encouraged by the often insoluble medical problems associated with certain industrial injuries. However in *Bonnington Castings Ltd.* v. *Wardlaw*[102] the House of Lords formulated a general test imposing on the injured plaintiff the burden of establishing on the balance of probabilities that the breach caused or "materially contributed to"[103] his injury. In that case the plaintiff was exposed to silica dust from a pneumatic hammer which he was operating and from swing grinders. The defendant factory owners were in breach of statute for failure to keep dust extraction equipment attached to the grinders working efficiently. There was no breach of statutory duty with regard to the hammer. It was held that provided that the plaintiff's pneumoconiosis was caused by dust from both machines, the breach of statutory duty could not be discounted as causally irrelevant.

The use of the phrase "materially contributed to" in Lord Reid's judgment has received close attention in later cases. It was held that increased concentration of silica dust through lack of ventilation was actionable although it was impossible to quantify the difference between the amount of dust inhaled and the lesser amount which would have been inhaled if ventilation had been improved.[104] Similarly in a common law action a plaintiff who had aggravated dermatitis by riding his bicycle home without first washing brick dust from his hands was still able to recover damages against his employer for failure to provide showers.[105] Lord Reid refused to accept the suggested distinction between "materially increasing the risk that the disease will occur and making a material contribution to its occurrence."[106]

Although most of the attention given to *Monk* v. *Warbey*[107] has concentrated on its contribution to the determination of the existence of an action for breach of statutory duty, the case also introduces an unusual problem of causation. The right of the plaintiff to recover damages against the owner of the car for his breach of statutory duty in allowing the car to be driven by an uninsured driver depended on the impecuniosity of the uninsured driver.[108] This condition was qualified in a recent case in which it was held that it was not necessary that the person primarily liable was "in such a financial position thatnothing is obtainable from him".[109] It was sufficient that his means were such that "prompt payment" of the judgment debt was impossible. In other words the owner's breach of statutory duty was still the cause of the plaintiff's damage, namely the inability to rely on payment of damages by means of insurance.

Such a case is a reminder that causation does not always involve a quasi-scientific analysis of the sequence of events between breach and damage. There is a grey area between straightforward problems of "causation in fact" often solved by primitive rules such as the "but for" test and superimposed problems of "causation in law"

101. *Vyner* v. *Waldenberg Brothers, Ltd.* [1946] K.B. 50.
102. [1956] A.C. 613.
103. *Id.*, per Lord Reid at 621.
104. *Nicholson* v. *Atlas Steel Foundry and Engineering Co. Ltd.* [1957] 1 W.L.R. 613.
105. *McGhee* v. *National Coal Board* [1973] 1 W.L.R. 1.
106. *Id.*, at 5.
107. [1935] 1 K.B. 75. .
108. Per Greer L. J. in *Monk* v. *Warbey, op. cit.* at 83.
109. *Martin* v. *Dean* [1971] 2 W.L.R. 1159. In at least one case *Monk* v. *Warbey* has been applied where no intervening impecuniosity was in question. *Owen* v. *Shire of Kojonup* [1965] W.A.R. 3.

where in the name of "proximity" or "remoteness" Courts set their limits to liability without any pretence of scientific analysis. In this grey area the language of causation is used to achieve the ends of proximity and remoteness. A number of American cases are cited by Harper and James[110] in which the use of proximate cause achieved results which the authors suggest could have been just as effectively achieved by such limitations as the doctrine of justifiable violation.[111] But it is not necessary to go to American cases for examples. The High Court of Australia has illustrated how causation can be used as a means of preventing recovery in a cause of action to which the common law defences of *volenti non fit injuria* and contributory negligence have no application.[112]

2. The Action for Breach of Statutory Duty as a Remedy Against Public Authorities

Anyone hopeful of uncovering a substantial amount of case law on the application of breach of statutory duty to public authorities would be soon discouraged on a perusal of prominent writing in the field.

Glanville Williams began his major article on the subject with the following remarks:

> .... the position of penal legislation may be oversimplified into two generalisations. When it concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases it is ignored. There are exceptions both ways, but, broadly speaking that is how the law appears from the current decisions.[113]

Referring to the absolute standards frequently imposed by statutes Professor Fleming comments:

> This stringent regime undoubtedly has the effect of visiting on some defendants what in the circumstances amounts to liability without any fault whatever. In the industrial sphere, this prospect has long become acceptable as a complement to workmen's compensation, but in other situations it probably accounts more than any other factor for the generally unenthusiastic attitude displayed especially by British Courts towards the whole doctrine of statutory negligence.[114]

More specifically Professor Street asserts:

> .... the courts will not readily allow an action in tort where public bodies have violated their general statutory duties.[115]

There is no doubt that the application of breach of statutory duty in this context is hampered by more than the aversion of British Courts to absolute liability. As with any use of this cause of action the search for legislative intent aided by often confusing and contradictory presumptions is prominent.

110. *Op. cit.*, at p. 1012 footnote 61.
111. *Quaere* whether such a substitute would constitute any improvement.
112. *Sherman* v. *Nymboida Collieries Pty. Ltd.* (1963) 109 C.L.R. 580. Cf. *Rushton* v. *Turner Bros.* [1960] 1 W.L.R. 96.
113. 23 M.L.R. 233, at 233.
114. *Law of Torts*, 4th ed., at 131.
115. *The Law of Torts*, 5th ed., at 262–3.

