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Codifying the tort of breach of statutory duty

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In recent years there has been a considerable process of judicial development and refinement of the difficult tort of breach of statutory duty, which I shall call "the breach tort". All this culminated in the important House of Lords decision in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353. The process includes crystallizing the distinction between remedies in public law and private law, clarifying the place of negligence (or carelessness), refining the distinction between the breach tort and the tort of negligence, contrasting those statutory duties which are of an administrative with those of a regulatory nature, distinguishing decisions of "policy" from "operational" acts, and assessing the nature and significance of factors such as vicarious liability and "subjective" discretion or judgment.

These changes have led me to think that the time might now be right to try and codify this branch of tort law. In what follows I offer an attempted code, accompanied by explanatory notes. I have tried to write both kinds of text in plain English, since this is nowadays expected. The future may lie with a system which accompanies legislation with official notes of this kind, as recently suggested by a report on the simplification of tax legislation. {Tax Law Review Committee of the Institute for Fiscal Studies, *Interim Report on Tax Legislation*, 23 November 1995. The report recommends that an official explanatory memorandum written in plain English should accompany each Finance Bill and be published in consolidated and updated form when the Bill becomes an Act: see para 6.16.} My draft code is in sixteen clauses. Below each clause is set out in turn, followed by the relevant explanatory note. {My explanatory notes are not altogether on the lines which an official version would follow since for obvious reasons I have included remarks more fit for a journal article.} At the end I give some general comments.

Introductory

1. The remedies, if any, available for a breach of statutory duty depend on the legislative intention. This may be that there shall be a special remedy laid down either by the enactment creating the duty or a related enactment, or that a general remedy shall apply, or both. An applicable special or general remedy may be criminal or civil. The legislative intention may be that there shall be no legal remedy.

General It is of the essence of a legal command that there shall be a sanction for disobedience to it. {See Bennion, *Statutory Interpretation* (2nd edn) p 40. That work, which presents the interpretative criteria in codified form, is hereafter referred to, as updated by the recently-issued Second Supplement (Cumulative), as "Code". Since *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353, which prompted me to formulate the limited code suggested in the present article, was not decided in time, its effect is not included in the Second Supplement.} However this is not necessarily so. If it thinks fit, Parliament has power to issue legislative commands without attaching sanctions. Nevertheless there is a presumption that a legislative command does carry a sanction, in accordance with the maxim *ubi jus ibi remedium* (where there is a right there is a remedy). {*Ashby v White* (1703) 2 Ld Raym 938 (remedy given by the court where returning officer wrongfully refused to accept plaintiff's vote at an election). Cf *Tozer v Child* (1857) 26 LJQB 151 (returning officers held to be quasi-judges, so that no action lay).} Thus Coke said that 'whensoever an act of parliament doth generally prohibit any thing' the party grieved shall have his action 'for

his private relieve'. {2 Inst 163. See also *Monk v Warbey* [1935] 1 KB 75, *per* Greer LJ at 81.}

Example 1 Section 3(4) of the Housing (Homeless Persons) Act 1977 requires local authorities to ensure that accommodation is made available for the homeless. No sanction for breach of this duty is laid down by the Act. In *Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626 the plaintiff brought an action for damages in respect of breach of this duty. *Held* The action was well-founded. Roskill LJ said (at 643): 'where the statute imposes a duty on a public authority or on anyone else for the benefit of a specified category of persons, but prescribes no special remedy for breach of duty, it can normally be assumed that a civil action for damages will lie.' {But see, in qualification of this dictum, clauses 13 to 15 and the notes thereon below.}

However the correct construction may be that the enactment is not intended to confer an actionable right, and in that case there is no civil remedy. Consideration of consequences plays a large part in this field. {As to consequential construction see Code s 286.}

Sanctions for disobedience to a statute may be criminal or civil, or both. {As to criminal sanctions see Code s 13.} Here it has to be remembered that the objects of criminal and civil law are different. In very broad terms, the criminal law exists to punish wrongdoing, remove dangerous criminals from circulation, and deter potential wrongdoers from offending; while the main object of civil law is to compensate the victim. Parliament may intend to visit breaches with both types of sanction, or one or other of them alone. {See *Wilson v Merry* (1868) LR 1 HL(Sc) 326, *per* Lord Chelmsford at 341.} If there is clearly no criminal sanction, the inference is stronger that a civil sanction is intended.

