INTRODUCTION

§SD.1    The tort of breach of statutory duty arises, where D is under a statutory duty to perform an act (or, more rarely, to refrain from doing an act); D does not perform the act, either in accordance with the terms of the statute, or at all (or does the act when it should not have done); C suffers damage as a result of the statutory breach; and that statutory breach gives rise to 'a private right of action for damages' at the suit of C.

It must be stated, at the very outset, that statutes do not generally give rise to a private right of action for damages at the suit of C, who happens to be injured by D’s breach of statutory duty. In the leading case of *X (Minors) v Bedfordshire CC*, the House of Lords called this common lack of private action a ‘basic proposition’, while the Court of Appeal has remarked that courts are ‘reluctant … to read a private right into a statutory scheme’ (per *Welsh Water v Barratt Homes Ltd (Rev 1)*). Without that, there is no tort available.

The main difficulty is that a private right of action for damages in C’s favour must have been created by Parliament, and this will depend solely upon parliamentary intention. Unfortunately, very few statutes state that intention (whether permitting or precluding a private right of action) outright. Usually, it must be judicially-inferred as a matter of statutory construction – which exercise is beset by some very inconsistently-applied rules of interpretation.

The tort as a whole has been judicially acknowledged to be problematical. In *Bedfordshire*, Lord Browne-Wilkinson observed that the application of the principles governing breach of statutory duty ‘remains difficult’; in *Todd v Adams*, Neuberger J called it an ‘often difficult and controversial area of law’; while, in *Digicel (St Lucia) Ltd v Cable & Wireless plc*, the outcome of any case was said to be ‘highly specific’ to the statute in question, and somewhat ‘haphazard’.

In spite of its problems, however, the tort continues to enjoy an important *practical* status, because of the prevalence of regulatory statutes whose reach is widespread, and which undoubtedly do confer a private right of action to victims of wrongdoing thereunder. For example, each of the following statutes – which seeks to regulate significant parts of commerce

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3 [1995] 2 AC 633 (HL) 731.
5 [2010] EWHC 774 (Ch) [12] (Morgan J).
and industry – potentially gives rise to the tort: the Environmental Protection Act 1990,\(^6\) re environmental harm; the Competition Act 1998, for anti-competitive conduct; the Data Protection Act 1998, re infringement of data protection and privacy; and the Financial Services and Markets Act 2000, re financial misconduct.

Further, the tort may arise, whether a statute ‘imposes a duty of commission or omission’, as Lord Atkin put it in *Phillips v Britannia Hygienic Laundry Co Ltd.*\(^7\) Of course, it most commonly involves positive statutory duties which either D has not performed at all, or has done in a way that contravenes the statute.

### §SD.2 Both primary and secondary legislation can give rise to a private law right of action for damages.

In the context of the tort, reference to a ‘statutory’ duty can encompass a duty arising in any type of enactment – from Acts of Parliament, to Rules promulgated thereunder, to Statutory Instruments and Orders. In other words, a statutory duty may include duties arising under subordinate, or delegated, legislation.

Where D has infringed delegated legislation, the primary legislation under which that delegated legislation was enacted must have provided the rules-making body with the power to legislatively cast duties on D. Otherwise, if that power is lacking in the primary legislation, then the rules-making body will have acted *ultra vires* (i.e., beyond the scope of its power) if it creates purported ‘duties’ in the delegated legislation. It necessarily follows that, if delegated legislation cannot contain duties because the primary legislation does not permit that, then quite simply, there is no duty upon which the tort can operate. Some primary legislation specifically states that the rules-maker can create duties in delegated legislation (as in, e.g., the Factories Act 1961, s 76(2), whereby, in the interests of setting safe standards of work practice, the Secretary of State is expressly authorised to make regulations which ‘impose duties on owners, employed persons, and other persons’). However, other primary legislation is not so specific – in which case, it will be a matter of statutory construction as to whether or not the rules-making body had the authority to impose duties on D in the delegated legislation (per Lord Jauncey in *R v Deputy Governor of Parkhurst Prison; ex p Hague*\(^8\)).

In *Olotu v Home Office*,\(^9\) Ms Olotu, C, was arrested, charged with criminal offences, committed in custody, and detained on remand at HM Prison Pucklechurch for 193 days. C alleged that she was detained for 81 days too long, because the Prosecution of Offences (Custody Time Limits) Regulations 1987 set a period of 112 days of detention between committal and arraignment. Contrary to Reg 6(1), the Crown Prosecution Service (CPS) had not brought C to court before the custody time limit, so that she might be admitted to bail. Those Regulations were enacted pursuant to s 22 of the Prosecution of Offences Act 1985, whereby the Secretary of State could make regulations ‘as to the maximum period ... during which the accused may ... be in the custody of a magistrates court or of the Crown Court’. Held: the CPS was under a *duty* to prevent C from languishing in custody for longer than the time-limit statutorily permitted – even though the primary legislation did not explicitly state that the procedures governing the preliminary stages of proceedings for an offence before trial, which were specified by Regulations, were to be cast as duties. (However, C’s claim for breach of statutory duty (BSD) failed under element 2, discussed later.)

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\(^6\) The Act came into force on 1 April 1992, and can only apply to breaches of duty occurring after that time.

\(^7\) [1923] 2 KB 832 (CA) 841.  

\(^8\) [1992] 1 AC 58 (HL) 170–73.  

The framework

The six elements of the tort of breach of statutory duty can be derived, in the main, from the judgment of Lord Browne-Wilkinson in X (Minors) v Bedfordshire CC.10

Nutshell analysis: Breach of statutory duty

Preconditions for the tort to apply:

i The statute does not expressly rule out a civil remedy

ii The statute has the requisite territorial operation

Elements of the tort:

1 The statute imposed a statutory duty, or obligation, on D

2 Parliament intended to confer a private law right of action for damages if the duty was breached

3 The statute was enacted for the benefit of a particular class of persons, of whom C was one

4 D breached the duty

5 The breach caused C damage

6 The relevant loss was of a kind which the statute protected C against

Defences to the tort: the usual defences that apply to the tort of negligence, and specifically:

- Contributory negligence
- *Volenti* (although subject to uncertainty)

Relationship with common law negligence

Negligence is an entirely separate tort from breach of statutory duty – as Lord Wright remarked, in London Passenger Transport Board v Upson,11 the two torts are not to be ‘confused’ – breach of statutory duty ‘has its origin in the statute … It is not a claim in negligence in the strict or ordinary sense.’ As is evident from the nutshell analysis above, however, many of their elements overlap. There are two key points to note, in respect of the interaction between the torts – one relates to the imposition of a duty of care, and the other relates to proof of breach.

Proving a duty of care

The fact that D is under a statutory duty to do something from which C would benefit (or which would avoid the risk of injury to C) does not mean, in and of itself, that D owes C a common law duty of care in negligence. A common law duty of care cannot be generated, parasitically and automatically, from a statutory duty.

This principle (which is considered in further detail in Chapter 13, ‘Public Authority Liability’) has been oft-stated by the House of Lords. In HM Customs & Excise Commr v Barclays Bank plc,12 Lord Hoffmann stated baldly that, ‘[t]he statute either creates a statutory duty or it does not. You cannot derive a common law duty of care directly from the statutory duty.’ Whether a common law duty of care is owed by D to C depends upon that duty being imposed by operation of law, via the principal tests of foreseeability, proximity and public policy; or the reciprocal assumption of responsibility/reliance test (considered in Chapter 2).

In *Gorringe v Calderdale MBC*, Lord Scott said to look at it as though the statute had not been enacted at all. If there was no possibility of D’s owing C a common law duty of care without the statute in being, then merely casting a statutory duty on D could not convert that statutory obligation into a common law duty of care. The proposition applies, whether C has suffered personal injury or economic loss:

In *Gorringe*, Mrs Gorringe, C, was severely injured in a car accident, and argued that the highway authority, D, should have painted or erected warning signs about the road conditions, and was negligent not to do so. Held: no negligence action could arise here, because D did not owe a duty of care to C to erect or paint warning signs. What occurred here was a ‘pure omission’ for which, for reasons of public policy, D could not be liable at common law, because D did not create the risk to C in the first place – that risk arose from naturally-occurring features of hills and resultant poor visibility. There was a statutory duty on D to maintain highways (under s 41 of the Highways Act 1980), but that was not actionable as a BSD, because the class to benefit from the statute was the general public. The statute could not, of itself, create a common law duty to warn drivers of road hazards, where no duty of care could possibly exist in its absence. In *Green v Royal Bank of Scotland plc (RBS)*, Rule 5.4 of the Conduct of Business Rules promulgated under the Financial Services and Markets Act 2000 required that a bank must not personally recommend a transaction ‘unless it has taken reasonable steps to ensure that the private customer understands the nature of the risks involved’. Two customers, C, entered into swap transactions with RBS, D, that proved economically unsound. Any claim that D had failed to take steps to ensure that C understood the nature of the risks involved in committing themselves to the swap could have been raised as an action for BSD (but was not issued within time). Instead, C sued D in negligence. Held: no negligence action could arise, because nothing justified a duty of care being imposed – D did not ‘cross the line’ between merely giving information about the product, and ‘the activity of giving advice’. Without the latter, no common law duty of care was possible. Further, just because D had a duty to advise about risk under r 5.4 did not import a duty of care in negligence.

Of course, if the tort of breach of statutory duty is available to C, and if a common law duty of care is also owed by D to C by virtue of the application of the usual duty of care tests, then a negligence action may be instituted, concurrently with the tort of breach of statutory duty.

There may also possibly be some advantage in pursuing the tort of breach of statutory duty where pure psychiatric injury is claimed. In *Hegarty v EE Caledonia Ltd* (where C, on board a support vessel, witnessed the *Piper Alpha* disaster), Brooke LJ remarked that, if breach of statutory duty was proven against D under the Mineral Workings (Offshore Installations) Act 1971, then that would ‘free [C] from the control mechanisms imposed on the claims of secondary victims by the House of Lords in *Alcock*’, because the basis of liability is established quite independently, on the basis of the statutory provision itself. However, that would require C to prove instead, inter alia, that the statute was enacted for the benefit of a class of persons of whom C was one (a most unlikely scenario in *Hegarty* itself). (The considerable difficulties for a secondary victim C to prove that D owed him a duty of care to avoid negligently-inflicted pure psychiatric injury have been discussed in Chapter 5.)

Conversely, the fact that D owes C a duty of care in negligence does not, of itself, give rise to any tort of breach of statutory duty on D’s part. Notably, in the employment context, employer
D owes his employee C a duty of care in negligence to provide a reasonably safe system of work; but the concurrent availability of the tort of breach of statutory duty is not permitted now, in light of the reforms cast by s 69(3) of the Enterprise and Regulatory Reform Act 2013 (as considered in the online chapter, ‘Employers’ Liability’). Similarly, driver D owes another driver C a duty of care to drive with reasonable care and attention, but (as discussed later in the chapter), the Road Traffic Act 1988 is considered not to be enacted for the benefit of a class of persons, but rather, for the general public, and hence, no civil right of action is conferred by that statute.

**Proving breach**

Where D commits a breach of a statutory duty, that does not automatically mean that D was negligent – but any such statutory breach may provide evidence as to a breach of a common law duty of care.

Where D did not perform the statutory duty at all, or undertook the performance of the duty carelessly, that breach ‘may point to a breach of the duty of care’, as Akenhead J put it in *Smith v South Eastern Power Networks plc*17 – albeit with the caveat that, ‘in practice, evidence which goes beyond the mere breach [of statutory duty] may well be required to establish negligence. A simple failure consistently to perform or discharge a statutory duty, with no reasonable explanation or justification, may provide grounds for a claim in negligence’. In *Grealis v Opuni*,18 the Court of Appeal approved of the trial judge’s statement that, ‘Regulation is one thing, negligence is another. The two may quite often coincide, but not in every case’. It will always be a question of fact and circumstance.

In *Barna v Hudes Merchandising Corp*,19 driver D was driving at between 30 and 40 mph in a zone which permitted a maximum speed of 30 mph. D collided with C’s car as C was driving out of a side road. Held: no negligence proven. Exceeding the speed limit is not, of itself, evidence of breach. In *Grealis*, driver D was driving at almost 40 mph in a zone marked at 30 mph when colliding with C’s moped. Held: negligence proven. Various other factors, apart from the speeding, showed that a prudent driver would have adjusted his speed when confronted with vehicles waiting to turn in front of him.

**PRELIMINARY MATTERS**

For the tort to operate, the statute which imposes the duty on D must not expressly preclude a private law right of action; and must have the requisite territorial application.

**Precondition #1: No legislative ousting**

A number of different drafting techniques have been employed by the Parliamentary Drafting Office, by which to restrict or preclude the availability to C of a private right of action for damages. It always entails a careful reading of the statute. The boxed text below gives a sample of the range of different provisions by which a civil action can be denied by the Legislature:

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18 [2003] EWCA Civ 177, [6].
Ousting civil actions for damages

- Some statutes provide an outright ban on a civil right of action – significantly, the Health and Safety at Work etc Act 1974, ss 2–8, imposes several statutory duties on employers (e.g., to do with the 'provision and maintenance of plant and systems of work', the 'use, handling, storage and transport of articles and substances', etc), as well as a general duty 'to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'. However, s 47(1)(a) provides that: 'Nothing in this Part shall be construed as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by [ss 2–8]'). As the House of Lords noted, in R v Chargot Ltd (t/as Contract Services), the lack of any civil right of action for employee C, for an employer's breach of those important workplace-related duties, means that the 'primary means' of enforcing the duties is via a system of inspection, investigative powers, and improvement notices, and via criminal sanctions (where applicable), plus, of course, a claim for breach of a safe system of work in negligence.

- Some statutes provide that a civil right of action is barred, 'other than proceedings for the recovery of a fine' (as in, e.g., the Radioactive Substances Act 1993, s 46, and the Water Resources Act 1991, s 70).