(a) *Presumptions and rules of construction*

As suggested earlier,[116] the adherence to the presumption in favour of duties only to members of a specified class must adversely effect the use of the action in the public sphere. Even so examples can be found of public liability justified in terms of this presumption. Probably the best known is *Read* v. *Croydon Corporation*[117] in which a ratepayer was held to have an action for breach of a statutory provision requiring water supplied by the corporation to be "pure and wholesome".[118] The teenage daughter of the plaintiff ratepayer had contracted typhoid as a result of drinking the defendant corporation's water. The father was suing for special damages incurred as a result of his daughter's illness. The daughter sued for general damages. Although she was permitted to recover in negligence, the right to sue for breach of statutory duty was held to be limited to ratepayers. Stable J., classified the words "sufficient for the domestic use of all the inhabitants of the town or district"[119] as prescribing the quantity of water to be supplied not defining the class to which the duty was owed.[120] His Lordship chose a later section of the Act as providing the defined class, namely, those who had "laid the necessary communication pipes and paid or tendered the water rate".[121]

More recently a claim against a local council by a landowner was upheld where his land had been flooded from drains which had become chocked, overgrown and silted through the defendant council's neglect.[122] In upholding the claim based on an award under the Enclosure Act, 1800, Salmon J. stated:

> I have come to the clear conclusion that the Act was passed and the award made for the benefit of the persons in favour of whom the enclosures were made, that is to say, for the persons whose land is immediately adjacent to the drains and through whose land the drains pass.[123]

Ratepaying occupiers again constituted the protected class in *Sephton* v. *Lancashire River Board.*[124]

Public interest and duty to a protected class were combined in *Owen* v. *Shire of Kojonup.*[125] In that case the plaintiff was injured while assisting in fighting a fire. S.37 of the Western Australian Bush Fires Act, 1954–58, required the local authority to insure voluntary fire fighters against personal injury sustained while engaged in controlling and extinguishing bush fires. The plaintiff had recovered expenses and wages under Workers' Compensation Insurance taken out by the defendant but, relying on the above section, claimed a further amount direct from the defendant representing the balance of his total loss. Hall, J. gave the following reason for a decision in the plaintiff's favour:

> . . . it is doubtless correct that the public are interested in having men willing to take risks in fire fighting, but this interest could be advanced by s. 37 only if the section confers some effective remedy on a man who is injured in such circum-

116. *Supra,* 1(b).
117. [1938] 4 A11 E.R. 631. In an earlier example a candidate at an election successfully sued a returning officer for failure to place the official mark on ballot papers as required by statute. *Pickering* v. *James* (1873) L.R. 8 C.P. 489.
118. Waterworks Clauses Act, 1847, s35.
119. *Ibid.*
120. [1938] 4 A11 E.R. 631. at 649.
121. s. 53.
122. *Attorney-General and anor.* v. *St. Ives Rural District Council* [1960] 1 Q.B. 312.
123. *Id.,* at 324. An appeal to the Court of Appeal was dismissed. [1961] 1 Q.B. 366. Their Lordships did not elaborate on the reasoning of Salmon J.
124. [1962] 1 W.L.R. 623.
125. [1965] W.A.R. 3 Cf. *Supra* n.109.
126. *Id.,* at 5.
127. (1968) 87 W.N. (N.S.W.) (Pt. 2) 308.

stances.[128]

Not unexpectedly, it is not difficult to find cases in which public authorities have been held to be under no statutory duty because the duty in question has been one owed to the public at large and not to an individual or class of individuals. Decisions of the New South Wales Supreme Court are prominent amontst them.

In *Evenden* v. *The Council of the Shire of Manning*[129] the plaintiff's husband, a school teacher, was drowned while attempting to rescue a child from his class who had fallen from the defendant's punt. The claim was based, *inter alia,* on a local government ordinance requiring a properly equipped boat to be attached to the punt and for the punt to be provided with sufficient lifebuoys for the number of passengers it was allowed to carry. The Court refused to uphold the count based on breach of statutory duty because the ordinance in question "was made for the benefit of the public generally and not of any limited class".[130]

A similar conclusion was reached in *Dennis* v. *Brownlee*[131] in which the statutory provision in question was a local government ordinance requiring holes and obstructions on the highway to be lit and guarded. However Sugerman J., with whose reasoning the other members of the Court agreed, stressed that the answer to whether the legislation was passed in the interests of the public at large or for a limited class provided guidance but was not conclusive.[132] In a Western Australian case,[133] Wolff J., referring to the judgment of Stable J. in *Read* v. *Croydon Corporation,*[134] expressed reservations about the emphasis given by his Lordship to membership of the protected class:

> If the matter is one of interpretation the laying down of rules such as this complicates the question.[135]

But the fact remains that in both of the cases in which conclusiveness was questioned, the statutory provisions were held to confer no right of action upon individuals.