Avoiding the difficulty The difficulty which frequently arises of determining whether a remedy for breach of statutory duty is intended, and if so which one, prompted Lord du Parc to say-

'To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be ... I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned.' {*Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 410.}

Relatively few Acts have contained provisions on the lines suggested by Lord du Parc. {For examples where the Act expressly states that no civil remedy lies for breach see Representation of the People Act 1949 ss 50(2) and 51(2); Radioactive Substances Act 1960 s 19(5)(a); Water Resources Act 1963 s 135(8); Medicines Act 1968 s 133(2); Consumer Credit Act 1974 s 170(1); Sex Discrimination Act 1975 s 62; Safety of Sports Grounds Act 1975 s 13; Guard Dogs Act 1975 s 51(2)(a); Race Relations Act 1976 s 53. For examples where the enactment states expressly that breach of the duty constitutes a tort see Mineral Workings (Offshore Installations) Act 1871 s 11; Resale Prices Act 1976, s. 25 (2), (3); Building Act 1984 s 38; Consumer Protection Act 1987 s. 41(1). Cf. Fatal Accidents Act 1976, s. 1(1), which confers a right of action in damages for breach of duty without stating that it is a tort. Citing Lord du Parc's suggestion in *M (a minor) v Newham London Borough Council* [1994] 2 WLR 554 at 579, Staughton LJ said that a reason why it is not more commonly acted on could be that it might be politically embarrassing to say expressly that a public authority was not to be liable for failing to perform its statutory duty even though that was the intention.}

In 1969 the Law Commissions recommended the enactment of a general provision to the effect that breach of a statutory provision is intended to be actionable as a tort unless the contrary is expressly stated. {*The*

Interpretation of Statutes (1969) LAW COM No 21, SCOT LAW COM No 11, para 38 and App A.} This has not been acted on. {See Bennion, 'Another Reverse for the Law Commissions' Interpretation Bill' (1981) 131 NLJ 840.}

Civil law remedies

2. Subject to any contrary legislative intention, the breach may give rise in civil law to a general public law remedy, or a general private law remedy, or both.

Modern English law on the right of action, if any, for breach of a statutory duty distinguishes between remedies in public law and those in private law. {For the nature of this distinction see Code pp 85-87.} As Lord Browne-Wilkinson put it-

It is important to distinguish such actions to recover damages, based on a private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives right to no claim for damages. A claim for damages must be based on a private law cause of action. {*X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 363.}

The fact that the statute renders breach of the duty a criminal offence, or expressly states it to be 'unlawful', has been held to strengthen the argument for an implied remedy in private law.

Example 2 Rickless v United Artists Corp [1988] QB 40 concerned the Dramatic and Musical Performers' Protection Act 1958 s 2, which renders it a criminal offence to make a cinematograph film by use of a dramatic performance without the consent of the performer, but does not refer to any civil remedy. The Court of Appeal held that since the Act was stated to be for the protection of performers a civil remedy was to be inferred. It was assisted in reaching this conclusion by the fact that the Performers' Protection Act 1963, which extended the protection given by the 1958 act to other types of performer, was stated to have the purpose of enabling effect to be given to the 1961 International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (Cmnd 2425), and the Convention requires a civil remedy to be made available. The court reached this result notwithstanding the ruling by Sir Nicholas Browne-Wilkinson V-C (at 51) that 'it is easier to spell out a civil right if Parliament has expressly stated the act is generally unlawful rather than merely classified it as a criminal offence'. {Here it is relevant to note that the former practice by which parliamentary drafters usually declared proscribed acts to be 'unlawful' has largely been abandoned in favour of declaring them merely to be 'an offence'. Indeed it is common in modern times for the drafter to refrain even from this, and merely state that if a person does a specified act he shall be liable to a specified penalty.}

3. In public law, the breach may be remediable by judicial review.

As to remedies for breach of statutory duty by way of judicial review, in succession to the prerogative writs of mandamus, certiorari and prohibition, see Code ss 24 (nature of the remedy) and 329 (rules governing decision making).