- To avoid any doubt, some statutes oust a civil right of action under either the Act, or any subordinate legislation which may be enacted thereunder (as in, e.g., the Water Act 1989, s 122).

- Some statutes may oust a civil action (by wording such as: the statute 'does not confer any right of action in civil proceedings in respect of any failure to comply with any duty imposed by or under the Act'), but then specify some other method of enforcement (as in, e.g., the Freedom of Information Act 2000, s 56(1), where the Commissioner can follow a procedure resulting in a public authority's contempt of court if information is not provided as statutorily required).

- Some statutes may oust a civil action in general – but then prescribe that certain exceptional circumstances can give rise to civil liability on D's part, at the private suit of C, e.g.:
  - where a particular type of C (employee) is affected by a breach of statutory duty by a particular type of D (employer) (as in, e.g., the Regulatory Reform (Fire Safety) Order 2005, reg 39);
  - where the statutory breaches cause C a particular type of injury (e.g., personal injury) (as in, e.g., the Petroleum Act 1998, ss 23 and 28(6)); or
  - where the breach of particular nominated provisions, or a particular nominated duty, is specifically provided for to be actionable in a civil action (as in, e.g., the Energy Act 2013, s 76, in respect of 'nuclear regulations'; the Channel Tunnel (Safety) Order 2007, reg 6; and the Housing Act 2004, Pt 3 s 2).

However, despite the range of possibilities noted above, an outright prohibition in a statute of any civil right of action is unusual. Most legislation which imposes statutory duties on D will either expressly state that it is intended that the breach of a statutory duty can give rise to civil action, or (even more usually) be entirely silent on the matter. In both scenarios, there is potential room for the operation of the tort.

Precondition #2: Appropriate territorial application

Given that the cause of action relies upon the statute whose provisions were allegedly breached, that statute must have territorial application to the subject matter of the dispute. Otherwise, the tort cannot lie.

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In *Davies v Global Strategies Group Hong Kong Ltd*, Julian Davies, an employee of D, was shot dead through the windscreen of his vehicle by insurgents, on the outskirts of Mosul in Iraq. His widow, C, sued in negligence, and for BSD (in reliance on the Management of Health and Safety at Work Regulations 1999, the Provision and Use of Work Equipment Regulations 1998 and the Personal Protective Equipment at Work Regulations 1992). Held: BSD was not ultimately pursued at trial, because the Regulations' territorial reach did not extend to Iraq.

Turning now to each element of the tort:

**ELEMENTS OF THE TORT**

**Element #1: A statutory duty on D**

§SD.6 The statute must impose a duty – a mandatory obligation – on D to perform, or not perform, some act. D must not merely be exercising a statutory discretion.

Whilst this element has not prompted much litigation, this section deals with a few scenarios where C may struggle to prove that the requisite duty existed in the statute at all.

Whatever statutory duty C is seeking to allege as an enforceable obligation must actually constitute a duty under the statute. If no ‘duty’ can actually be detected on the face of the statute, C’s claim must fail.

In *Lyons v QPM*, David Lyons, C, ran a garage business. D, the Chief Constable of Strathclyde Police, wrote to regulatory bodies advising that intelligence held by Strathclyde Police indicated that C was involved in serious and organised crime, including drug trafficking. D was a data controller of sensitive personal data relating to C, to which the Data Protection Act 1998 (DPA 1998) applied. C argued that D did not make it clear to the recipients of those letters that he was only reporting what was held in his records, and that he was not endorsing the factual accuracy of that data. C also alleged that the data had been unfairly processed, because the source of the information had not been disclosed to the recipients. Held: no tort of BSD was available. The DPA 1998 did not impose any duty on D not to ‘endorse’. Also, D did not have a duty to disclose the identity of the sources of information where the data was held for the purpose of preventing or detecting crime (because those people were themselves data subjects entitled to the protection of the Act). To have an entitlement to compensation, C must prove that D, as data controller, contravened an identified requirement or duty of that Act, which he could not do.

In the context of this tort, a statutory duty is to be distinguished from a mere discretionary power which D may or may not exercise. This distinction is essential, for the tort to have any room in which to operate.

In *Ali v Bradford MDC*, Mrs Ali, C, slipped on mud and debris on a footpath in Bradford. She sued the Council, D, under s 130(3) of the Highways Act 1980, which provided that, ‘it is the duty of a council who are a highway authority to prevent, as far as possible, the stopping up or obstruction of (a) the highways for which they are the highway authority, and (b) any highway for which they are not the highway authority, if, in their opinion, the stopping up or obstruction of that highway would be prejudicial to the interests of their area.’ Held: the tort of BSD was not available. Section 130

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involved a discretionary judgment by D, and hence, it placed no automatic and express obligation on D to remove all obstructions.

**The correct defendant**

D must be the particular party upon whom the statute casts the obligation or duty.

Subject to the doctrine of vicarious liability (discussed below), a claim for the tort of breach of statutory duty must be pursued against the party upon whom the statutory duty is imposed. In *Groves v Lord Wimborne*,<sup>24</sup> the Court of Appeal remarked that, where an action is based upon a statute, ‘[t]here being an unqualified statutory obligation imposed upon the defendant ... [that] defendant cannot shift his responsibility for the performance of the statutory duty on to the shoulders of another person.’

The issue has arisen most significantly in the employment context. If it is upon the employer that the statutory duty is cast, then it is contrary to Parliament’s intention that the statute should be construed as permitting the employee to be civilly liable for the tort of breach of statutory duty. To allow that action ‘would be a case of piercing the corporate veil with a vengeance’, as Stuart-Smith LJ put it in *Richardson v Pitt-Stanley*.<sup>25</sup>

In *Richardson*, David Richardson, C, suffered a severe mutilating injury to his right hand while working as an employed cutter upon a baling machine. He obtained judgment in default against his employer for damages. However, that employer went into liquidation with no assets, and as turned out, it was uninsured against liability for injury sustained by its employees, in contravention of the employer’s duty to maintain such insurance under s 1 of the Employers’ Liability (Compulsory Insurance) Act 1969. Faced with that problem, C sued the employer’s directors and secretary, D (or, more realistically, their indemnity insurers), claiming that they had committed an offence under s 5 by having knowingly consented to or connived at the failure to insure; and that C suffered economic loss equivalent to the sum he would have recovered, if the company had been properly insured. Held (2:1): no tort of BSD was possible against D. The statutory duty to insure was imposed upon the employer, not upon the directors and officers of the company.

**Where the statute does not cast the duty upon any particular party, then it may be held that no specific party should be liable for a civil action.**

This particular principle exemplifies just how restrictively the tort has been applied. Rather artificially, if the statutory obligation is cast on no particular party, but a criminal sanction for that statutory breach is imposed upon a party, that may not be sufficient to give rise to the tort. If the statutory obligation is not imposed on D, that may be an indicator that no private law action for breach of duty is available.

In *Todd v Adams*,<sup>26</sup> a fishing trawler, *Margaretha Maria*, capsized and sank off the Cornish coast in 1997, with the loss of all hands. Relatives of the crew, C, argued that the vessel was unstable, and that the vessel owner failed to comply with safety rules for UK fishing vessels, promulgated under the Merchant Shipping Act 1995, s 121(1). Held: the tort of BSD was not available. The obligations as to safety of hulls, equipment and machinery in s 121(1) were not expressly

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<sup>24</sup> [1898] 2 QB 402 (CA) 410 (Smith LJ).  
<sup>25</sup> [1995] QB 123 (CA) 133.  
allocated to any specific person – all that it said was that a fishing vessel of a particular nature should satisfy those rules. The owner or master of the vessel could be criminally liable for a breach of those rules under the Act, but the statutory duty was ‘not a duty which the legislature has imposed in terms on any particular person’ – all it had done was to ‘state that, where there is an infringement of the rules concerned, the sanction expressly provided for, namely a criminal liability, is to be against the owner or master’. This pointed against any specific person being civilly liable.

The application of vicarious liability

§SD.9

Generally, where a statute confers a civil right of action upon C to recover for damages, in the event that an employee, D1, breaches the statute – but does not expressly impose a statutory duty upon the employer, D2 (when it would have been easy enough for Parliament to legislate for that) – D2 may still be vicariously liable for D1’s breach of statutory duty, unless the statute itself expressly or impliedly displaces that general rule and excludes vicarious liability.

This principle, established by the House of Lords in Majrowski v Guy’s and St Thomas’s NHS Trust,27 creates a general presumption in favour of the availability of vicarious liability for the tort. Although Majrowski specifically concerned a suit under the Protection from Harassment Act 1997, the comments on vicarious liability were stated to be applicable to breach of statutory duty generally.

The point was actually a novel one in Majrowski – as Lord Hope mentioned, cases where the principle of vicarious liability had been applied to a breach of statutory duty laid on an employee personally were ‘hard to find’, because statutes which provided for the health and safety of employees in the workplace ‘normally include provisions which impose a direct duty on the employer in such circumstances’.28 Nevertheless, as a matter of common law, the doctrine of vicarious liability can apply, even if there is no mention of any duty on the employer in the statute.

In Majrowski, Mr Majrowski, C, a clinical auditor co-ordinator, alleged that his departmental manager bullied, mistreated, and humiliated him, was abusive towards him in front of other staff, and excessively critical of his work. C sued for damages, pursuant to s 3 of the 1997 Act for distress, anxiety and consequential losses caused by harassment, and sued the NHS Trust, their employer, D, vicariously. Held: the NHS Trust, as employer, was vicariously liable. Neither the terms of the legislation, nor the practical effect of this legislation, indicated that Parliament intended, either expressly or impliedly, to exclude the ordinary principle of vicarious liability.

The House of Lords expressly refused to follow the outcome or reasoning of the High Court of Australia in Darling Island Stevedoring & Lighterage Co v Long,29 in which a regulation set out precautions which should be observed before loading or unloading a ship – in the event of contravention, a penalty was imposed on ‘the person in charge’. That court held that the employer of that ‘person in charge’ could not be vicariously liable for the employee’s breach of the regulations.

Element #2: Parliamentary intention to confer a civil right of action

An express intention

The relevant statute may explicitly state that, in the event of breach of one of its duties, C, as an injured party, has the right to seek damages. This gives rise to ‘an express cause of action for breach of statutory duty’.

This scenario, described as such in Green v RBS plc,\(^{30}\) is fairly rare. There have been judicial requests to the Parliamentary Drafting Office to state expressly in the statute whether or not a duty should be actionable as a private action for damages (e.g., Lord Du Parcq in Cutler v Wandsworth Stadium Ltd\(^{31}\)), but that admonishment has not been much heeded.

However, some modern statutes do give an express cause of action for breach of statutory duty. As with the prohibitive provisions discussed under the ‘Precondition’ in this chapter, a variety of statutory drafting techniques have been used to provide for that outcome. The boxed text below sets out some examples:

### Conferring civil actions for damages

- A statute may state that any person who causes damage is liable for that damage (as in, e.g., the Environmental Protection Act 1990, s 34(1)(b), which imposes a duty on ‘any person who imports, produces, carries, keeps, treats or disposes of controlled waste … to take all such measures applicable to him in that capacity as are reasonable in the circumstances … to prevent the escape of the waste from his control or that of any other person’ – as noted in Re Corby Group Litigation,\(^{32}\) this statutory duty is ‘converted expressly into the type of statutory duty, breach of which gives rise to a civil claim of damages’, because s 73(6) provides, in general, that any person who deposited waste which causes damage is liable for the damage).

- Alternatively, a statute may expressly refer to the tort as being available in the event of a breach of statutory duty (as in, e.g., the Financial Services and Markets Act 2000, s 150(1): ‘[a] contravention by an authorised person of a rule is actionable at the suit of a private person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty’; similarly, in the Mobile Homes Act 2013, s 10: ‘[a] claim that a person has broken the duty [under provisions] may be made the subject of civil proceedings … in tort for breach of statutory duty’; and in the Copyright, Designs and Patents Act 1988, ss 103 and 194: ‘[a]n infringement of any of the rights conferred by [certain Parts of the Act] is actionable by the person entitled to the right as a breach of statutory duty’).

- Alternatively, by enabling C to obtain ‘compensation’ for a statutory breach, the tort is implicitly available (as in, e.g., the Data Protection Act 1998, s 13(1): ‘[a]n individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage’ – this gives rise to a claim for the tort of BSD (per Murray v Express Newspapers plc\(^{33}\))).

Where these statutes are concerned, it is not necessary to define a limited class for whose benefit the statute was enacted (under element 3), but the other elements of the tort remain

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\(^{31}\) [1949] AC 398 (HL) 410.

\(^{32}\) [2009] EWHC 1944 (TCC), [2010] Env LR D2, [693].

\(^{33}\) [2007] EWHC 1908 (Ch) [92].

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to be established (and the action must be brought within the relevant time limitation period, which was not so in Green v RBS plc\textsuperscript{34}).

**Construing the intention**

§SD.11  Usually, the relevant statute will be silent on the right to damages, which requires that parliamentary intention be construed. It certainly cannot be presumed.

The key issue is whether the statutory duty imposed on D should be regarded as a ‘public law duty’ only, or whether Parliament intended that C, injured by the failure by D to perform its statutory duty, should enjoy a private right of action sounding in damages. Just which path should prevail will depend upon ‘a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted’ (per Cutler v Wandsworth Stadium Ltd\textsuperscript{35}) – a tenuous principle which is still considered to be the ‘starting point’ for construing parliamentary intention (per Poulton v MOJ\textsuperscript{36}).

The burden is on C to establish the existence of a private right of action, and not for D to prove that it does not exist (Poulton\textsuperscript{37}). Further, the relevant statutory provision is to be construed at the time it was enacted, and not at the time of trial (per Ministry of Housing and Local Government v Sharp\textsuperscript{38}).

§SD.12  There is no overarching principle or conclusive factor for identifying what the parliamentary intention might have been. Rather, a number of factors may indicate, or negate, that such an intention existed.