On the other hand, cases can be found in which a civil action was upheld against a public authority where the statutory provision on which it was based appears to have been passed in the interest of the public generally. Most frequently discussed amonst these cases is *Dawson & Co.* v. *Bingley Urban District Council.*[136] A decision of the English Court of Appeal, it concerned a fire which had broken out on the plaintiff's premises. The fire brigade arrived promptly but were delayed while they searched for a fire plug. Under s.66 of the Public Health Act, the defendant council were required to provide and maintain indicator markings near fire plugs to denote their position. In this case the defendants had attached a plate to a nearby wall but it was so misleading that it indicated a point nearly seven feet away from the actual position of the plug. It was this discrepancy which caused the delay when the firemen arrived and which caused far more extensive damage to the plaintiffs' premises than would otherwise have been the case. The Council was held liable in an action for breach of statutory duty. Their Lordships devoted most of their judgments to the distinction between non-feasance and mis-feasance. On the question of whether the duty was owed to the public or to a class thereof Farwell

128. *Id.*, at 310.
129. (1929) 30 S.R. (N.S.W.) 52.
130. *Id.*, per Halse Rogers J., at 56.
131. (1963) 63 S.R. (N.S.W.) 719.
132. *Id.*, at 720.
133. *Anderson* v. *Lockyer* (1950) 52 W.A.L.R. 60.
134. *Supra.*, n.117.
135. 52 W.A.L.R. 60, at 65.
136. [1911] 2 K.B. 149.

L.J. said nothing and while Vaughan Williams L.J. paid lip service to the class benefit rule,[137] his Lordship made no attempt to explain what "class" was protected in the instant case. Only Kennedy L.J. sought to make the rule work by treating "inhabitants of the district" as the protected class.[138] Such a "class" comes very close to the general public. It is unlikely that their Lordships would have found for the defendant if a visitor to the district had been injured when the fire spread.

Rowning v. *Goodchild*[139] was one case in which a public authority was held liable for breach of statutory duty owed to the public generally. It was relied on in *Couch* v. *Steel*[140] and is probably tarnished by the latters' fall from grace. Whether such a fate was deserved in either case has already been questioned.[141]

A more positive and much more recent statement is to be found in the judgment of T. A. Gresson J. in *Maceachern* v. *Pukekohe Borough*,[142] in which a local authority was held liable for failure to keep fire hydrants in effective working order in accordance with s.257(1) of the Municipal Corporations Act 1954. The section was for the protection of the public as a whole but that was "not . . . conclusive against the existence of a private right to damages".[143]

In *McKinnon* v. *Board of Land and Works*[144] nominal damages were awarded against the defendant Board for wilful refusal to register the transfer of a lease upon payment of the registration fee as required by the Land Act 1865. If this can be assumed to have been an action for breach of statutory duty, it contains no suggestion that the plaintiff was a member of a protected class. It could nonetheless be argued that of necessity only a restricted class would be entitled to insist on performance, namely, transferees and others tendering a registrable interest.

This case is a reminder of a number of examples amongst older English authorities in which public officials were held liable for failure to perform a specific function of office. The best known of them would undoubtedly be *Ashby* v. *White*[145] in which the House of Lords by a majority of fifty to sixteen upheld the dissenting judgment of Holt, C. J. in the Court of King's Bench. The result was that a person entitled to vote at an election was permitted to maintain an action in damages against a returning officer who refused to allow him to record his vote. Rarely is this case ignored in texts on administrative law. The question of whether it is properly classified as an example of an action for breach of statutory duty as we now understand that term is not easily answered. Professor Street gives the decision a prominent place in the early part of his discussion of breach of statutory duty.[146] It is difficult to envisage that the origin of a duty to admit qualified voters could be anything other than a statutory provision. But one difficulty lies in the fact that no reference is made to any such statute in *Ashby* v. *White* itself. Later cases in which *Ashby* v. *White* has been applied are equally ambiguous.[148] Only in

137. *Id.*, at 154.
138. *Id.*, at 160.
139. (1773) 2 W.Bl. 906.
140. (1854) 3 E. & Bl. 402.
141. *Supra.*, 1(b).
142. [1965] N.Z.L.R. 330.
143. *Id.*, at 334.
144. (1872) V.R. (L) 70; 3 A.J.R. 41.
145. (1703) 2 Ld. Raym. 938; 92 E.R. 126.
146. *The Law of Torts*, 5th ed., at 261–4. It is in this context that Professor Street emphasises the importance of identifying the interest protected by the statute rather than the duty created by it in determining whether an action for damages by a person aggrieved will lie.
147. e.g. Benjafield & Whitmore *Australian Administrative Law*, 4th ed.; Hogg, *Liability of the Crown*, 1971. Cf. *Winfield & Jolowicz on Tort*, 9th ed. in which the decision is dealt with under both breach of statutory duty (at 129) and "miscellaneous and doubtful torts" (at 499).
148. e.g. *Drewe* v. *Coulton* (1787) 1 East. 563; 102 E.R. 217.

Barry v. *Arnaud*[149] a case in which a collector of customs refused to sign a bill of entry, is it possible to identify the statutory provision on which the defendant's obligation was based. Yet in this case the report refers to an action not for breach of statute but for non-feasance in the exercise of an office.

If such cases can be treated as early examples of actions for breach of statutory duty, they do bolster the rather sparse representation of the remedy in this area. Their presence also weakens the view considered below that the action is not available for non-feasance as distinct from mis-feasance.