4. In private law, the breach may constitute the tort of breach of statutory duty ('the breach tort') or the tort of negligence, or some other general remedy may apply.

The breach tort The common law treats actionable breach of statutory duty as a distinct species of tort. {*Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626 at 642. For the implied importation by statutes of the general rules of tort law see Code s 339.} Parliament also has recognised such

a breach to be a tort. {See the definition of 'fault' in the Law Reform (Contributory Negligence) Act 1945 s 4; *AB Marintrans v Comet Shipping Co Ltd* [1985] 1 WLR 1270; *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852. See also Sex Discrimination Act 1975 s 66(1).} It follows that statutory references to 'tort' include breach of statutory duty. {*American Express Co v British Airways Board* [1983] 1 WLR 701.}

The tort of negligence The common law rules governing the tort of negligence sometimes apply in the context of a statutory duty. This is dealt with elsewhere. {See clause 16 and note thereon below.}

Some other general remedy An example of a general remedy otherwise than in tort is the action for recovery of a debt owed under an enactment.

Example 3 Under the statute 11 & 12 Vict c 14 (1848) money had accrued due to a retired police constable. An application being made to attach this sum as a debt, it was objected that the sum was not truly a debt and so could not be attached. *Held* It must be treated as a debt, since otherwise the intention of Parliament would not be fulfilled. Lord Coleridge CJ said-

'It appears to me to be nonetheless a debt because no particular mode of enforcing the payment is given by the statute. When there is a statutory obligation to pay money, and no other remedy is expressly given, there would be a remedy by action.' {*Booth v Traill* (1883) 12 QBD 8 at 10.}

Another example is the remedy for misfeasance in a public office, where the office is created by statute. Lord Browne-Wilkinson said that one of the categories of private law claims for breach of statutory duty is 'misfeasance in public office, ie the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful'. {*X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 363-364.}

The breach tort

5. The breach tort may arise either because the defendant is the principal tortfeasor or because, under general principles governing vicarious liability, the defendant is vicariously responsible for tortious acts committed by employees or agents.

Where a tort is committed by a person in the course of his or her employment by another person the employer will be vicariously liable, regardless of whether the actual tortfeasor is also liable. If for example a doctor employed by a health authority treats a patient carelessly, this may be actionable against the authority either as a breach of a duty of care owed by the authority to the patient (direct liability), or because the authority, though owing no relevant duty of care to the patient, is nevertheless responsible for the act of its employee in breaching a duty of care owed by the employee to the patient (vicarious liability). In the former case the liability arises because the authority is itself acting, even though it acts through its employee (the only way a body corporate can act). In the latter case the authority is not acting, but is nevertheless vicariously liable for the act of its employee. {See *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353, per Lord Browne-Wilkinson at 372.}

It is established that doctors and other persons having special skills, such as social workers, usually owe a direct duty to the patient or client arising irrespective of contract. {*Ibid* at 383.} Nevertheless on its facts the case may be one where the duty of the professional person is owed to his or her employer rather than to the patient or client. {*Ibid.*}

In many cases where, for reasons such as are set out in clauses 13 to 15 below, no direct claim can be made, it will be possible for the plaintiff to succeed on a claim for vicarious liability. {*Ibid* at 391-392.} It is important

to handle this right of action correctly. '... failure to allege and identify the separate duty of care said to be owed by the servant or agent of the defendant is not a mere pleading technicality. Unless and until the basis on which the servants are alleged to be under a separate individual duty of care is identified it is impossible to assess whether, in law, such duty of care can exist'. {Ibid at 399.}

6. The sanctions available for the breach tort in damages or otherwise arise at common law, and are the same as for tort generally.