Inevitably, the courts must undertake a balancing exercise, in order to construe parliamentary intention. The difficulties are that different weights are ascribed to different factors, they frequently pull in different directions, some are judicially-mentioned rather infrequently, and as one court put it, they are ‘indicators only, and not free-standing tests’ (per Neil Martin Ltd v HMRC\textsuperscript{39}). Hence, the result of the balancing act is very difficult to gauge. It is an artificial exercise in any event – as the Law Commission has noted, ‘the general view ... is that the judicial search is for an intention which does not exist.’\textsuperscript{40}

Drawing from relevant case law, the following factors will be relevant, when determining whether or not a private action was intended by the Legislature:

- **Factor #1: the availability of another remedy for C:** If the statute provides no other remedy to C for D’s statutory breach (whether via tortious, public law, or criminal proceedings), that is an indicator that the availability of a private right of action may have been intended. Conversely, if the statute provides some other means for C to enforce the statutory duty, that militates against the availability of a private right of action for damages via breach of statutory duty.

\textsuperscript{34} [2013] EWCA Civ 1197, [15] (the claim was issued six years after the relevant damage was suffered).
\textsuperscript{35} [1949] AC 398 (HL) 407 (Viscount Simonds).
\textsuperscript{36} In full: St John Poulton’s Trustee in Bankruptcy (Poulton) v MOJ [2010] EWCA Civ 392, [2011] 1 Ch 1, [38] (Lloyd LJ).
\textsuperscript{37} [2009] EWHC 2123 (Ch) [97], aff’d on this point (but overruled in outcome): [2010] EWCA Civ 392, [2011] Ch 1, [108]–[110].
\textsuperscript{38} [1970] 2 QB 223 (CA) 276 (Salmon LJ).
\textsuperscript{39} [2006] EWHC 2425 (Ch) [66].
\textsuperscript{40} Aggravated, Exemplary and Restitutionary Damages (Rep 247, 1997), fn 58.
In *ex p Hague*, Mr Hague, C, serving 15 years imprisonment, was perceived by the officials at Parkhurst Prison to be a troublemaker, and he was segregated from other prisoners for 28 days. This segregation was unlawfully done, in contravention of Rule 43 of the Prison Rules 1964. Held: the tort of BSD failed. Where a prisoner, C, was wrongfully segregated from the prison population, then C could complain to the Governor under r 8(1) of the Prison Rules 1964, and a report could then be made to the Secretary of State under s 6(3) of the Prisons Act; C could challenge any administrative decision of the Secretary of State or the Governor by judicial review proceedings; and C could sue in tort for damages for misfeasance in public office, assault or negligence, if the facts supported those actions.

When deciding against the availability of the tort, courts have also cited in-house inspection and reporting schemes as being relevant — which do not entail compensation for C *per se*, but nevertheless, serve to protect a class of persons of whom C was one.

In *Morrison Sports Ltd v Scottish Power*, buildings were destroyed and damaged by fire, including premises leased by Morrison Sports, C. The fire had started in an electricity meter cupboard. C alleged that Scottish Power, D, had wrongfully wrapped a metal shim around a fuse, which had caused arcing and the fire, and that D breached their statutory duties under Regs 17, 24 and 25 of the Electricity Supply Regulations 1988. Held: the tort of BSD failed. The statutory regime set up means of enforcement, other than a private law right of action — the Secretary of State could appoint inspectors to carry out various checks of electric lines and electrical plant on consumers’ premises, to ascertain whether a breach of the Regulations had occurred; and there was also a provision to allow for consumers’ committees to investigate certain matters. All of this (‘with its carefully worked-out provisions for various forms of enforcement on behalf of the public’) militated against any parliamentary intention to allow consumers to bring an action for damages for D’s statutory breaches.

The potential involvement of a regulator, a scheme for making complaints to that regulator, and a scheme for enforcement notices, etc, also count as ‘remedial’ measures which may indicate that no civil right of action for breach of statutory duty was intended (per *Digicel (St Lucia) Ltd v Cable & Wireless plc*).

Self-help remedies on C’s part can also count against the availability of the tort, even where (as occurred in both the following examples), C did not exercise that remedy at all. Indeed, C may have considered that, practically-speaking, it could or should not exercise the remedy – nevertheless, the availability of the remedy has counted against the availability of a private law right to damages.

In *Morshead Mansions Ltd v Di Marco*, Mr Di Marco, C, alleged that s 21 of the Landlord and Tenant Act 1985 entitled him, as a tenant, to require his landlord, Morshead Mansions Ltd, D, to supply him with a written summary of costs which would form part of a service charge, and that he should be given reasonable facilities for inspecting the documents supporting that summary under s 22. The Act provided the tenant with a civil remedy, viz, the right to withhold the service charge. D did not supply the costs summary. C sought a mandatory injunction to compel D to comply with those obligations, and sued for BSD. Held: the tort of BSD failed. No intention to confer a private right on a tenant to damages could be inferred from the legislation, given the option of withholding
the service charge. In *Poulton v MOJ*, Ms Poulton was rendered a bankrupt, and a trustee-in-bankruptcy, C, was appointed to manage her assets. A bankruptcy petition was presented against Ms Poulton in the Guildford County Court. A scheme was set up under the Insolvency Rules 1986, r 6.13, that a notice should be sent by the court to the Chief Land Register to be registered on the title of a bankrupt's property, to deter or to prevent sale of that property. The Court failed to send notice to the Registrar; and Ms Poulton sold some land, and the proceeds were dissipated and largely untraceable. C claimed that, but for the failure of the Court to comply with IR 6.13, the value in the property would have been preserved for Ms Poulson’s creditors. Held: the tort of BSD failed. IR 6.13 did not confer a private right of action for damages. It was open to a creditor (including C, the trustee-in-bankruptcy) to itself request the Chief Land Register to register the petition, for a modest fee – even though those experienced in insolvency matters would expect the court to do it, and would not have taken steps themselves, at least in the first instance.

Even if C did not pursue other remedies because he was entirely ignorant of those other avenues of redress, no parliamentary intent to confer a private right of action on C can be inferred. It is fair to say that this harsh outcome has caused some judicial consternation. Lord Bingham stated, in *Olotu v Home Office*, that no tort of breach of statutory duty could be pursued, even if C was not alerted to her rights, and even if she were not legally represented at the time, albeit that ‘[i]t would ... be a matter of acute concern if it were the case that [C] had, through no fault of her own, spent an excessive time in prison on remand, and had no right to compensation for this injury.’ However, that dire prospect did not mean that Parliament intended a private right of action.

In *Olotu*, facts previously, held: the tort of BSD failed. The effect of s 4 of the Bail Act 1976 was that, if a custody time limit expired before C, the accused, was brought before the Crown Court by the CPS, then C was automatically entitled to bail, and the court could only impose conditions on the grant of that bail. The custody time limit expired, but thereafter, C did not apply for release. The court held that, if the CPS did not perform its statutory duty, then C ‘was doubtless expected to apply for release on bail at once, such application being assured of success’. Alternatively, judicial review was available to C. In these circumstances, no private law right of action for damages by C against the CPS could have been intended by Parliament.

Obversely, the absence of any other remedy for C is not an automatic trigger for the tort’s availability – it is only one factor to be considered in the matrix (per *Morshead Mansions Ltd v Di Marco*). In that respect, the tort has become more restrictively interpreted over time. In *Cutler v Wandsworth Stadium Ltd*, Lord Simonds said that if no remedy or sanction was prescribed for a statutory breach, then, ‘it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration.’ However, there can now be no such presumption in modern law. That sort of ‘pious aspiration’ decried by Lord Simonds has become evident, where no remedy or penalty was prescribed – and yet no breach of statutory duty was available to C either (witness, e.g., the outcomes in *Welsh Water v Barratt Homes Ltd (Rev 1)* and *Poulton v MOJ*, discussed shortly).

44 [2014] EWCA Civ 96.
47 [2014] EWCA Civ 96, [27].

• Factor #2: the imposition of a penalty on D: If the statute imposes a penalty, fine, imprisonment, or other ‘criminal sanction’ on D for his contravention of the statute, that may indicate that Parliament intended that to be the only ‘punishment’ that D should bear for the breach, without the additional liability of having to pay C damages by way of compensation (per Lonrho Ltd v Shell Petroleum).

In Phillips v Britannia Hygienic Laundry Co Ltd, D’s lorry and C’s car collided, when one of the axles of the lorry broke, and a wheel came off, and hit the car. The lorry had been sent for service about 7 weeks before the accident, and the defective axle was installed. The Motor Cars (Use and Construction) Order 1904, cl 6, provided that ‘the motor car and all the fittings thereof shall be in such a condition as not to cause ... danger to any person on the motor car or on any highway’. Under the Locomotives on Highways Act 1896, s 7, a breach of any Regulations made under that Act (including cl 6) ‘may, on summary conviction, be punished by a fine not exceeding 10l’. Held: the tort of BSD failed. The statute provided a penalty for its non-observance; which pointed against any additional private action.

The justification for this factor was explained in Cutler v Wandsworth Stadium Ltd – a criminal sanction suggests that the statutory obligation was imposed on D for the public benefit and, hence, that the breach should best be viewed as a public, rather than a private, wrong. Also, the fact that Parliament ascribed such importance to the duty, by imposing a criminal sanction on D if it were breached, actually pointed against a civil action for breach of statutory duty (per Lonrho v Shell Petroleum).

Indeed, the sanction may be purely economic, rather than criminal. Even so, the fact that the Legislature saw fit to include such an outcome for D mitigates against the availability of a civil action.

In Cutler v Wandsworth Stadium Ltd, the occupier of a licensed dog-racing track at Wandsworth Stadium, D, was obliged, by s 11(2)(b) of the Betting and Lotteries Act 1934, to provide a bookmaker with ‘space on the track where he can conveniently carry on bookmaking’. Its purpose was to provide attendees at the race-track with some competition (apart from the totaliser), as to where they could place bets. The duty was enforceable by criminal penalties, including substantial fines and/or a term of imprisonment. Mr Cutler, C, claimed that he was illegally excluded from D’s race-track. Held: the tort of BSD failed. Parliamentary intent was not to create any private action for damages, because the penalties imposed by the Act were punishment enough. In addition to the fines, the consequence of imprisonment was that an occupier’s license to occupy a racetrack could be revoked, ‘a disastrous result’. In Digicel (St Lucia) Ltd v Cable & Wireless plc, D were monopoly telecommunications operators in various jurisdictions in the Caribbean. Their governments passed legislation, providing for the ending of those monopolies, and for new operators (such as Digicel, C) to be able to enter the telecommunications markets to compete with the former monopolist. C alleged that D delayed the process of interconnection with the existing network, and that such conduct was a breach of that legislation, and actionable as breaches of statutory duty. Held: the tort of BSD failed. A sanction was imposed under the Act for delays in connection, viz, the Minister could suspend or revoke the licence of D, or could revoke the existing licence and offer a new licence to D on more stringent terms – either ‘could operate as a worthwhile deterrent.’
However, the effect of this factor is difficult to predict. The absence of any penalty (whether criminal or economic) has not necessarily led to the tort being available (illustrated by *ex p Hague*), while the availability of a penalty provision has not always precluded the tort (per *Groves v Lord Wimborne*, below).

The adequacy of the sanction imposed on D is highly relevant under this factor too. A civil action may be less warranted, where the penalty imposed on D is substantial – whereas if the penalty is small or even trivial, then that may point to the availability of the tort. Moreover, the fact that any fine would be paid, not to the party injured, but to some consolidated revenue fund, may also militate in favour of breach of statutory duty being available.

In *Groves v Lord Wimborne*, a young employee, Master Groves, C, was injured when his arm was caught in the revolving cog-wheels of a steam winch. Ultimately, his arm had to be amputated. The machinery should have been fenced, under s 5 of the Factory and Workshop Act 1878, but the guard had been removed and not replaced. The Act provided for a maximum fine of 100l. Held: the tort of BSD was proven. The penalty was inadequate to remove any private action for damages. According to Rigby LJ, ‘[i]t seems monstrous to suppose that it was intended that in the case of death or severe mutilation arising through a breach of the statutory duty, the compensation to the workman or his family should never exceed 100l.’ Further, although the fine could go to the injured workman, or to his family if killed, that depended upon the Secretary of State making that order, otherwise, it went to consolidated revenue.

This factor is effectively ‘neutralised’, however, if the statute does impose a criminal sanction on D, but then also provides that ‘nothing shall affect any liability of any such person to pay compensation in respect of any damage or injury which may have been caused by the contravention’. Then a private law right of action for breach of statutory duty would be perfectly consistent with that criminal sanction (as noted in *Morrison Sports Ltd v Scottish Power*). It all depends on the proper construction of the statute.

**Factor #3: a specific and simple task, rather than a regulatory or value-judgment task:** If the statutory obligation imposed on D is very limited and specific, then a private right of action is more readily construed. On the other hand, where D is carrying out some general administrative or management function, or one where difficult value-judgments or discretionary decisions have to be made, then the tort of breach of statutory duty is less likely to be available.

In *X (Minors) v Bedfordshire CC*, there were multiple cases which raised the issue as to whether public authorities, D, charged with statutory duties were liable in damages to individuals injured by the failure of those authorities to perform properly their social welfare duties. Held: no tort of BSD was available for any of the claims. A key factor was that social welfare services are ‘of peculiar sensitivity, involving very difficult decisions on how to strike the balance between protecting the child from immediate feared harm and disrupting the relationship between the child and its parents. Decisions often have to be taken on the basis of inadequate and disputed facts. ... in such a context, it would require exceptionally clear statutory language to show a parliamentary intention that those responsible for carrying out these difficult functions should be liable in damages if, on subsequent investigation with the benefit of hindsight, it was shown that they had reached an erroneous conclusion and therefore failed to discharge their statutory duties.’ There was no such clear language in the statute.