A recent example of mis-feasance in a public office can be found in *Ministry of Housing* v. *Sharp.* However its role as an authority on breach of statutory duty is uncertain. The plaintiff sought to recover compensation paid to a land-owner upon refusal of a development application. The compensation was repayable if at some future date development permission was granted. Such permission was subsequently given and the land was sold to a developer. The developer had made a title search at the local land registry office and had obtained a certificate which failed to disclose a charge on the land securing the plaintiff's right to repayment of the compensation. Having purchased in reliance on the certificate, the developer was not liable to repay the compensation. The original land-owner who had received the compensation was not obliged to repay unless he was the developer. The plaintiff therefore sought to recover against Sharp, the local registrar, and the local council, alleging that the negligence of a clerk employed by the council had caused the issue of the clear certificate which in turn had made the recovery of the compensation from either vendor or purchaser impossible. The claim against Sharp was based on a provision in the Land Charges Act, 1925, requiring the registrar to make a search and issue a certificate setting out the result. The majority (Salmond, and Cross L.JJ.) held that no action for breach of statutory duty was available against the registrar since the duty imposed by the statute was not absolute. There Lordships therefore left open the possibility of a duty requiring a lesser standard. Lord Denning, M.R., who took the view that the duty was absolute, commented:

> He (i.e. the registrar) is a public officer and comes within the settled principle of English law that, when an official duty is laid on a public officer, by statute or by common law, then he is *personally* responsible for seeing that the duty is carried out . . . if the duty is broken, and injury done thereby to one of the public then the public officer is answerable.[151]

The reference to "one of the public" appears to lend support to the argument that at least in this context the "class benefit" presumption can be ignored. However in an earlier passage of the same judgment his Lordship asserted that the register kept under the Land Charges Act was intended to provide security for "two *classes* of people, incumbrancers and purchasers".[152] His later remarks could therefore be read down to restrict a remedy for breach of statutory duty to members of those two classes.

The majority of cases considered in this section have attached some significance to the plaintiff's membership of a protected class. In at least some of them the existence of a protected class has been expressly treated as a requirement of the existence of a remedy for breach of statutory duty. The rest fall into two categories. Firstly those in which the statute was passed for the protection of the public generally but where the plaintiff suffered special damage as a result of its breach. Secondly, those in which the statute created a right and refusal to permit the

149. (1839) 10 Ad. & E. 646; 113 E.R. 245.
150. [1970] 2 Q.B. 223.
151. *Id.*, at 266.
152. *Id.*, at 265.

exercise of that right constituted the breach on which the action was based. Such a right will usually be available only to a limited class and in that sense the existence of an action is dependent upon it. But to recognize the first category as an alternative would seem to be sufficient to inject a desirable degree of flexibility. It should be possible to classify all future cases in one category or the other.

The presumption that an action for damages is denied where the statute provides its own remedy has been prominent. In a series of English cases from 1878 to 1922,[153] local authorities were sued for alleged failure to maintain or provide sufficient sewers. In each case the plaintiff was unsuccessful and in each case reliance was placed on the provision of a remedy in the statute on which the plaintiff's claim was based. The statute was the Public Health Act, 1875 and under s.299 of the Act a person wishing to complain of a breach of the Act could take the matter up with the Local Government Board. The Board had power to direct an inspection to be made and if necessary to order work to be done.

> . . . which seems to make the whole system tolerably complete . . . the Court ought to hesitate a great deal before it interferes with respect to a wrong done to a whole district when the remedy provided by the Legislature would be quite sufficient for the purpose.[154]

A similar view has been expressed in actions based on alleged breaches of the Education Act, 1944. In *Watt* v. *Kesteven County Council*[155] the plaintiff the father of twin boys refused to send them to a local independent grammar school where the defendant authority was prepared to pay tuition fees. For religious reasons he sent them to a Roman Catholic boarding school. Although the fees payable at the Catholic school were less that those at the local grammar school the authority refused to pay the full fees but made a grant towards them based on the plaintiff's income. The plaintiff sought to recover the difference between the grant and the actual fees, alleging a breach of s.76 of the Act which provided, subject to certain conditions, "pupils are to be educated in accordance with the wishes of their parents". However under ss.68 and 99 of the Act the Minister was given power to direct performance of the relevant provisions of the Act. It was held by Omerod, J.[156] that, even if the Council had behaved improperly, the duty could only be enforced by the Minister. While affirming the judgment of Ormerod, J. in favour of the defendant authority, Denning and Parker L.JJ. in the Court of Appeal[157] restricted their judgments to the view that there had not been a breach of s.76. However later decisions both at first instance[158] and in the Court of Appeal[159] have used the availability of ministerial review as at least one reason for holding that no claim for breach of statutory duty existed under other provisions of the Act.

Both their Lordships[160] refused to exclude the possibility of an action for breach of statutory duty in other cases under the Act in view of the earlier decision in *Gateshead Union* v. *Durham County Council.*[161] In that case an injunction was

153. *Glossop* v. *Heston and Isleworth Local Board* (1879) 12 Ch. D. 102; *Robinson* v. *Workington Corporation* [1897] 1 Q.B. 619; *Pasmore* v. *Oswaldtwistle Urban District Council* [1898] A.C. 387; *Hesketh* v. *Birmingham Corporation* [1924] 1 K.B. 260.
154. *Glossop* v. *Heston & Isleworth L.B. op. cit.* per James, L.J. at 116.
155. [1955] 1 Q.B. 408; [1955] 2 W.L.R. 499.
156. [1955] 1 Q.B. 408, at 415.
157. [1955] 1 Q.B. 408, per Denning, L.J. at 423–4; per Parker, L.J. at 429.
158. *Wood* v. *Ealing* L.B.C. [1967] Ch. 364.
159. *Bradbury* v. *Enfield L.B.C.* [1967] 1 W.L.R. 1311; *Cumings* v. *Birkenhead Corporation* [1972] Ch. 12.
160. Denning, L.J. at 425 and Parker, L.J. at 429–30.
161. [1918] 1 ch. 146.

granted to restrain a local education authority from requiring a special fee from guardians of boarded-out poor law children who were attending the authority's public elementary school.