General As authority for the statement that the sanctions available for the breach tort are the same as for tort generally see *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247. {See also Code p 68.} Since the High Court and county courts possess the old equity jurisdiction, the remedies this provided are available for the breach tort. As Farwell J stated-

'... there was nothing to prevent the Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating the right provided a remedy which it enacted should be the only remedy, subject only to this, that the right was such a right as the [Court of Chancery] under its original jurisdiction would take cognisance of.' {*Stevens v Chown* [1901] 1 Ch 894 at 904. Cf *A-G v Sharp* [1931] 1 Ch 121. As to equitable remedies for the breach tort see further Code s 330.}

Relator actions A person or body entitled to restrain apprehended breaches of statutory duty may apply to the Attorney General for that official to bring a relator action against the person bound. Here the Attorney acts in pursuance of his constitutional function as guardian of the public interest. {See *Brookes v DPP of Jamaica* [1994] 1 AC 568 at 579.} Once the Attorney's consent to the action has been obtained, the actual conduct of the proceedings is in the hands of the relator, who is responsible for the costs. {Administration of Justice (Miscellaneous Provisions) Act 1933 s 7.} The question of giving consent is solely for the Attorney, and the court cannot intervene. {*London County Council v A-G* [1902] AC 165.}

An action may be brought by the Attorney General at the relation of a local authority to enforce a byelaw of that authority. {*A-G v Ashbourne Recreation Ground Co* [1903] 1 Ch 101.} Where an enactment is persistently flouted by a person, regardless of frequent convictions, a relator action may be brought.

Example 14 In contravention of the Manchester Police Regulation Act 1844 s 102, Mr and Mrs Harris each operated a flower stall which projected on to a footway near the entrance to a public cemetery. The penalty laid down by the Act was limited to a small fine, which was regarded by the defendants as a business expense. During a period of two years Mr Harris was convicted 74 times under s 102, and Mrs Harris 34 times. Finally, on the relation of the Town Clerk, a relator action was brought for an injunction, which was granted: *A-G v Harris* [1961] 1 QB 74. Sellers LJ said (at 86): 'It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law.' Pearce LJ referred (at 92) to 'the community's general right to have the laws obeyed'. {See also J L G Edwards, *The Law Officers of the Crown*, pp 286-295.}

Local authorities now have a specific statutory power to bring civil proceedings in such cases. {See Local Government Act 1972 s 222; *Runnymede Borough Council v Ball* [1986] 1 WLR 353.}

7. Where no relevant enactment specifies that the breach shall constitute the breach tort, the considerations set out in clauses 8 to 15 below may affect the question of whether by implication the breach is intended to constitute that tort.

Questions concerning the breach tort

8. Does the law provide a sufficient remedy by other means? If so, the breach tort is unlikely to arise.

'Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner'. {*Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847, per Lord Tenterden CJ at 859. See also *Stevens v Evans* (1761) 2 Burr 1152 at 1157; *Stevens v Jeacocke* (1848) 11 QB 731 at 741; *Wake v Mayor of Sheffield* (1884) 12 QBD 145; *R v County Court Judge of Essex* (1887) 18 QBD 704 at 707; *Clegg Parkinson & Co v Earby Gas Co* [1896] 1 QB 592 at 595; *Wilkinson v Barking Corpn* [1948] 1 KB 721 at 724; *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173 at 185; *Wentworth v Wiltshire County Council* [1993] QB 654.} This 'general rule' is stronger in these days of precision drafting, where the drafter may be expected to insert a remedy if one is truly intended. {For precision drafting see Code s 141. As to when the 'general rule' does not apply see *Waghorn v Collison* (1922) 91 LJKB 735 at 736 and 738.} The likelihood that Parliament intended breach of the statute to amount to the tort of breach of statutory duty is lessened where some other adequate civil remedy is available. {See eg *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 (no remedy in damages for breach of right to information where the information could be obtained by applying to a tribunal).} This may be provided under another statute {*Square v Model Farm Dairies (Bournemouth) Ltd* [1939] 2 KB 365.} or at common law. {*Phillips v Britannia Hygienic Laundry Co* [1923] 2 KB 832 at 842.} A statutory duty does not extinguish a corresponding common law duty, unless the contrary intention appears. {*Glossop v Heston Local Board* (1879) 12 Ch D 102 at 110-111; *East Suffolk Catchment Board v Kent* [1941] AC 74 at 89; *Read v Croydon Corpn* [1938] 4 All ER 654; *Barnes v Irwell Valley Water Board* [1939] 1 KB 21.} Sometimes the Act imposing the duty expressly states that other causes of action are not affected. {This was done for example by the Water Resources Act 1963 s 135(8) (see *Cargill v Gotts* [1981] 1 WLR 441) and the Control of Pollution Act 1974 s 105(2) (see *Budden v British Petroleum Ltd* (1980) 130 NLJ 603). See also (1981) 131 NLJ 1026.} Where in one provision a statute both lays down a new right or duty and links it with a tailor-made special remedy there provided, the implication is strong that no other remedy is intended to be available.