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Quite apart from social welfare statutes, other statutes which regulate the provision of services for society are also unlikely to give rise to a civil action in tort at the suit of a particular C:

In *ex p Hague*, facts previously, held: the tort of BSD failed, because the Prison Rules related to 'the administration and good government of a prison'; many of the rules did not relate to the prisoners, individually, at all; and they were 'regulatory in character, provid[ing] a framework within which the prison regime operates.' In *Capital and Counties plc v Hampshire CC*\(^{62}\) one of the cases of the conjoined appeal concerned the failure of the relevant fire authority, D, to deal with a classroom fire. Of the seven fire hydrants around the building, four did not work, and three were never found (or never found in time). Water had to be obtained from a mill dam some distance away, by which time a classroom and adjacent chapel had been destroyed. Under s 13 of the Fire Services Act 1947, '[a] fire authority shall take all reasonable measures for ensuring the provision of an adequate supply of water, and for securing that it will be available for use, in case of fire.' Held: the tort of BSD failed. The duty in s 13 was in no way 'limited and specific', but was 'more in the nature of a general administrative function of procurement placed on the fire authority in relation to supply of water for fire-fighting generally.'

However, even so, this factor seems to carry little weight – even specific, narrow and straightforward tasks have not given rise to an actionable tort, where D has not performed them adequately, or at all. Case law demonstrates that other factors can *easily* outweigh this one, again making the outcome of the factor very difficult to gauge.

In *Poulton v MOJ*,\(^ {61}\) facts previously, held: the tort of BSD failed. Judge Hazell (first instance) held that the duty to send the bankruptcy petition was 'particularly clear, simple and easy to perform'. It did not require 'intricate tasks', nor value judgments about prioritising scarce resources, nor the exercise of any discretion as how best to achieve a result 'as to which there might be room for a difference of opinion and argument as to what constituted performance of the duty.'\(^ {62}\) But on appeal, even though the task was again admitted to be 'a narrow and specific one', factor #1 outweighed this one. In *Welsh Water v Barratt Homes Ltd (Rev 1)*, Barratt Homes, C, had permission to construct a school and 98 houses in a development. It applied to Welsh Water, D, the sewerage undertaker for the area, to connect the development's drains to the public sewer. Before it could do so, D poured concrete into C's drainage pipe, which prevented connection with the sewer. Section 106 of the Water Industry Act 1991 created an 'entitlement on an owner/occupier to have its drains or sewer connected to the sewerage authority's sewer. However, C had to connect the drains itself, at considerable expense. Held: the tort of BSD failed. D's duty was 'specific and limited, and was not based on a general administrative function involving the exercise of administrative discretions', but parliamentary intention was, nevertheless, construed against the tort being available (because of factor #6, below).

- **Factor #4**: whether D has an immunity against damages: If D enjoys an immunity from prosecution in negligence for the wrong committed, then (in the absence of an express provision permitting a private right of action), that also suggests that a civil action is not available.

In *Olotu v Home Office*,\(^ {63}\) facts previously, Mummery LJ noted that there is no general duty of care owed by the CPS at common law in the conduct of its prosecution of an accused, and the CPS was

\(^{60}\) [1997] EWCA Civ 3091, [120].  
\(^{62}\) [2009] EWHC 2123 (Ch) [87].  
immune from actions for negligence (per Elgouzi-Daf v Commr of Police\textsuperscript{64}). That indicated that Parliament did not intend the CPS to be vulnerable to claims for BSD either.

- **Factor #5: personal injury or property damage versus economic damage:** Where the purpose of a statute is to protect the safety and health of a class of persons, rather than to protect a class against economic loss, then a civil right of action will more readily be construed, and vice versa. That factor contributed to the overall outcome, that no tort of breach of statutory duty could be proven, in both Digicel (St Lucia) Ltd v Cable & Wireless plc\textsuperscript{65} and in Richardson v Pitt-Stanley.\textsuperscript{66}

However, as the court admitted in Richardson, ‘[t]his point clearly cannot be taken too far’. More recently, in Morrison Sports Ltd v Scottish Power,\textsuperscript{67} the Supreme Court agreed that a statute aimed at reducing the risk of personal injury or damage to property was, ‘by no means an infallible indication that Parliament intended to give individuals a private right of action for breach of its provisions. It is simply one factor to be taken into account.’ Certainly, there is no general principle that protection against economic loss cannot found a successful claim for breach of statutory duty – as reiterated in Murray v Express Newspapers plc,\textsuperscript{68} pecuniary loss suffered by C is compensable, if that is the type of loss which the statute protects against.

Notably, where the injury suffered by C, by reason of D’s statutory breach, is deprivation of liberty, then while that may give rise to ‘anxious consideration’ by the court, it does not compel any finding that Parliament intended to confer upon C a private law right of action (as the outcome in Olotu\textsuperscript{69} demonstrated).

- **Factor #6: the statutory breach in the context of the rest of the statute:** Where the Legislature has provided that, for some breaches of the statute’s duties, there is a right to compensation for loss or injury – but for the particular statutory duty in question, no such private right of action is provided for – then that is a strong indicator (a ‘natural inference’, as the Supreme Court put it in Morrison Sports\textsuperscript{66}) that Parliament did not intend the particular statutory breach to sound in damages. As Pill LJ remarked in Welsh Water, this sort of scenario means that, ‘the need for sanctions, where considered appropriate, was plainly in the minds of the legislators, and a right was not specifically conferred for breach of [the instant duty under consideration].’

In Welsh Water, facts previously, held: the tort of BSD failed. A right to damages was specifically conferred by the Legislature for breaches of other sections in the Water Act 1991, e.g., for escapes of water under s 209. Hence, a lack of private right must have been contemplated for s 106. (Had this element succeeded, there was a limited class for whom the statute was enacted, viz, those who sought connection to the public sewer).

In conclusion, and ultimately, the enquiry under element 2 is a delicate balancing act, as to whether or not the requisite parliamentary intention to permit a private right of action exists. Welsh Water provides a very useful illustration of this:

\textsuperscript{64} [1995] QB 335 (CA). \hspace{1em} \textsuperscript{65} [2010] EWHC 774 (Ch) [180].
\textsuperscript{67} [2010] UKSC 37, [2010] WLR 1934, [41]. \hspace{1em} \textsuperscript{68} [2007] EWHC 1908 (Ch), [92].
\textsuperscript{69} [1996] EWCA Civ 1070. \hspace{1em} \textsuperscript{70} [2010] UKSC 37, [2010] WLR 1934, [13].
Element #3: For the benefit of a particular class

The status of the element

§SD.13 The better view is that a statutory duty for the benefit of a particular class (as opposed to a duty for the benefit of the general public) is a separate element of the tort of breach of statutory duty, and not merely one factor that goes to show parliamentary intention (under element 2).

This issue has become somewhat obfuscated by the case law, with viewpoints each way.

Viewpoint#1: that a limited class is necessary: Indications at the highest appellate level suggest that the existence of a limited class must be treated as being a separate element, additional to the question of parliamentary intent.

In Lonrho Ltd v Shell Petroleum Co Ltd (No 2),71 Lord Diplock noted that, ‘upon the true construction of the Act, it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals’. Subsequently, Lord Browne-Wilkinson stated in X (Minors) v Bedfordshire CC, that: ‘a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty’.72 More recently, in Morrison Sports Ltd v Scottish Power,73 the Supreme Court justified the existence of a limited class, as ‘one of the necessary preconditions of the existence of a private law cause of action’, because otherwise, the effects of D’s breach of statutory duty could be ‘potentially far-reaching’, in that any member of the public who suffered loss as a result of the breach could claim against D, leading to floodgates concerns.

In Morrison Sports, and apart from the claim by Morrison Sports for the loss of its leased premises by fire (at no 23), the owners of a building two doors away (at no 27), C2, claimed for the cost of weatherproofing to the gable wall, because the building at no 25 was also damaged by fire and had to be demolished, thereby exposing the gable wall between nos 25 and 27. Held: no tort of BSD was available to C2. They were not within the protected class, viz, those who suffered damage by fire or

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For a private right of action:  
Against a private right of action (these arguments prevailed):

- The duty to connect C to the public sewer was ‘specific and limited’, not involving the exercise of administrative discretions’, nor was it of a ‘regulatory or policy nature’;
- The Water Industry Act 1991 did not impose a criminal sanction (penalty or fine) on D for breach. A criminal sanction may have been expected, if an owner was to be left without a private law right of action;
- The right/duty relationship between property owner and sewerage services provider was such that normally D would be required to compensate the party, C, whose right was infringed, especially where C was put to large expense as a result of D’s breach.

- A right to damages was specifically conferred by the Legislature for breaches of other sections in the Act, e.g., for escapes of water under s 209;
- Courts are loath to read a private right into a statutory scheme, which ‘weigh[ed] heavily against Barratt Homes in this case’.

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71 [1982] AC 173 (HL) 185 (having regard to Lord Diplock’s ‘first exception’ to the general rule of no civil action).
72 [1995] 2 AC 633 (HL) 731 (emphasis added).
damage by explosion, as a result of D’s statutory breaches, but were merely members of the general public, who could not found a claim for BSD. In *Sebry v Companies House (Rev 1)*, C sued the Registrar of Companies for inaccurate entries on the company register, which it had a duty to maintain under the Companies Act 2006. Held (dictum only, without having to decide): no tort of BSD likely to be available. Otherwise anyone who suffered economic loss by reason of an act or omission on the register could sue, and that information was available, via the internet, to the whole world.

These authorities mandate that a limited class is a separate element of the tort.

**Viewpoint #2: an enactment for the general public is sufficient, provided that a parliamentary intention to enable a civil right of action exists:** Elsewhere in Lord Browne-Wilkinson’s judgment in *Bedfordshire*, it is somewhat confusingly stated that, if legislation is introduced primarily for the protection of a limited class, then that is one of the ‘pointers in favour of imputing to Parliament an intention to create a private law cause of action.’ Similarly, in *Olotu*, Lord Bingham indicated that, in seeking to understand the intention of Parliament, the class (if any) intended to be protected by statutory provision was only one aspect of the enquiry.

In further support of the notion that a limited class is not a separate element, there are some cases which have held that legislation which has been enacted for the benefit of the general public should still enable a private right of action to be pursued. In *Phillips v Britannia Hygienic Laundry*, Atkin LJ commented obiter that whether the tort was available did not depend upon whether C ‘can bring himself within some special class of the community … The duty may be of such paramount importance that it is owed to all the public. It will be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public cannot.’ Subsequently, in *Todd v Adams*, Neuberger J considered this view to have ‘considerable force’, but thought that it could not be followed, given that *Bedfordshire* pointed to the requirement for a limited class (although, as noted above, there are contrary indications in Lord Browne-Wilkinson’s judgment on that point).

**A category on point: ‘road users’:** The category of ‘road users’ exemplifies just how artificial the requirement of proving a limited class can be.

On the one hand, in *Phillips v Britannia*, Bankes LJ held that ‘the public using the highway is not a class; it is itself the public and not a class of the public’. Several authorities which turn upon highway repair and road behaviour statutes (considered shortly in the chapter) also support the notion that these statutes are enacted for the protection or benefit of the general public, and accordingly, cannot confer a civil right of action in tort for breach of statutory duty.

On the other hand, road users have been considered by some authorities as being a sub-set of the general public. In *Roe v Sheffield CC*, Pill LJ defined a limited class as being that of ‘road users’. This was affirmed in *Morrison Sports v Scottish Power* as showing a limited class, ‘albeit broad’. In *Monk v Warbey*, the class of road users who could be injured by an uninsured driver was also held to be a limited class. These cases permitted a civil action for breach of statutory duty, and have never been overruled. This is despite the sense that the classes were far too widely-drawn to found a civil action for damages, because everyone is a passenger, a pedestrian or a driver.

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74 [2015] EWHC 115 (QB) [106].
76 [1923] 2 KB 832 (CA) 841.
78 [1923] 2 KB 832 (CA) 840.
79 [2004] QB 653 (CA) 672–73.
80 [2010] UKSC 37, [39].
81 [1935] 1 KB 75 (CA) 85–86.
In any event, and on the broader question of whether the limited class is a separate element, the better view (and weight of highest appellate authority, such as *Bedfordshire* and *Morrison Sports*) is that it is a separate, and restrictive, element of the tort of breach of statutory duty.

**What C must prove under the element**

§SD.14 The relevant statute must be enacted for the benefit or protection of a limited class of persons, and not for the general public's benefit. Whether the class is numerous is not determinative, provided that it is 'limited'.

The distinction between a limited class and the general public can be a very finely-drawn distinction – given that a lot of legislation ultimately and indirectly benefits the general public. This element is one of the principal reasons that the tort has been relatively under-utilised.

On the one hand, there have been a number of cases in which the relevant statutes did not found a civil action because they were construed as being enacted for the benefit of society in general – and yet, there was, arguably, a very distinct class of persons who particularly benefited from their enactment (a sub-class 'particularly affected by that activity', as Lord Browne-Wilkinson put it in *Bedfordshire*).

On the other hand, in *Todd v Adams*, the court pointed out that safety provisions in the Merchant Shipping Act 1995 were 'of particular benefit to those at sea on fishing vessels' – but they were also in society's interest, because 'it is in the public interest that people at sea are protected', and because any 'lack of safety in fishing vessels may discourage those who would otherwise go to sea from providing consumers with fish.' However, if this latter viewpoint were upheld, then (as Neuberger J pointed out), very little legislation could be said to be solely for the benefit or protection of a limited class, and hence, the tort would practically never operate. These cases demonstrate how problematical this element is for the tort.

§SD.15 C must be a member of the limited class for whose benefit or protection the statute was enacted. An ancillary benefit is insufficient.

Some statutes enacted for the public benefit may actually have a very considerable *incidental benefit* accruing to C, but that will not be sufficient to prove this element. The statute must have been enacted specifically for a limited class's benefit, of whom C was one. However, that can be a seemingly arbitrary assessment.