In *Reffell* v. *Surrey County Council*[161A] a twelve year old schoolgirl was injured when she put her hand through a glass door. Veale, J. distinguished *Watt* v. *Kesteven County Council.* The duty under the Act and regulations to ensure that the safety of the occupants of the school was reasonably assured was absolute and the plaintiff was entitled to sue both for breach of statutory duty and common law negligence. In the later case of *Ward* v. *Hertfordshire County Council*[162] Hinchcliffe, J. refused to apply the regulation relied upon by Veale, J. to a claim by an eight year old child injured when he ran against the sharp edges of a flint wall in the school playground. His Lordship expressed the view that a boundary wall was not part of a "building" within the regulation.

> If I had thought that these walls fell within the ambit of the regulation, then I would agree with Veale, J., who held in *Reffell* v. *Surrey County Council* that an absolute duty is created.[163]

His Lordship did however find for the plaintiff on his claim based on a breach of the common duty of care under the Occupiers' Liability Act, 1957. The Court of Appeal[164] reversed the decision on the common duty of care. While not expressing any view on the application of the regulation concerning safety of buildings to the flint wall, both Lord Denning, M.R.[165] and Salmon, L.J.[166] held that the standard imposed by the regulation was met so long as tthe wall was, as they considered, reasonably safe. It is a question of some delicacy whether any distinction can be made between a regulation requiring that safety "shall be reasonably assured" and the ordinary common law standard of reasonable care. If they do amount to the same thing there is little to be gained from exploring the possibility of an action for breach of statutory duty. However such a statutory standard may at least shift the onus of proof of reasonableness onto the defendant.[167]

In *Southwark London Borough Council* v. *Williams*[168] quatters in a disused house belonging to the plaintiff Council were sued for trespass. As a defence the squatters relied on a section of the National Assistance Act requiring provision of temporary accommodation for persons who were in urgent need. The Act also gave the Minister power to make an inquiry and, if he thought fit, to make an order declaring the authority to be in default, if the authority had failed to discharge its functions under the Act or, in the course of discharge, failed to comply with any regulations. As this remedy was given by the Act, it was held that no other was available.

The third presumption discussed earlier was that relating to adequacy of pre-existing common law. Referring to s.54 of the Bush Fires Act 1949 (N.S.W.) which imposed a duty on local authorities to prevent and minimise the danger of bush fires, Walsh J. commented:

> . . . it imposes no additional or different duty upon the Council. It does no more than restate a duty which would already be owed to such persons at common law. This serves to suggest to me that it should be regarded as

161A. [1964] 1 W.L.R. 358.
162. [1969] 2 A11 E.R. 807.
163. *Id.*, at 811.
164. [1970] 1 A11 E.R. 535.
165. *Id.*, at 537.
166. *Id.*, at 539.
167. *Nimmo* v. *Alexander Cowan & Sons Ltd.* [1968] A.C. 107.
168. [1971] 2 W.L.R. 467.

> intended as a measure directed to the public welfare, rather than as one designed for the benefit and protection of individual citizens.[169]

Similar reasons were offered in *Dennis* v. *Brownlee*[170] and corresponding observations were made by Lord Denning M.R. in *Ministry of Housing* v. *Sharp.*[171] There his Lordship lamented the possibility that the absence of an action for breach of statutory duty would, at a time when recovery for economic loss resulting from reliance on carelessly made statements was not possible at common law, have left the plaintiff without a remedy.[172]

If such cases can be regarded as representative in the field of public authority liability, the reliance on existing common law has at least been consistent. Where other common law remedies are adequate there is less likelihood of an independent remedy for breach of statute covering the same area than would be the case where such common law remedies were lacking. On the other hand even in the cases mentioned the function of such a presumption has at best been secondary. It could be argued that it has been called upon to do no more than reinforce a conclusion already established by other means.

(b) *Non-feasance and mis-feasance*

Apart from the attention paid to these presumptions, the courts have been influenced by other considerations most of which have assumed greater importance in the context of public authority liability that elsewhere. The absence of liability for non-feasance is most commonly associated with the tort of negligence. However in actions for breach of statutory duty one reason frequently given for refusing a remedy has been based on the distinction between non-feasance and mis-feasance. In the sewerage cases discussed earlier, the provision for review by the Local Government Board was only one reason for holding that the plaintiffs had no action. Equally relevant was the fact that the plaintiffs' complaints were directed at failure to provide adequate sewerage rather than some misdeed in the installation or repair of the sewers. The earliest of these cases[173] was distinguished in *Dawson & Co.* v. *Bingley Urban District Council*[174] on the grounds that while in the latter the misplacement of the fire-plug indicator was an act of mis-feasance the claim in the former was not based on any act done by the defendants nor even on any specific omission.[175]

Without suggesting that these earlier cases were wrongly decided judgments in a number of more recent English decisions have displayed much less reverance for the significance of the non-feasance/mis-feasance distinction than their forerunners.