Example 5 An Act empowered harbour undertakers to remove any sunken ship from the harbour and recover the expenses of doing so from the ship's owner in a magistrates' court. In *Barraclough v Brown* [1897] AC 615 undertakers applied for a declaration of their right to recover damages in respect of such expenses. *Held* The only remedy available was the one laid down by the Act, namely an order of a magistrates' court. Lord Herschell LC said (at 620) that the appellant could not claim to recover by virtue of the statute and yet insist on doing so by means other than those prescribed by the statute. Lord Watson said (at 622)-

'The right and remedy are given *uno flatu*, and the one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has therefore by plain implication enacted that no other court has any authority to entertain or decide these matters.' {*Craies* treats this as an ouster of jurisdiction (*Statute Law* 7th edn, 1971, p 247); but in fact it was a novel judicial procedure as to which no High Court jurisdiction was ever conferred.}

Where a particular sanction is specifically provided for by the enactment laying down the duty the *expressio unius* principle suggests that no other sanction (whether civil or criminal) was intended. {*Atkinson v Newcastle & Gateshead Waterworks Co* (1877) 2 Ex D 441; *Phillips v Britannia Hygienic Laundry Co* [1923] 2 KB 832 at 841; *Witham Outfall Board v Boston Corpn* (1926) 136 LT 756; *Monk v Warbey* [1935] 1 KB 75 at 84; *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20. In *Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626 at 643 Roskill LJ said that 'where an

Act imposes a duty on a public authority and provides an administrative remedy by way of complaint to the Minister or to some other body, that almost invariably excludes the right of action in the courts'. As to the *expressio unius* principle see Code ss 390-395.}

9. Is the plaintiff within the class of persons intended to benefit from the duty? If not, the breach tort does not arise.

To be entitled to recover in tort, the plaintiff must be a member of the class Parliament intended to relieve when creating the duty. The plaintiff may have suffered damage of the kind contemplated by the statute, yet still not be one of the intended beneficiaries. As Maugham LJ said, an action for breach of statutory duty must be brought 'by a person pointed out on a fair construction of the Act as being one whom the Legislature desired to protect'.{*Monk v Warbey* [1935] 1 KB 75 at 85.}

Example 6 In *Buxton v North-Eastern Railway Co* (1868) LR 3 QB 549 a bullock got through a gap in a fence on to the railway line. This caused a train accident, in which the plaintiff was injured. He sued for breach of the duty imposed by the Railways Clauses Consolidation Act 1845 s 68. The section begins with the following introductory words: 'The company shall make and at all times thereafter maintain the following works *for the accommodation of the owners and occupiers of lands adjoining the railway ...*'{Emphasis added.} The relevant provision of s 68 refers to the erection of fences 'for separating the land taken for the use of the railway from the adjoining land not taken, and protecting ... the cattle of the owners or occupiers thereof from straying thereout'. *Held* The plaintiff could not recover, since s 68 was intended only for the protection of owners and occupiers.{See also *Square v Model Farm Dairies (Bournemouth) Ltd* [1939] 2 KB 365 (Food and Drugs (Adulteration) Act 1928 s 2 enacted for benefit of purchasers only, and not those to whom they passed on food they had purchased); *Ex p Island Records Ltd* [1978] Ch 122 (Performers' Protection Acts 1958 to 1972 enacted for benefit of performers only, and not recording companies; cf *RCA Corp'n v Pollard* [1983] Ch 135); *Peabody Donation Fund Governors v Parkinson (Sir Lindsay) and Co* [1984] 3 WLR 953 (drainage requirements imposed to safeguard occupiers of buildings, not developers).}