In *Cutler v Wandsworth Stadium Ltd*, facts previously, held: the tort of BSD failed. The Betting and Lotteries Act 1934 was designed to protect, not the livelihood of bookmakers, but the general public. The Act authorised the establishment of totalisators at dog racing tracks, and made it lawful for bookmakers to attend race-tracks (which was illegal prior to the Act being passed), all of which prevented the track-owner's totalisator from having a monopoly on betting at the track; and provided the public with competitive facilities for betting. In that regard, the economic interests of bookmakers was 'incidental, and [was] not one of the general purposes of the statute.' In *Digicel*, facts previously, held: the tort of BSD failed. The relevant legislation was held to be enacted to protect the public interest in the Caribbean, and to advance information and communications technology.
and availability. Licensees who requested interconnection with the network would also undoubtedly be detrimentally affected if access were refused, but that sub-class was not the primary class protected by the Act.

Similarly, if the class of protected persons is limited, but does not include C, then no possible action for the tort can lie.

In *Vibixa Ltd v Komori UK Ltd*, [85] Polestar Jowetts Ltd and Vibixa Ltd, C, sued Komori UK Ltd, D, where D had supplied C with printing machinery. Fires destroyed all three presses and caused a lot of damage to C's premises, but nobody's health or safety was at risk from the fires. C alleged that Reg 12 of the Supply of Machinery (Safety) Regulations 1992 required that the relevant machinery was 'safe', where 'safe' was defined to mean that there was no risk of its causing death or injury to persons 'or, where appropriate, to domestic animals or damage to property'. C alleged that these Regulations were health and safety regulations, enacted for the welfare of employers too. *Held:* the tort of BSD failed. These Regulations were not intended to protect an employer from damage to his property, but were enacted to protect the health and welfare of a limited class, *viz,* employees or others at or around the employer's premises.

It is not sufficient, either, if the statute is directed towards C – it must be enacted for C's *benefit,* or for the benefit of a class of persons of whom C was one.

In *Lonrho v Shell Petroleum Co Ltd*, [86] Lonrho, C, built and operated a pipeline from Mozambique to a refinery in Rhodesia, and agreed that petroleum suppliers, Shell and BP, D, would transport their petroleum via the pipeline to the refinery, from which C would profit. Three years later, Rhodesia declared independence, and it became a criminal offence (under the Southern Rhodesia (Petroleum) Order 1965) to supply oil to Rhodesia without licence. D put no further oil through C's pipeline, but in contravention of the sanctions, continued to supply Rhodesia with oil via other means, to support the new political regime in that country. C claimed damages against D on the grounds that their actions had brought about the declaration of independence, supported the new regime in power, and prolonged the abandonment of C's pipeline, causing C economic loss. *Held:* the tort of BSD failed. The Order was not imposed for the benefit of a class of individuals (including C) who were engaged in supplying oil and petroleum to Southern Rhodesia. Rather, the Order was intended to end the supply of oil and petroleum to Southern Rhodesia. It was not protective or beneficial at all.

As a further problem of construction, C may be one of two possible classes: the general public, and something more limited. In such a case, the court may be prepared to restrict the class to the smaller one, thereby conferring on C a private right of action, however artificial that may be.

In *Read v Croydon Corp*, [87] a child, C, contracted typhoid from the water supply. Her father brought an action for the pollution of the water supply. The Water Works Clauses Act 1847, s 35, provided for the supply of 'wholesome water sufficient for the domestic purposes of all owners and occupiers of premises within their limits of supply.' *Held:* the parental C could bring an action for BSD, because he was a ratepayer, and therefore, of a limited class for whose protection the statute was enacted. The child C could not bring an action, because he was not a ratepayer, but merely a member of the public who had consumed water.

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[86] [1982] AC 173 (HL).

[87] [1938] 4 All ER 631 (QB).
It has been remarked since, in the Scottish case of *Weir v East of Scotland Water Authority*,\(^{88}\) that *Read* was a single judge decision, but a decision that has never been challenged. However, under more recent authorities (considered below), the provision of utilities has generally not given rise to the tort.

### §SD.16

The fact that D’s services are only used by those who *pay money* for them does not render that paying class a limited class, and therefore, the tort cannot succeed.

If D’s services are theoretically available to *all* who may wish to make use of (and pay for) them, then that equates to the general public, and no action for breach of statutory duty will lie as a private law action.

In *Cutler v Wandsworth Stadium Ltd*, facts previously, *held*: the tort of BSD failed. The statutory provisions regulating track betting were for the benefit of any who may (pay to) attend entertainment venues such as race-tracks and who wished to lay a bet. That class was the general public.

In *Barco De Vapor BV (t/a Joint Carrier) v Thanet DC*,\(^ {89}\) Barco, C, exported live sheep from the UK to continental Europe for slaughter, via the port of Ramsgate in Kent. The port was owned and operated by the Thanet DC, D. During a media documentary, 3 sheep drowned, and 40 more had to be destroyed. D then decided to suspend the shipment of livestock from the port, but the ban was lifted by court order after one month. C claimed that it suffered approx. £1.5M in damages as a result of the ban, and that the ban was a BSD under s 33 of the Harbours Docks and Piers Clauses Act 1847 (which required the port to ‘be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers’, where the fee was paid). *Held*: the tort of BSD failed, because the class was the general public – D, as the port authority, was required by the Act to ‘permit anyone to use the port for the purposes concerned [subject to payment of a fee]. The fact that anyone who wants to use the port to ship goods through it and has paid the fee ... does not make the class a limited one. It is open to all’.

### §SD.17

The fact that there is a sub-set of the general public for whose benefit the section was enacted does not render the remainder a limited class.

In other words, a carve-out of a small sub-class does not mean that the rest of the public is a limited class. The general public will still be the intended class in that scenario.

In *Peterhead Towage v Peterhead Bay Authority*,\(^ {90}\) a sub-class (tug operators) were not the beneficiaries of a statute (the same statute under consideration as in *Barco*), because they did not ship or load goods or passengers, and hence, were outside the scope of the statutory provision. *Held*: the tort of BSD failed; there was no limited class for whose benefit the 1847 Act was enacted.

### Specific categories of statute

To take some key examples of statutory provisions which have been at issue under this element:

- **social welfare legislation**: As mentioned in *X v Bedfordshire CC* (discussed previously), statutes which regulate areas of social welfare have consistently been held not to confer a private right of action for breach of statutory duty, because they are for the public benefit, and not merely

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\(^{88}\) [2000] Scot CS 292 (CSOH) [6].  
\(^{89}\) [2014] EWHC 490 (Ch), with quote at [33].  
\(^{90}\) 1992 SLT 595, and cited in *Barco, ibid*, [32].

for the benefit of those who are drawing upon those services. This has been apparent across a range of social welfare legislation:

In O’Rourke v Camden LBC, Mr O’Rourke, C, a homeless person, sued the council, D, on the basis that it had failed in its statutory duty to provide him with accommodation under the Housing Act 1985. Held: the tort of BSD failed. The Act was ‘a scheme of social welfare … Public money is spent on housing the homeless, not merely for the private benefit of people who find themselves homeless, but on grounds of general public interest: because proper housing means that people will be less likely to suffer illness, turn to crime or require the attention of other social services. The expenditure interacts with expenditure on other public services such as education, the National Health Service and even the police. It is not simply a private matter between [C and D].’ In any event, the parliamentary intention was that the homeless should have *locus standi* to bring proceedings for judicial review, rather than by private action. In X (Minors) v Bedfordshire CC, in the Bedfordshire and Newham cases, D allegedly negligently carried out, or failed to carry out, statutory duties under the Children Act 1989, the Child Care Act 1980, and the Local Authority Social Services Act 1970, to safeguard or promote children, to protect them from abuse, and to provide accommodation for children in need. In the Dorset, Hampshire and Bromley cases, D allegedly failed to carry out duties imposed upon them as education authorities under the Education Acts 1944–81 in relation to children with special educational needs. Held: the tort of BSD failed – whilst ‘[i]t is true that the legislation was introduced primarily for the protection of a limited class, namely children at risk’, such legislation was ultimately for the welfare of society as a whole. In Phelps v Hillingdon LBC, four cases considered whether a local education authority was liable for, inter alia, BSD, in failing to provide appropriate educational services for children at school, under the Education Act 1944 – three cases concerned dyslexic children; the fourth was a child suffering from Duchenne Muscular Dystrophy. Section 8 of the Act imposed a duty on a local education authority to give all pupils opportunities for education, ‘offering such variety of instruction and training as may be desirable in view of their different ages, abilities and aptitudes … including practical instruction and training appropriate to their respective needs.’ Held: the tort of BSD failed. The statutory duties in the Act were intended to benefit a particular group, mainly children with special educational needs, but were ‘essentially providing a general structure for all local education authorities in respect of all children who fall within its provision … in the context of a national system of education’.

- **prison statutes:** Those statutes which have, as their object, the regulation of prisons and prisoners, have been generally construed as being for the public good, and not for the benefit of those in custody. This is demonstrated by previously-mentioned cases – in Otolu v Home Office (where statutory provisions to do with remand had the purpose of enhancing prisoners’ protection, and the speed and efficiency of the prosecution process, and were for the public benefit); and in ex p Hague (although Lord Bridge noted that a private right of action might be available to a prisoner in an appropriate scenario).

- **highway and road statutes:** This category is riddled with conflicting authorities and viewpoints, as to whether or not they confer a private right of action. A quick perusal of relevant statutes confirms that they appear to contain very ‘public’-type duties.

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91 [1998] AC 188 (HL) 193, overruling Thornton v Kirklees MBC [1979] QB 626 (CA), which had held to the contrary.
Under s 41(1) of the Highways Act 1980, a highway authority is ‘under a duty ... to maintain the highway’. Prior to 1961, it was actually the duty of parish inhabitants to put and keep parish highways in repair, and to ensure that they were passable in all seasons, but that duty was then transferred to statutory highway authorities. The duty was originally limited to the repair obligation which had previously been borne by the parish members, and in that regard, the House of Lords held, in Goodes v East Sussex CC, that the duty did not require the highway authority to remove ice or snow from the road, because the highway was not ‘out of repair’ in that instance. However, and subsequently, the obligation to keep highways in good repair was amended, statutorily, by imposing a statutory duty to remove ice and snow.

Further, ss 39(2) and (3) of the Road Traffic Act 1988 impose statutory duties on local authorities to ‘prepare and carry out a programme of measures designed to promote road safety’, and to ‘take such measures as appear to the authority to be appropriate to prevent such accidents, including ... the construction, improvement, maintenance or repair of roads for which they are the highway authority’, respectively.

According to weighty authority, these various ‘highway’ duties are indeed ‘public duties’, and hence, unable to found a private law action for damages for breach of statutory duty:

In Gorringe v Calderdale MBC, Lord Steyn described s 39 as a 'public law duty, expressed in the widest and most general terms', while Lord Scott noted that '[t]he reason why damages in a private action for breach of the statutory duty imposed by s 39 cannot be recovered is because s 39, correctly construed, does not impose a duty owed to any individual. It imposes a duty owed to the public as a whole.' In Ali v Bradford MDC, a highway authority could not be liable under the Highways Act 1980 for an accident suffered by a member of the public on a public footpath, as a result of slipping on an accumulation of mud and debris, because any duties of repair and maintenance were public duties. There was no limited class for whose protection or benefit the legislation was enacted. In Grealis v Opuni, D collided with, and injured, C, as a result of exceeding the speed limit, which constituted a breach of a duty under the Road Traffic Act 1988, but that did not provide a remedy to C for BSD – the Road Traffic Acts ‘impose public duties only, and do not, in addition, impose duties enforceable by an aggrieved individual’.

However, there is, confusingly, significant authority to the contrary:

In Shine v Tower Hamlets LB, where C leapfrogged a loose bollard on a road in Bethnal Green and was injured when the bollard (which was loose) fell over, the duty under s 41 on highway authorities to maintain a highway did not encompass any duty to maintain street furniture – however, there was no suggestion that C, as a member of the general public, could not sue for a private law right of action under s 41. Indeed, the contrary was suggested. In Dept for Transport, Environment & The Regions v Mott MacDonald Ltd, the highway authority was under a duty under s 41(1) to maintain a highway drainage system which had suffered a longstanding blockage by silt, debris or vegetation, and which, in turn, led to a dangerous accumulation of water on the surface of the highway; it was

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93 When s 1(1) of the Highways (Miscellaneous Provisions) Act 1961 was enacted.
94 [2000] 1 WLR 1356 (HL).
96 [2004] UKHL 15, [2004] 1 WLR 1057, [19] and [70], and see too, [54] (Lord Scott) (‘it is accepted, and rightly, that s 39 cannot possibly be construed so as to justify the conclusion that a private action in damages can be brought for breach of the statutory duty’); and [97] (Lord Brown).
97 [2010] EWCA Civ 1282, [33].
98 [2003] EWCA Civ 177, [5].
held to be actionable as a civil action for BSD. In *Roe v Sheffield CC*, the Court of Appeal held that a duty imposed on the highway authority by s 25 of the Tramways Act 1870 to lay tramlines level with the surface of the road (so that drivers did not skid on wet rails) was actionable as a civil action, for the benefit of ‘road users’. Further, in *Monk v Warbey*, a civil action could arise from the duty imposed on a person, D, not to use (or permit to be used by another person) a vehicle on a road unless there was a policy of insurance that protected a third party, C, should injury result to C from the use of the vehicle by that uninsured person (now imposed by s 143(1) of the Road Traffic Act 1988). C was injured in a collision with a car belonging to D, where D had permitted it to be used by an uninsured driver (a breach of the—then s 35(1) of the Road Traffic Act 1930), and the tort of BSD was available to C, as a member of a limited class.

The divergent opinions as to whether highway and road statutes can confer a civil right of action is one of the most unsatisfactory aspects of the tort. It should be noted that the effect of *Monk v Warbey* has subsequently been restricted, however. Where the party seeking to invoke a breach of statutory duty under the Road Traffic Act 1988 is, not an innocent party injured by an uninsured driver, but a negligent driver seeking to recover from the uninsured driver some contribution towards his damages liability (under the Civil Liability (Contribution) Act 1978), the principle of *Monk v Warbey* is not available (per *Bretton v Hancock*). In any event, the invocation of the compensation scheme for injuries caused by uninsured and untraced motorists, per the Motor Insurers’ Bureau, has significantly reduced the need for injured parties to rely on a *Monk v Warbey*-type claim for breach of statutory duty.