In *Sephton* v. *Lancashire River Road*[176] and *Rippingdale Farms Ltd.* v. *Black Sluice Internal Drainage Board*[177] failure to maintain embankments on the part of the local Boards was held to be a sufficient basis for an action for breach of a statutory duty to maintain them. Distinguishing *East Suffolk Rivers Catchment Board* v. *Kent*[178] Lord Denning M.R. concluded in the second of the two cases that the Black Sluice Commissioners "were under a positive duty to embank the

169. *Edwards* v. *Blue Mountains City Council* (1961) 78 W.N. (N.S.W.) 864, at 867.
170. [1964] N.S.W.R. 544.
171. [1970] 2 Q.B. 223.
172. *Id.*, at 267.
173. *Glossop* v. *Heston and Isleworth Local Board* (1879) 12 Ch. D. 102.
174. [1911] 2 K.B. 149.
175. *Id.*, per Vaughan Williams, L.J. at 154 and per Kennedy, L.J. at 159.
176. [1962] 1 W.L.R. 623.
177. [1963] 1 W.L.R. 1347.
178. [1941] A.C. 74.

Rippingdale Running Dyke and keep it in repair".[179]

Such observations indicate a return to the law as stated by Best C.J., in a case in which the defendant was held liable for failure to repair decayed sea walls:

> ... if a public officer abuses his office, either by an act of omission or commission and the consequence of that is an injury to an individual an action may be maintained against such public officer.[180]

So long as the relevant statutory provision is unambiguous enough to impose a positive duty, it must follow that the relevant authority cannot be excused on the grounds of non-feasance. This point is well illustrated by cases such as *Ashby* v. *White* concerned as they were with the protection of a right to have something done by a public official. The breach of the official's duty was in failing to do it.

In the tort of negligence a notorious application of the non-feasance rule is the immunity of highway authorities from liability for failure to repair. This line of authority appears to have had some influence on the decision in *Saunders* v. *Holborn District Board of Works*[181] in which there was held to be no right of action for failure to remove snow from a street under s.29 of the Public Health (London) Act, 1891. However in *Attorney-General* v. *St. Ives Rural District Council*[182] Salmon J. referred to the rule which protected highway authorities as:

> .... an archaic and anomalous survival into modern times. It would be difficult indeed to think of any sound reason why to-day highway authorities should enjoy this immunity.[183]

His Lordship went on to hold that the drains for which the defendant Council was responsible were primarily for land not for road drainage. The Council was therefore not protected by the rule concerning highway authorities.

Closely linked with the non-feasance/mis-feasance distinction is that made between statutory provisions imposing general responsibility and those requiring a specific precaution to be taken. In *Board of Fire Commissioners* v. *Rowland*[184] the owner of a picture theatre sued the defendant commissioners for damage done by fire to his theatre alleging a breach of s.19 of the Fire Brigades Act 1909–1949 (N.S.W.). The section read as follows:

> It shall be the duty of the board to take all practicable measures for preventing and extinguishing fires and protecting and saving life and property in case of fire . . .,

One reason given by the Full Court of the Supreme Court of New South Wales for refusing the plaintiff's action for breach of statutory duty was that s.19 "does not create a special duty to put out all fires but merely defines the functions of the board in a general way".[185] These words were to be echoed by another Supreme Court judge two years later in another case involving damage by fire.[186] The defendant was a local council. The action was based on s.54 of the Bush Fires Act, 1949 (N.S.W.). Referring to the "well known" statement of Dixon J. in *O'Connor*

179. [1963] 1 W.L.R. 1347, at 1355 – 1356. In *Raleigh Corporation* v. *Williams* [1893] A.C. 540, the Privy Council assumed a right of action for non-performance of a statutory duty to keep drains in repair.
180. *Henley* v. *The Mayor of Lyme* (1828) 5 Bing. 91, at 107.
181. [1895] 1 Q.B. 64.
182. [1960] 1 Q.B. 312.
183. *Id.*, at 323.
184. [1960] S.R. (N.S.W.) 322.
185. *Id.*, at 327.
186. Walsh J. in *Edwards* v. *Blue Mountains City Council* [1961] 68 W.N. (N.S.W.) 864.

v. *S. P. Bray Pty. Ltd.*[187] his Honour said:

> .... s.54 is not a provision "prescribing a specific precaution for the safety of others" within this field. It does not set out any specific precaution at all, but is expressed as a general requirement "to take all practicable steps".[188]

Referring to breach a statutory duty generally Professor Fleming observes:

> .... it is easy enough, and quite proper to infer an intention to create correlative private rights from the enactment of *specific* safety measures.
>
> .... on the other hand, to give the same effect to a statute which does not address itself to the observance of specific precautions ... would impose a burden far in excess of the standard of reasonable care and the penalty enacted by the legislature.[189]

But Professor Fleming is an advocate of the negligence *per se* doctrine which has failed to find acceptance in courts outside the United States. It is questionable whether his thesis, more suited as it is to the doctrine to which he subscribes, is a necessary part of a body of law which permits a separate and independent action for breach of statute.

However that may be in the wider context, his remarks seem to have gained validity in the area of public duties. In those cases in which the courts have upheld a remedy for breach of statutory duty without regard for the "class benefit" presumption and those in which a remedy was supplied for infringement of a right supplied to the plaintiff by statute, the duty imposed was in specific not general terms. One further illustration may be added. In *Hall* v. *The Fish Board,*[190] the defendant Board was required by statute to sell fish certified as fit for human consumption to be sold in the order of delivery to the market. The plaintiff was entitled to damages against the Board for failing to submit his fish for sale in priority to fish subsequently delivered to it.