- **health legislation:** The duty on the Secretary of State under s 1(1) of the National Health Service Act 1977, ‘to continue the promotion ... of a comprehensive health service’, does not confer a private right of action at the suit of an aggrieved patient. As Lord Browne-Wilkinson said of this legislation, in *Bedfordshire*, ‘[n]o one suggests that such duties are enforceable by a private individual in an action for breach of statutory duty.’

- **essential utilities statutes:** Provisions that govern the supply of essential utilities to the public have been construed as being for the public as a whole, and hence unable to give rise to any tort of breach of statutory duty. Regulations governing the supply of electricity (per *Morrison Sports Ltd v Scottish Power*), gas (*Clegg v Earby Gas Co*), potable water (*Weir v East of Scotland Water Authority*), a monopoly provider of port and harbour services (*Barco De Vapor BV (t/a Joint Carrier) v Thanet DC*), and ‘an adequate supply of water ... in case of fire’ (*Capital and Counties plc v Hampshire CC*), have all been construed in that fashion. In respect of the duty on a fire-fighting authority, the Court of Appeal remarked, in *Capital and Counties*, that there was no suggestion of ‘any class of person, short of the public as a whole, being ear-marked for protection’ under s 13 of the Fire Services Act 1947.
• statutes that seek to protect the integrity of the political process: On one view, these are
enacted to protect a particular class of persons (i.e., politicians) from outside interference with
the performance of their functions. However, the better view is that they are enacted for ‘the
purely public purpose of protecting the integrity of proceedings of the States’ (per Syvret v
Chief Minister (Jersey)).

• tax legislation: Even though some provisions of the Income and Corporation Taxes Act 1988
provide exemptions or deductions schemes for certain classes of taxpayers, an income tax
statute is for the benefit of the general public. As confirmed in Neil Martin Ltd v HMRC, the
primary purpose of tax legislation is ‘to impose liability for income and corporation taxes on
taxpayers for the benefit of the general public (including non-taxpayers),’ and ‘to protect the
Revenue, and thus the general public, against tax fraud’.

By contrast, some types of statute can potentially give rise to a breach of statutory duty, be-
cause of the limited class which those statutes seek to protect. For example:

• workplace health and safety legislation: The ability of an employee to institute an action
against his employer for breach of statutory duty, arising out of legislation which seeks to
promote and enhance workplace health and safety, has been substantially recast, in light of the
reform implemented by s 69(3) of the Enterprise and Regulatory Reform Act 2013. Although
workplace health and safety legislation was long considered to confer a private civil right of
action at the suit of an employee (per, e.g., the 1898 decision in Groves v Lord Wimborne),
that proposition has been substantially reformed, for accidents occurring after 1 October 2013.
This topic is considered in detail in the online chapter, ‘Employers’ Liability’.

• tenants: The duty on a landlord under the Landlord and Tenant Act 1985 to carry out obliga-
tions of repair to leased premises is imposed for the benefit of tenants, as a limited class, and
can give rise to the civil remedy of breach of statutory duty (dicta, in Morshead Mansions Ltd
v Di Marco). Some provisions which relate to service charges may also give rise to the tort
(although not in that case).

Element #4: Breach of duty

Proving the breach

Having identified a duty on D (element 1) under the relevant statute, C must prove that D
breached or contravened that duty.

Although an obvious principle, some cases have stumbled at this hurdle. It may be incontro-
vertible that D did bear duties under the statute – but the circumstances of the case did not fall
within the wording of the provision. This will preclude any tort from succeeding. A ‘purposive
interpretation’ has been favoured by the House of Lords over an exclusively literal interpreta-
tion of the words used (per Smith v Northamptonshire CC).

In Chipchase v British Titan Products Co Ltd, John Chipchase, C, was employed as a painter by
British Titan Products, D, at their factory, when he fell from a platform consisting of a plank only nine
inches wide, and suffered injuries. Reg 22(c) of the Building (Safety, Health and Welfare) Regulations

116 [1956] 1 QB 545 (CA).

Online resources: Mulheron, Principles of Tort Law, Cambridge University Press, © 2016
1948 provided that, ‘[e]very working platform from which a person is liable to fall more than 6 feet 6 inches shall be at least 34 inches wide’. The plank on which C was working was only six feet above the ground. Held: the tort of BSD failed, and the plank did not have to be 34 inches wide. C conceded that, and proceeded only in negligence (which failed). In Smith v Northamptonshire CC, Jean Smith, C, was employed as a carer by the Council, D, and transported people in need of care from their homes to a daycare centre. She was wheeling a wheelchair patient down a wooden ramp outside the patient’s house, when the edge of the ramp crumbled beneath C’s foot, injuring her. The ramp had been put there about 10 years earlier by the NHS. C sued D, alleging breach of the Provision and Use of Work Equipment Regulations 1998. The trial judge held that D was in breach of those Regs, because the ramp was defective (and the regime was one of strict liability, discussed below); the ramp was ‘work equipment’ within Reg 2(1); and it was being ‘used at work’ within Reg 3(1). Held (HL, 3:2): the tort of BSD failed. The ramp was not ‘work equipment’ or being ‘used at work’ within the Regulations. D had no ability to maintain or control it, and did not supply or repair it; and it was part of the patient’s premises. According to Lord Mance, courts ‘should be careful not to impose on employers responsibilities which go far beyond those which the Directive and Regulations can … have been intended to impose. … [an] over-generous interpretation of the concept of control would, if accepted, add both unjustifi ed stringency and undesirable uncertainty into this area.’

Furthermore, even where the statute does impose a duty on D, it must be proven that D actually breached that duty – and not some other alleged ‘duty’ that the statute does not actually impose at all:

In Francis v Southwark LBC, Mr Francis, C, had a secure tenancy in a property owned by the Council, D. C had a history of rent arrears, but he had avoided repossession/eviction by clearing those arrears. C submitted a Right to Buy application for the premises under s 118 of the Housing Act 1985 (‘[a] secure tenant has the right to buy ... if the landlord does not own the freehold’), but that application was rejected by D under s 124 (whereby the landlord had a duty to either admit or reject that application, with reasons) – the reason stated simply, ‘you have breached the terms of a possession order’. As it turned out, that decision by D was wrongly-formed, but by then, the house had been demolished. C claimed that D had breached its statutory duty under ss 118 and 124 to give C a right-to-buy if C was entitled to it. Held: the tort of BSD failed. The provisions did not impose any duty on D, other than to state a decision and its opinion, which D had done. D may have been wrong in not admitting that C was entitled to exercise a right-to-buy, but s 118 did not impose on a landlord an absolute and strict duty to give effect to the tenant’s right-to-buy if the tenant was entitled to it. What duty was imposed, D had complied with.

**Strict liability**

The distinct advantage of the tort of breach of statutory duty, from C’s point of view, is that the language of the statute may impose strict liability, in that no fault or proof of negligence on D’s part is required, in order for D to be liable.

As the Court of Appeal put it well in Bux v Slough Metals Ltd, ‘[t]he statutory obligation may exceed the duty at common law, or it may fall short of it, or it may equal it. The court has always to construe the statute or statutory instrument which imposes the obligation’.

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Where a statutory provision imposes an absolute, unqualified obligation on D, then either D has performed that mandatory requirement, or he has not. Duties are strict, if they can be broken without proof of negligence or any other fault (per *Fytche v Wincanton Logistics plc*[^120^]). In such cases, proof of conduct falling below the reasonable standard of care is irrelevant and unnecessary; D may be liable, even if D had no knowledge of the defect, and even if the reason for the defect turned out to be quite inexplicable to all concerned.

As mentioned previously, by virtue of s 69 of the Enterprise and Regulatory Reform Act 2013 (which took effect 1 Oct 2013), the right of an injured employee to claim damages from his employer based on breach of statutory duty is now removed (with an exception created for ‘new and expectant mothers’ under certain EU Directives[^121^]) – mainly because of the perceived burdens that strict liability statutes imposed on employers. A number of leading cases on strict liability did concern the liability of employers towards injured employees, as the following sample demonstrates (in each case, D was the employer):

In *Groves v Lord Wimborne*,[^122^] machinery was unfenced when it should have been ‘securely fenced’ under s 5(3) of the Factory and Workshop Act 1878, and the employer was liable, whatever the reasons as to why the guard had been removed and not replaced. In *Galashiels Gas Co Ltd v Millar*,[^123^] Mr Millar, C, was injured when a lift hoist failed in a factory, and D was liable under s 152(1) of the Factories Act 1937 for contravention of the duty to ‘maintain [the lift] in an efficient state, [and] in efficient working order’, even though all reasonable steps had been taken to provide a suitable hoist and to maintain it properly. In *Stark v Post Office*,[^124^] Mr Stark, C, a postman, was thrown over the handlebars of his bike whilst doing his postal rounds, when the stirrup of the front brake suddenly broke in two, and jammed the front wheel. D was liable (under Reg 6(1) of the Provision and Use of Work Equipment Regulations 1992, which used the same wording as interpreted in *Galashiels*), even though the breakage was due to either metal fatigue or some manufacturing defect, neither of which would have been revealed on even the most rigorous inspection by D. In *Threlfall v Hull CC*,[^125^] Mr Threlfall, C, cut his hand whilst working as a street cleaner, and D was liable for failing to provide him with suitable protective gloves in breach of Reg 4(1) of the Personal Protective Equipment at Work Regulations 1992 (‘every employer shall ensure that suitable personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work, except where ... such risk has been adequately controlled by other means such are equally or more effective’). In this case, more expensive cut-resistant gloves were available which would have been more effective to prevent or control the risk of laceration.

Of course, the aim of strict liability statutes is to make it easier for C to prove his claim, and in that respect, they offer C greater legal protection (albeit that a causal link between the contravention and the damage must be proven). In any event, in the context of employees’ claims against their employers, the task was somewhat too ‘easy’, in the opinion of Parliament, and reform was introduced.

As an aside, when deciding whether a statute contains an absolute duty, or one which requires proof of negligence, regard may be had to the EU Directive pursuant to which the

[^120^]: [2004] UKHL 31, [60].
[^121^]: The Health and Safety at Work etc Act 1974 (Civil Liability) (Exceptions) Regulations 2013.
[^122^]: [1898] 2 QB 402 (CA), quote at 413 (Rigby LJ).
[^124^]: [2000] ICR 1013 (CA). For a similar result, under Reg 5(1) of the Provision and Use of Work Equipment Regs 1998, see: *Ball v Street* [2005] EWCA Civ 76, [46], [60].
[^125^]: [2010] EWCA Civ 1147.

**The spectrum of standards of behaviour required**

The standard required of D is very dependent upon the particular wording used – and these vary enormously. The Table below gives some examples of different standards which have been legislatively-set:

<table>
<thead>
<tr>
<th>DIFFERENT LEVELS OF CULPABILITY: Illustrating by case law</th>
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<tbody>
<tr>
<td><strong>the strict liability standard</strong> (e.g., that machinery must be ‘securely fenced’ or equipment in ‘efficient working order’)</td>
</tr>
<tr>
<td>the statutory duty requires that premises be ‘suitable for purpose’</td>
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<tr>
<td>the statutory duty requires that D take steps that are ‘practicable’</td>
</tr>
<tr>
<td>the statutory duty requires that D take steps that are ‘reasonably practicable’</td>
</tr>
<tr>
<td>the statutory duty requires that D take such steps ‘as are reasonable in the circumstances’</td>
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Dealing briefly with each in turn (except for strict liability, which has been discussed above), with reference to some illustrative cases:

- where ‘[e]very floor in a workplace ... shall be of a construction such that the floor or surface of the traffic route is suitable for the purpose for which it is used’ (per Reg 12(1) of the Workplace (Health, Safety and Welfare) Regulations 1992), that obligation of ‘suitability’ imposes an absolute obligation – although it entails an objective risk assessment (considering the use of the floor, how permanent or temporary the risk presented by the floor is, the degree of frequency and regularity of the risk occurring):

  In Ellis v Bristol CC,\(^{126}\) Ms Ellis, C, a care assistant employed at D’s care home for the elderly and mentally infirm, slipped on a pool of urine left by one of the residents in the main corridor; many of the residents were affected by dementia and incontinence; this resident frequently urinated in the hallways, the problem was well-known and frequent. **Held:** D breached the absolute obligation imposed on it by Reg 12(1)).

- where a statutory duty requires that D takes ‘practicable’ steps, then that may impose a stricter standard than “reasonably practicable”, because ‘practicable’ could not take into account whether D could afford the measures (which ‘reasonably practicable’ must entail). To be ‘practicable’, something must be ‘possible’, when considered against ‘the current knowledge and invention at the time’ (per Adsett v K&L Steelfounders and Engineers Ltd\(^ {127}\)).

  In Jones v Sec of State for Energy and Climate Change,\(^ {128}\) approximately 250 Cs sued for respiratory diseases/cancer whilst employed at the Phurnacite Plant in South Wales. Section 63 of the

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\(^{126}\) [2007] EWCA Civ 685.

\(^{127}\) [1953] WLR 137 (QB) 142, aff’d: [1953] 1 WLR 773 (CA).

Factories Act 1961 stated that, for every factory 'in which ... there is given off any dust or fume or other impurity ... all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom'.

**Held:** the tort of BSD succeeded. More feasible or possible measures could have been done to reduce or eliminate sources of dust and fume and to protect D's workforce inside the plant (but not outside of it).

- where the statutory duty requires that D take steps that are ‘reasonably practicable’, then according to *Edwards v National Coal Board*,129 the assessment takes on a negligence-type analysis: ‘it is the risk that has to be weighed against the measures necessary to eliminate the risk. The greater the risk, no doubt, the less will be the weight to be given to the factor of cost.’ As the Court of Appeal noted recently in *McDonald v Dept of Local Govt*,130 ‘practicable’ does not necessarily mean the same as ‘reasonably practicable’.

  In *Baker v Quantum Clothing Group Ltd*,131 a group of employees, C, suffered noise-induced hearing loss whilst working in knitting mills in Derbyshire and Nottingham, and sued their employer, D, for breach of s 29(1) of the Factories Act 1961 (‘[t]here shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person has at any time to work, and every such place shall, so far as is reasonably practicable, be made and kept safe for any person working there’). **Held:** the tort of BSD failed. It was reasonable for D to rely on a 1972 Code by which to gauge the risk of hearing loss, and not to provide ear protectors to their employees.

- where the statutory standard is to take steps to fulfil a duty ‘as are reasonable in the circumstances’, then that is, ‘in effect and practice, a duty to exercise reasonable care and skill ... in practical terms, there is no difference between the statutory and the tortious test [in negligence]’ (per *Corby Group Litigation*132).

  In *Corby*, a group of children born between 1986–99, C, sued Corby BC, D, for reclamation work done at a site near the steelmaking town of Corby, alleging that numerous birth defects (shortened or missing arms, legs and fingers) were caused as the result of their mothers' ingesting or inhaling harmful heavy metal substances generated by the reclamation works. C sued under s 34(1) of the Environmental Protection Act 1990 (‘any person who imports, produces, carries, keeps, treats or disposes of controlled waste ... must take all such measures ... as are reasonable in the circumstances [to prevent escape of waste, etc]’). **Held:** the tort of BSD was proven (but for the element of causation, which was sent for separate trials). D did not provide any adequate wheelwashing of transport trucks, or effective road sweeping or clearing, or effective damping down of dust, or sheeting of lorries on public roads, or capping of deposited wastes.

**Element #5: Causation**

**§SD.20** Proof of damage to C is a requirement of the tort. It is not actionable *per se*.

It is necessary for a breach of statutory duty to sound in damages which are recoverable at law, before the tort can be complete and actionable – and recoverable damages consist of personal

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129 [1949] 1 KB 704 (CA) 710 (Tucker LJ).
130 [2013] EWCA Civ 1346, [98].
132 [2009] EWHC 1944 (TCC) [696].
injury, injury to property, or economic loss (per *Morshead Mansions Ltd v Di Marco*). It follows that some sort of ‘adverse effect’ upon C by virtue of D’s breach, which is not measurable in damages, is not sufficient to prove the tort.

In *Pickering v Liverpool Daily Post*, Mr Pickering, C, had been convicted of manslaughter, and detained as a patient in a mental hospital. C applied to a mental health review tribunal for a discharge. C’s previous application for release had attracted media publicity, so he sought injunctive relief against newspaper, D, to restrain publication about the application, on the basis that such publication was prohibited by r 21(5) of the Mental Health Review Tribunal Rules 1983 (which imposed a duty not to publish the fact that a named patient had made a release application). **Held:** the tort of BSD failed. The publication of unauthorised information about a release application was, in one sense, adverse to C’s interest, but it was ‘incapable of causing him loss or injury of a kind for which the law awards damages.’

The House of Lords has since confirmed the broader principle of *Pickering*. Suggestions were made by the dissenters in *Cullen v CC of Royal Ulster Constabulary* that a statutory duty to provide a detained person with access to legal advice was of such public importance that it should be a duty which was actionable per se – but the majority considered that such a proposition could not stand, in the face of *Pickering*, and that breach of statutory duty was not a tort in which nominal damages could be awarded in recognition of an infringement having occurred.

The only circumstance in which the tort could be actionable per se is where the statute expressly provides that proof of damage is not a necessary ingredient of the cause of action (per *WH Newson Holding Ltd v IMI plc* – remarking, in that case, that s 47A of the Competition Act 1998, permitting follow-on actions for damages arising from anti-competitive conduct, was not such a provision).

**SSD.21** There must be a causal link between the statutory breach and the damage, which is determined by the usual ‘but for’ test.

Although the point is an obvious one, some causal connection has to be proven – a mere breach, and then some coincidental damage, is not sufficient.

In *Phillips v Britannia Hygienic Laundry Co Ltd*, Bankes LJ pointed out that a car might have a defective brakelight, and as such, D would be in breach of a statutory duty that a motor vehicle ‘shall be in such a condition as not to cause danger’ to another person. Suppose that a pedestrian is injured when crossing in front of that car, but not because of any negligence of the driver. No tort of BSD could be proven, because the absence of a red light ‘may concern the safety of the car itself … but it cannot affect the safety of a foot passenger passing in front of the car.’

The analysis of the ‘but for’ test is as applicable to this tort as to negligence (see Chapter 8):

In *McWilliams v Sir William Arrol & Co Ltd*, Mr McWilliams, C, was employed by Sir William Arrol, D, as an experienced steel erector, and was working on a steel lattice work of a tower crane being constructed in the Kingston shipbuilding yard, Port Glasgow. The tower had already been erected to

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133 [2014] EWCA Civ 96, [28], [33].  
136 [2012] EWHC 3680 (Ch) [37]–[38].  
137 [1923] 2 KB 832 (CA) 840.  

its full height, and C was working at a platform about 70 feet above the ground, when he fell and died. A safety belt would have prevented the death, and had been available until 2–3 days before the accident, but was then transferred to another site. C’s widow sued D for BSD, alleging that the failure to provide C with a safety belt was in breach of s 26(2) of the Factories Act 1937. *Held*: causation failed. Had safety belts been provided:

- the *innocent cause*: there was a strong probability that C himself would have elected not to wear one on the occasion of the accident. His colleagues gave evidence that C did not normally wear a safety belt, even when working at greater heights than 70 feet. He had not worn or asked for a safety belt on those occasions. Occasionally, when conditions were dangerous (windy), other steel-workers did, but those conditions did not apply on that day either.
- the *tortious cause*: there was a very slight possibility only, that C would have worn a safety belt if provided.

**Element #6: Relevant type of loss**

§SD.22 The damage of which C complains must be a foreseeable consequence of D’s breach (even if the extent of the loss is unforeseeable).

The test of remoteness which applies in negligence also applies to the tort of breach of statutory duty (*Welsh Water v Barratt Homes Ltd (Rev 1*)). In *Rubenstein v HSBC Bank plc*, Mr Rubenstein, C, sold his house and sought advice from HSBC, D, as to where he could invest the sum safely, pending the purchase of another property in about a year’s time. He wanted to find an investment that provided a higher interest rate than a standard bank deposit, but he emphasised that he could not afford to risk the capital. As it turned out, C was unable to find another home three years later, and his sum was still invested when Lehmann Bros collapsed in 2008. HSBC had told C that the investment was ‘the same as cash deposited in one of our accounts’, but as it turned out, it was a market-dependent investment. HSBC had breached certain statutory duties under the Financial Services and Markets Act 2000, in failing to explain the level of risk adequately. However, the trial judge held that C’s loss was caused by unprecedented market turmoil, and was unforeseeable and too remote. *Held (3:0)*: the tort of BSD succeeded. The loss was foreseeable: ‘in truth, although the Lehman Brothers collapse was both a symptom and a contributory cause of market turmoil, the underlying causes of that turmoil ... stretched to a failure of confidence in marketable securities in which there had previously been greater confidence. And what is new about that?’ The extent of C’s loss may have been unforeseeable, but that did not matter.

§SD.23 The damage or loss suffered by C must be of a type which it was the object of the statute to prevent. Otherwise, that loss will be irrecoverable.

According to *Gorris v Scott*, if a statutory duty is aimed at preventing a loss or damage of a particular kind, and C suffers a loss or damage of a different kind, C is not entitled to maintain an action in tort for breach of statutory duty.

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139 [2013] EWCA Civ 233, [2013] 1 WLR 3486, [73].
140 [2012] EWCA Civ 1184, [118].
141 (1873–74) LR 9 Ex 125.
This principle is consistent with the principle in negligence that C may only recover loss which it was the object of the duty of care to prevent (per *South Australia Asset Management v York Montagu Ltd*[^142^]), but as Lord Hoffmann stated in *SAAMCO*, the remoteness enquiry for breach of statutory duty may be somewhat narrower than in negligence, because ‘the question is answered by deducing the purpose of the duty from the language and context of the statute’.[^143^]

Undoubtedly, this element has had a restrictive application in the tort of breach of statutory duty, whether operating in the realms of property damage, intangible rights of privacy, or in personal injury, as the following cases demonstrate, respectively:

In *Gorris v Scott*,[^144^] a shipowner, D, contracted to transport C’s sheep from Hamburg to Newcastle. During the voyage, some of the sheep were washed overboard in bad weather, because they were not kept in pens. Under s 75 of the Contagious Diseases (Animals) Act 1869, animals on ships were to be kept in pens of certain dimensions, and the floors of those pens were to be fitted with footholds for the animals. The object of the statute was stated in the preamble, ‘to prevent the introduction into Great Britain of contagious or infectious diseases among cattle, sheep, or other animals,’ and the ‘spread of such diseases in Great Britain.’ Hence, the pens were intended to prevent infectious animals from communicating disease to other animals, and animal overcrowding. Held: the tort of BSD failed. Despite there being a causal link between the breach and loss of the sheep, the Act was ‘calculated and directed to the prevention of disease … [and not] to the danger of loss by the perils of the sea’. C would have succeeded, if the sheep had contracted a contagious disease during transit. In *Syvret v Chief Minister (Jersey)*,[^145^] Mr Syvret, C, a Jersey politician, claimed that he accused various parties of neglecting the welfare of children in Jersey, and that, as a result, certain parties contravened Art 47 of the States of Jersey Law 2005, which created a criminal offence of bringing unlawful pressure on a member of the States to influence his conduct as a member. Held: the tort of BSD failed. The unlawful interference with the performance of a politician’s functions was directed towards protecting the integrity of the State proceedings. It did not cover any loss of the type claimed by C, viz, stress, leading to ill-health and impairment of his family life. This was ‘plainly not loss of a kind which Art 47 was intended to prevent.’ In *Fytche v Wincanton Logistics plc*[^146^], Mr Fytche, C, was a heavy goods vehicle driver who had been provided by his employer, D, with steel cap safety boots. One night, his lorry got stuck in snow, and he spent many hours digging it out. He suffered frostbite in his toe, when ice and snow entered his boot through a tiny undetected hole in the toecap. C alleged that D breached Reg 7(1) of the Personal Protective Equipment etc Regulations 1992 (which required D to keep personal protective equipment ‘in an efficient state … and in good repair’). Held (3:2): the tort of BSD failed. Although *Gorris v Scott* was (oddly) not referred to by the House of Lords, the same principle was evident – the type of injury suffered by C (frostbite, via digging out his snow-bound lorry) was not the type of injury for which the statutory obligation was enacted (crush injuries). Reg 7 only required D to provide equipment suitable to protect an employee against an identified risk, which was the risk of heavy objects crushing his toes.

[^142^] [1997] AC 191 (IIIL).
[^143^] ibid, 212, citing *Gorris v Scott*, above.
[^144^] (1873–74) LR 9 Ex 125, quote at 129 (Kelly CB).
[^145^] [2011] JRC 116, quote at [55].
[^146^] [2004] UKHL 31.
DEFENCES

The defences which apply to negligence potentially apply to the tort of breach of statutory duty too. For example, in Digicel (St Lucia) Ltd v Cable & Wireless plc, there was a potential application (ultimately not decided) of the following defences in relation to the tort of breach of statutory duty: whether C had given free and voluntary consent to the breach of statutory duty; and whether C had contractually waived his right to sue for the tort. Contributory negligence and volenti have particular principles which are specific to this tort:

Contributory negligence

§SD.24 Where D is in breach of statutory duty, then the standard by which C's contributory negligence is judged may be less onerous than where D is liable for ordinary negligence.

C's behaviour must be assessed in the context that, by virtue of a statutory duty, Parliament has seen fit to endow D with the responsibility for ensuring compliance with the duty. Hence, C's conduct may be more leniently regarded under the Law Reform (Contributory Negligence) Act 1945. This was especially prevalent in the context of workplace accidents (at least, prior to the 2013 reforms which substantially reduced that avenue of litigation for employees).

For example, in Staveley Iron and Chemical Co Ltd v Jones, Lord Tucker said that, 'in the Factoy Act cases, the purpose of imposing the absolute obligation [on D] is to protect the workmen [C] against those very acts of inattention which are sometimes relied upon as constituting contributory negligence, so that too strict a standard [expected of C] would defeat the object of the statute.' Similarly, in Toole v Bolton MBC, Buxton LJ stated that '[i]t is not usual for there to be marked findings of contributory negligence in a breach of statutory duty case.' In the context of workplace accidents, particularly, Keene LJ noted, in Cooper v Carillion plc, that 'it is important to ensure that the statutory requirement placed on the employer is not emasculated by too great a willingness on the part of the courts to find that the employee has been guilty of contributory negligence.'

In Cooper v Carillion plc, Paul Cooper, C, was a carpenter engaged by D in a large project concerning the refurbishment of dry docks. He fell through a hatchway into a subway below, suffering serious injuries. The system on the site was to have a scaffolding barrier around any such hatchway or to place a plywood board over the hole with a warning sign. On the night before the accident, the scaffolding barrier was removed and not replaced. A plywood board was placed over the hole, but with no sign to indicate that there was a hole below it. C was held at trial to be liable for CN of 10% ('having regard to the extent of the works and the nature of the works being carried on, it does seem that [C] should have looked underneath the plywood board before placing his feet into the area that was wholly concealed by the plywood board'). Held (on appeal): no CN should apply. In the two years that C had worked on the site, there had never been a hole covered merely by a plywood board, so he could not reasonably have expected it to happen.