(c) *Public duties, policies and presumptions*

Early examples of public authority liability for breach of statute contain no trace of the array of presumptions and other considerations which more recently have severely restricted the use of the remedy. In *Henley* v. *The Mayor of Lyme,* Best C.J. was in no doubt about the generality of the rule. *Rowning* v. *Goodchild*[191] had already been decided and more than twenty five years after Best C.J. made his pronouncement, Lord Campbell C.J. was to echo it in an even more famous judgment.[192]

It is now convenient to examine in more detail the decision in *Atkinson* v. *The Newcastle and Gateshead Waterworkds Co.*[193] which more than any other case was responsible for unsettling foundations built up over more than two hundred years. The plaintiff had lost his house, timberyard and sawmills in a fire. In an action against the waterworks company he alleged a breach of s.42 of the Waterworks Act which required pipes to which fireplugs were fixed to be constantly charged with

187. (1937) 56 C.L.R. 464, at 478.
188. 68 W.N. (N.S.W.) 864, at 867.
189. *Law of Torts,* 4th ed., at 125.
190. [1957] Q.S.R. 565.
191. (1773) 2 W.Bl. 906. Cf. even earlier examples cited by Lord Denning, M.R. in *Ministry of Housing* v. *Sharp* [1970] 2 Q.B. 223, at 266 – 267. *Herbet* v. *Paget* (1663) 1 Lev. 64;*Douglas* v. *Yallop* (1759) 2 Burr. 722.
192. *Couch* v. *Steel, supra,* no. 71 and discussion which follows.
193. (1877) 2 Ex.D.441. *Supra,* n. 74.

water at a certain pressure. At first instance Bramwell B.[194] upheld the plaintiff's declaration, applying *Couch* v. *Steel.* While distinguishing between a duty owed to the public and to the individual, his Lordship discounted a ten pound penalty recoverable by a common informer as offering no relief to an individual who suffered loss in the fire. He held that the "ordinary right of action" still existed and the plaintiff was entitled to sue for his loss. This decision was reversed on appeal. There is no doubt that the decision of the Court of Appeal in this case marks an important stage in the evolution of the modern law on breach of statutory duty. It is equally true that the decision can be explained on narrow grounds which deprive it of any significance in the area of public authority liability. These grounds can be found in the following words of Lord Cairns:

> . . . the Act with which the Court has to deal is not an Act of public or general policy, but is rather in the nature of a private legislative bargain with a body of undertakers as to the manner in which they will keep up certain public works.[195]

It was "startling" his Lordship had remarked earlier in his judgment,

> that a company undertaking to supply a town like Newcastle with water, would not only be willing to be put under this parliamentary duty to supply gratuitously for the purpose of extinguishing fire an unlimited quantity of water at a certain pressure, and to be subjected to penalties for the non-performance of that duty, but would further be willing in their contract with parliament to subject themselves to the liability to actions by any number of householders who might happen to have their houses burnt down in consequence.[196]

Since a public authority would rarely, if ever, have sufficient autonomy to negotiate a private legislative bargain of the kind referred to by his Lordship, the case is of doubtful relevance. In addition private Acts of Parliament in general are increasingly rare occurrences. But as a case in which Lord Campbell's statement of general principle was discredited it has had a lasting effect, particularly since there has been little judicial challenge to the assumption that Lord Campbell's statement was not supported by authority. It was a case which also provided some support for the supposed presumption that no individual right to sue was intended by the legislature where the breach of statute was accompanied by a criminal penalty.[197]

The examination by Lord Cairns of the character of the particular statute and his assessment of the unexpressed legislative intent set the pattern for future decisions. His judgment does indicate that in this assessment the courts are likely to go beyond words of the statute and embark on a consideration of wider questions of policy.

One example was mentioned earlier,[198] where it was suggested that such resort to policy is especially justified in the context of public authority liability. Although spawned of it, it is to be hoped that such resort to policy could survive without the succour of non-existent legislative intention.

Considerations of policy have appeared in different forms. In *Board of Fire Commissioners* v. *Rowland*[199] one reason for refusing to attach a suit for damages to the defendant board's statutory obligation to use all practicable means to

194. (1871) L.R. 6 Ex. 404.
195. (1877) 2 Ex. D. 441, at 448.
196. *Id.*, at 445.
197. Cf. Lord Cairns, (1877) 2 Ex. D. 441, at 446 – 447.
198. Holmes J.A. in *Bennett and Wood Ltd.* v. *Council of City of Orange, supra* n. 77.
199. [1960] S.R. (N.S.W.) 322.

prevent and extinguish fires was based on insurance. The property owner had a right to recover damage inflicted by the board in the *bona fide* exercise of its powers from his own fire insurance policy. Similarly, it was said:

> . . . . in view of the fact that insurance companies contribute very substantially to the financing of the board's operations . . . the policy and scheme of the legislation does not admit of a private right of action against the board or its officers where the duty . . . is not duly performed. The sole right of the aggrieved owner is to recover the damage under the policy of insurance in that property.[200]

Another aspect of loss distribution of particular relevance to local authorities is demonstrated by the concern expressed for the ultimate burden imposed on the ratepayer, or, in the case of government bodies, on the taxpayer.

The appropriateness of a suit by an individual compared with other remedies raises policy issues particularly relevant to ensuring effective administration. Referring to an action based on an alleged failure to effectually drain a district, the Earl of Halsbury L.C. remarked:

> . . . . if it were possible to conceive a case in which it would be extremely inconvenient that each suitor in turn should be permitted to apply for a specific remedy against the body charged with the care of the health of the inhabitants of the district in respect of drainage, it is such a case as this.[201]

His Lordship concluded by stating that the right to call upon the body to reform its mode of dealing with drainage,

> . . . should not be open to the litigation of any particular individual, but should be committed to a Government department.[202]

This may be compared with cases in which policy is synonymous with those considerations which an administrative body must weigh up in allocating its limited resources. It was suggested by Veale J. in *Reffell* v. *Surrey County Council*[203] that failure on the part of the defendant to justify its neglect in these terms was one reason for allowing the plaintiff's claim.