However, there are other authorities which confirm that, where a risk has been consciously accepted by C, and where C is skilled and knowledgeable, and where a precaution against the

\[147\] [2010] EWHC 774 (Ch) [104].
\[148\] [1956] AC 627 (HL) 648.
\[149\] [2002] EWCA Civ 588, [13].
\[150\] [2003] EWCA Civ 1811, [13].
accident is ‘neither esoteric nor one which he could not take himself’, then an apportionment
of the relative culpability is called for (and, in some cases, quite a high apportionment at that).

In *Sherlock v Chester CC*, Mr Sherlock, C, lost his left thumb and index finger when using a
circular saw provided by Chester CC, his employer, D while trimming fascia boards, and he sued
for BSD. Held: CN of 60% applied. C was an experienced joiner. He could have made himself a
run-off bench, or ensured that a colleague was present when he cut the relevant fascia board. C
was properly required to bear the greater responsibility for ‘the dreadful injury he suffered to his
hand’. In *Chappell v Imperial Design Ltd*, Robert Chappell, C, 13, found a drum-shaped container
partly filled with a waste solvent or thinner near to D’s factory near Birmingham, when playing
with some friends. C set light to some of the contents, and it exploded, causing C severe burns.
The container had been left outside D’s factory either for collection by the local authority or by D’s
own transport contractors. C sued for BSD, under s 34 and s 73(6) of the Environmental Protection
Act 1990, for failing to prevent the escape of waste. Held: CN of 50% applied. The statutory duty
showed ‘the seriousness with which Parliament views the need to take steps to control waste. It
therefore underscores the degree of culpability to be attached to [D’s] conduct and the seriousness
of their failure to take care of the can’. But C appreciated the risk that he was running, leading to
a high CN finding.

**Volenti**

§SD.25 The application of *volenti* to the tort of breach of statutory duty is legally uncertain.

On one view, D cannot rely on the defence, because the purpose of a statutory duty which is
enacted for the benefit or protection of C is to ‘protect C against himself, and it is incompat-
ible with the imposition of that duty that C could agree to give up the benefit of that duty’ (per
*Spreadex Ltd v Sekhon*).

On the other hand, in *Imperial Chemical Industries Ltd v Shatwell*, the House of Lords spe-
cifically overruled the proposition that ‘it has long been treated as settled law that the doctrine
of *volenti* affords no defence to a claim based on breach of statutory duty’. Rather, it held that
there was no public policy reason why D should not avail itself of the defence, albeit that, in
that case, the facts were unusual – the relevant statutory duty was a duty imposed directly on
a third party (the shotfirers) and not directly on the employer, D; and D had ‘done their utmost
to see that the regulations were complied with.’

In *Imperial Chemical v Shatwell*, George Shatwell, C, was employed by D as a shot firer in a quarry.
There was to be a test of the electric wiring connecting explosive charges, and D instructed that
the testing must be done from a place of ‘proper shelter’, because of a risk of a charge exploding
during testing, as Reg 27(4) of the Quarries (Explosives) Regulations 1959 required. Contrary to this,
C and his brother James, another shot firer, carried out a test in the open, and were both injured.
Held: *volenti* applied. C knew the risk involved; and that D ‘were taking strong measures to see that
the order was obeyed. If he did not choose to believe what he was told, I do not think that he could
for that reason say that he did not fully appreciate the risk.’

Nevertheless, recent examples of the application of the defence to breach of statutory duty
cases are very difficult to find, confirming its rarity.

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151 [2004] EWCA Civ 201, quote at [32].  
153 [2008] EWHC 1136 (Ch) [164] (a point of common ground).  
154 [1965] AC 656 (HL) 673 (Lord Reid).
BREACH OF EUROPEAN STATUTORY LAW

Quite apart from the domestic statutes which have been considered thus far in the chapter, a right of civil action for damages at the suit of an individual C, where a European Law has been breached and for which the Member State is responsible, is available in very limited circumstances.

The general principle

Where C alleges that the State (or a public authority or other agency of the State), D, committed a breach of an EU Treaty, directive or other statutory law, D will be liable in damages to C for that breach, in a private law action for damages, where three requirements are met:

1. the relevant EU law was intended to confer rights on private individuals such as C;
2. D’s breach was sufficiently serious; and
3. there was a direct causal link between the breach of obligation by D and the damage sustained by C, in that C must meet the ‘but for’ test, and prove that his damage was suffered as a ‘sufficiently direct consequence’ of the unlawful act complained of.

These requirements were established by the European Court of Justice in Francovich v Italy, and in Brasserie du Pêcheur; Factortame (No 3) (‘Factortame III’). Where satisfied, then a Member State is required to make reparation for loss and damage caused to an individual, C, as a result of breaches of Community law for which the State can properly be held responsible.

Although this private right of action (called a ‘Francovich claim’) has been judicially described as being a breach of statutory duty claim (e.g., AB v Home Office), its elements differ from the domestic tort considered throughout in this chapter, and they are separate causes of action. Indeed, as AB itself demonstrated, a Francovich claim and a claim for breach of statutory duty arising under a domestic statute may be brought in the one action, against the same Governmental agency.

As is evident from the principle above, element 1 of the Francovich claim resembles the ‘limited class’ criterion, whilst a direct causal link is common to both actions. As noted in Phonographic Performance Ltd v Dept of Trade and Industry, a Francovich claim for damages is not actionable per se either. However, element 2 (i.e., a sufficiently serious breach), is quite different, and a good deal more onerous, than what is required under the tort of breach of statutory duty. In Brasserie du Pecheur, the European Court of Justice emphasised that element 2 was essential, and that the ‘decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.’ The factors which (it was said) were relevant to the gravity of the breach included: (1) the clarity and precision of the rule breached, (2) the measure of discretion left by that rule to the national or Community authorities, (3) whether the infringement and the damage caused was intentional or involuntary, (4) whether any error of law was excusable or inexcusable, (5) the fact that the position taken by a Community

156 [1996] ECR I-1029 (ECJ). See too: Haim v Kassenzahnarztliche Vereinigung Nordrhein Case (C-424/97) [2000] ECR I-5123, [36]; Köbler v Austria (Case C-224/01) [51].
159 [1996] QB 404 (ECJ) [55].
institution may have contributed towards the omission, and (6) the adoption or retention of national measures or practices contrary to Community law’.

In *AB v Home Office*, AB and MVC, who were unmarried partners, sued the Home Office, D, because of the delay (953 days) in processing an EEA residence card for MVC, and claimed that D’s prolonged failure to deal with the application prevented MVC from working lawfully in the UK and providing financial support to her family, it stymied AB’s studies to be a solicitor, etc. MVC alleged that D’s conduct failed to give effect to, inter alia, her rights under Arts 20 and 21 of the Treaty on the Functioning of the European Union (the TFEU), and under Regs 12 and 17 of the Immigration (European Economic Area) Regulations 2006. Held:

- the tort of BSD failed. The Secretary of State had a discretion whether or not to grant a residence card to MVC; a right of appeal was provided against that party’s decision under Reg 26, which MVC exercised successfully; and judicial review was available too. Hence, given the discretionary nature of the Secretary of State’s duties, the public policy dimension to that role, and the availability of effective alternative remedies, these factors counted against any statutory duty conferring a private law right of action;
- no *Francovich* claim could succeed either. The first limb was not met – there was no relevant provision of Community law in the TFEU or in the Directive which conferred a right of residence or grant of residence to an individual such as C. The second limb was not met either – the complaint did not involve a sufficiently serious breach by the UK of its obligations under Community law as to give MVC any claim for damages for breach of her Community rights – ‘their complaint is in substance simply about delay and maladministration. That would not involve any sufficient manifest and grave disregard by the Home Office of its Community law obligations as to give rise to a claim for damages’.

Contrary to this case, however, the tort of breach of statutory duty may fail, but the *Francovich* claim succeed, emphasising again the different natures of these claims:

In *Barco De Vapor v Thanet DC*, facts previously, held:

- the tort of BSD failed. C was unable to prove that a private law right of action existed under s 33 of the Harbours Docks and Piers Clauses Act 1847 (which required D’s port to ‘be open to all persons for the shipping and unshipping of goods, and the embarking and landing of passengers’, where a fee was paid by C);
- however, the *Francovich* claim succeeded. C alleged that D’s ban on live animal exports from Ramsgate port constituted a restriction on the exporting of goods within the EU in breach of Art 35 TFEU (which provides that, ‘[q]uantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States’). Art 35 TFEU did confer rights on individuals; the ban on live exports, even for a month, was a sufficiently serious breach of a fundamental element of the EU Treaty; and there was a direct causal link between the breach and the damage sustained by C. Even though D did not specifically intend to cause damage to the particular C, the ban was a disproportionate decision, reached in haste, without separate legal advice, and breached a fundamental element of the rules governing free trade in the EU.

The *Francovich* principle has also been applied in the context of breaches of competition law. Art 81 of the EC Treaty prohibits cartels or concerted practices that restrict competition – and

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160 [2012] EWHC 226 (QB) [119]. 161 [2014] EWHC 490 (Ch) [37].
price-fixing victims have a right to damages for breaches of the duties imposed by Art 81 (per Courage Ltd v Crehan\textsuperscript{[162]})

MISCELLANEOUS

Law reform

There have been two significant recommendations concerning the tort, made by the Law Commission of England and Wales. One occurred more than 40 years ago, when the Commission examined the rules governing the interpretation of statutes in 1969, while the other is far more recent, in 2010.

The law reform corner: Breach of statutory duty

- *The Interpretation of Statutes* (1969):\textsuperscript{[163]} it was recommended that, where a statute was silent as to whether or not it gave rise to a private law right of action at the suit of C, there should be a statutory presumption that it did. A contrary intention could be expressed by the Legislature, by which to rebut that presumption. The reasons for the recommendation were that some of the relevant factors in order to construe the parliamentary intention were dubious as to ‘what measure of authority they enjoy, and what is the respective weight to be attached to them’.

- *Administrative Redress: Public Bodies and the Citizen* (2010):\textsuperscript{[164]} originally, in its Consultation Paper (2008), the Commission recommended that the tort should be abolished altogether. In its final report, the Commission noted that, in light of Bedfordshire, breach of statutory duty ‘is not a suitable cause of action in relation to most forms of administrative wrong-doing’. However, the Commission did not ultimately endorse that breach of statutory duty should be abolished against public bodies in general, but rather, that the tort should be barred, in any circumstances where there was an actionable statutory provision that related to ‘truly public’ activities.

Neither report has ever taken hold. Even though the Law Commission did not refer to it in its 1969 report, there was English judicial precedent for the recommended presumption. For example, in Monk v Warbey,\textsuperscript{[165]} Maugham LJ remarked that, ‘*prima facie*, the rule is that, where there is a breach of a statutory duty resulting in damage to an individual, an action for damages will lie’, while Greer LJ observed that, ‘*prima facie*, a person who has been injured by the breach of a statute has a right to recover 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.’ However, the Commission’s recommendation has never been implemented, and hence, the task of construing parliamentary intention remains a vexed and difficult-to-predict task. Moreover, the recommendation for a separate statutory scheme against public authorities, in respect of ‘truly public’ activities, was also shelved in 2010.

\textsuperscript{162} [2002] QB 507 (C453/99, ECJ).
\textsuperscript{163} EWLC (Rep 21, 1969), especially [38], and cl 4 of Appendix A.\textsuperscript{[164]} EWLC (Rep 322, 2010), quote at [1.18].
\textsuperscript{165} [1935] 1 KB 75 (CA), with quotes respectively at 84, and 81. See too: Dawson & Co v Bingley UDC [1911] 2 KB 149 (CA) 159 (Kennedy LJ).
Canada has trodden a different path from England, in abolishing the tort altogether:

**The comparative corner: The Canadian position**

- in *R v Saskatchewan Wheat Pool*, the Supreme Court of Canada held that the tort of BSD should no longer be a cause of action recognised in Canadian law;
- however, proof of statutory breach may be evidence of negligence, and the statutory formulation of a duty may afford a specific and useful standard of reasonable conduct against which D’s conduct should be assessed;
- other torts (such as misfeasance) may serve much the same ends (per *Leroux v Canada Revenue Agency*).

**Other theories of liability arising from a statutory breach**

For the sake of completeness, it is worth noting that a breach of statutory duty by D has been linked with two other causes of action – but one is rare, and the other is now abolished.

**The Lonrho ‘special damages’ principle**

In *Lonrho v Shell Petroleum Co Ltd (No 2)*, Lord Diplock observed that C, a private individual, could enforce the performance of a statutory duty, where the statute created a public right (to be enjoyed by all of the public, not just a limited class), and a particular member of the public, C, suffered direct and substantial damage (a ‘special damage’) peculiar to himself, and not shared in common with the rest of the general public.

However, even Lord Diplock did not consider this route to a statute’s enforcement to be a particularly useful one. It did not assist *Lonrho’s* cause, because the Order made pursuant to the Southern Rhodesia Act 1965 did not create any ‘public right’ to be enjoyed by all of the public; to the contrary, it withdrew a previously-existing right of citizens and companies to trade with Southern Rhodesia in oil and petroleum. The principle seems to have been very rarely applied since, and in any event, is likely subsumed, in part, within the tort of public nuisance (an online chapter).

**The Island Records principle**

In *ex p Island Records Ltd*, Denning MR (with whom Waller LJ agreed) held that where D breached a statutory duty, but the Legislature did not intend to confer a private law right of action for damages on C, then nevertheless, a civil right of action could be maintained by C, if, as a result of D’s statutory breach, this caused an unlawful interference with, and damage to, C’s lawful business.

However, the principle did not meet with subsequent approval, and was overruled in *Lonrho*, where Lord Diplock remarked that, ‘Lord Denning MR appears to enunciate a wider general rule ... [but] I am unable to accept that this is the law’. As Laddie J remarked in *Michaels v Taylor*
if this cause of action were permitted, then that would side-step the tort of breach of statutory duty altogether, and would mean that, in Cutler v Wandsworth Stadium Ltd, Mr Cutler and all other bookmakers could have sued on this cause of action for unlawful interference with C’s business. Laddie J consequently rejected an Island Records-type argument in Michaels too.

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