Such diverse examples serve to illustrate that the courts have been prepared to explore a variety of factors in order to determine the desirability of an individual's right to damages, but rarely has such exploration occurred in the absence of a conclusion in terms of legislative intent. Equally rarely has such a conclusion been unaccompanied by recourse to one or more of the so-called presumptions.

There are exceptions. Some have been mentioned already.[204] To these may be added the Privy Council decision in *Fulton* v. *Norton.*[205] The plaintiff had sought renewal of a timber cutting licence over a parcel of land in British Columbia. The provincial Chief Commissioner of Land and Works refused the application whereupon the plaintiff left with the defendant, the Provincial Secretary, a petition of right by way of appeal. Under the Crown Procedure Act, the defendant was required to submit the petition to the Lieutenant-Governor for his consideration, but, in a letter to the plaintiff, the defendant declined to so submit it. It was held that the plaintiff was entitled to damages for breach of statutory duty and that

200. *Id.*, at 327 – 328.
201. *Pasmore* v. *Oswaldtwistle Urban District Council* [1898] A.C. 387, at 395.
202. *Ibid.*
203. [1964] 1 W.L.R. 358, at 364.
204. e.g. *Dawson & Co.* v. *Bingley U.D.C., supra,* n. 136; *Maceachern* v. *Pukekohe Borough,* supra, n. 142.
205. [1908] A.C. 451.

such damages were not necessarily nominal.

But overall, cases in which public authorities have been sued for breach of statutory duty have more often been resolved according to what have become the traditional formulae. Most suspect is the continued use of the class benefit presumption. Often fortified by suspect distinctions[206] it is the one presumption which serves no useful purpose in the area of public responsibility. As to the other presumptions, while courts continue to search for non-existent legislative intent, the continued use of all of them seems assured.

(d) *Reading down the statutory standards – negligence victorious after all?*

Having begun with a discussion of the doctrine of negligence *per se*, it is perhaps appropriate that negligence should reappear in conclusion. So preoccupied has the twentieth century judicial mind become with negligence that the resultant desire to read down liability in tort to make it dependant on fault has opened the door to the standard of the reasonable man to places from which it might properly have been excluded. There are conspicuous examples of this tendency in some of the cases already discussed.

The early cases from which *Atkinson* v. *The Newcastle and Gateshead Waterworks Co.* broke away show no signs of this later homage to liability based on fault. But just as those early cases represent a more generous approach to the use of statutory duties as a basis for individual claims for damages than is found in more recent cases, their neglect of the reasonable man is equally out of step. As early as 1874, Brett J. stated:

> It would seem to me to be contrary to natural justice to say that parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate. The duty may notwithstanding be absolute but, if so, it ought to be imposed in the clearest possible terms.[207]

This case was referred to with approval by Stable J. in *Read* v. *Croydon Corporation.*[208] His Lordship distinguished statutes in which certain means are directed to secure a particular end. Using industrial legislation as an example, he conceded that the standard imposed in such cases was absolute. He also used the freedom to act as a further reason for distinguishing between the factory owner and the local corporation charged with the responsibility of supplying a town or district with water.[209] His Lordship continued:

> The particular section in question does not indicate the means by which provision of a pure and wholesome supply of water is to be maintained. It directs the end to be achieved . . . the obligation on the corporation is not an absolute obligation, but is limited to the exercise of all reasonable care and skill to ensure that the water provided accords with the provisions of the Act.[210]

In *Ministry of Housing* v. *Sharp*[211] the statutory provision in question imposed

206. e.g. the use of a relationship equivalent to contract to distinguish between the rights of the successful plaintiff and those of his daughter in *Read* v. *Croydon Corporation, supra,* n. 117.
207. *Hammond* v. *The Vestry of St. Pancras* (1874) L.R. 9 C.P. 316, at 322.
208. [1938] 4 All E.R. 631.
209. Compare the main reason for refusing an action for breach of statutory duty in *Atkinson* v. *The Newcastle & Gateshead Waterworks Co., supra,* n. 196.
210. [1938] 4 All E.R. 631 at 651. Cf. *Osborne* v. *Burnie Fire Brigade Board* [1959] Tas. S.R. 133, at 145.
211. [1970] 2 Q.B. 223.

on the local land charges registrar a duty to "make the search required" upon the tender of a requisition and payment of a fee. The majority relied on a section of an earlier Act which had been superseded by the later section in which the proper officer was charged with "diligently" making the search required. Their Lordships took the view that the later omission of the word "diligently" could not be interpreted as evidence of an intention to impose an absolute duty on the registrar.[212] The word "diligently" should therefore be read into the new section.

Although English Courts have preserved the action for breach of statutory duty as one independent of the tort of negligence, there is a danger that a tendency to read down duties stated in unqualified terms may have provided the law of negligence with an even more conclusive victory.

C.S. PHEGAN*

212. *Id.* per Salmon, L.J. at 274; per Cross, L.J. at 289. Lord Denning, M.R. did not agree, 267. Cf. The views of Lord Denning, M.R. and Salmon, L.J. in *Ward* v. *Hertfordshire County Council, supra* nn. 165 & 166.

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