Example 7 In *West Wiltshire District Council v Garland* [1993] Ch 409 the question arose whether an action lay against district auditors at the suit of (a) the local authority or (b) officers of that authority in respect of breach of the duty imposed by the Local Government Finance Act 1982 s 15. Morritt J (at 418-419) relied on a suitable modification of the two questions posed by Lord Bridge in *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 158-159: 'They are (1) whether the provision in question is intended to protect the interests of a class of which the council or the officer is a member, and (2) did Parliament intend to confer on the council or the officer a cause of action for breach of such duty?'*Held* The answer to both questions was in the affirmative as respects the council but in the negative as respects the officers. Morritt J said (at 423) that he was assisted in coming to his favourable conclusion as respects the council by the fact that 'The ability of the council to seek judicial review and such powers as it enjoys enabling it to determine whether to re-engage that auditor do not provide an adequate remedy in the case of an audit negligently conducted'.

10. Is damage suffered by the plaintiff of a kind for which the law awards damages? If not, the breach tort does not arise in respect of that damage.

The tort of breach of statutory duty does not arise unless the breach gives rise to 'loss or injury of a kind for which the law awards damages'.{*Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 *per* Lord Bridge at 420.}

Example 8 An action for an injunction was brought by a mental patient to restrain publication of details of his case in alleged breach of the Mental Health Tribunal Rules 1983, r 21(5). *Held* The rules gave no such cause of action. Lord Bridge said-

I know of no authority where a statute has been held ... to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss. But publication of unauthorised information about proceedings on a patient's application for discharge to a mental health review tribunal, though it may in one sense be adverse to the patient's interest, is incapable of causing him loss or injury of a kind for which the law awards damages. {*Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 *per* Lord Bridge at 420.}

11. Is damage suffered by the plaintiff of a kind to which the duty is directed? If not, the breach tort does not arise in respect of that damage. If the answer is yes, the breach tort is more likely to arise if the plaintiff is an individual who has suffered physical injury from the breach.

Nature of damage Every enactment is passed to remedy a mischief. {As to the doctrine of the mischief see Code Part XIX.} In determining whether a breach constitutes the tort of breach of statutory duty it is therefore necessary to ask whether the damage suffered by the plaintiff is the type of mischief the enactment set out to remedy. Only if the answer is yes will the breach constitute the tort.

Example 9 An order made under the Contagious Diseases (Animals) Act 1869 s 75 required ship owners carrying cattle on deck to fit pens. These were intended to separate cattle, so as to guard against murrain. In *Gorris v Scott* (1874) LR 9 Ex 125 the owner of sheep washed overboard in a storm sued for breach of this duty. If there had been pens fitted, the sheep would have been safe in the storm. *Held* The action failed. The mischief of animals being washed overboard was not that to which the enactment was directed. Pollock CB said (at 131)-

The Act was passed *alio intuitu* ... the precautions directed may be useful and advantageous for preventing animals from being washed overboard, but they were never intended for that purpose, and a loss of that kind caused by their neglect cannot give a cause of action. {See also *Grant v National Coal Board* [1956] AC 649.}

Example 10 *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 concerned the requirement in the Betting and Lotteries Act 1934 s 11(2) that occupiers of dog-racing tracks should make available for bookmakers 'space on the track where they can conveniently carry on bookmaking'. A bookmaker sued for damages on the ground that space had not been made available for him. *Held* The mischief to which the enactment was directed was lack of sufficient bookmaking services for members of the public attending races, not lack of facilities to enable a particular bookmaker to carry on his business. The action therefore failed. {See also *Newman v Francis* [1953] 1 WLR 402 (no cause of action where plaintiff injured by dog whose owner contravened park byelaws, since they were for the protection and regulation of the park only).}

Example 11 Sanctions orders made under the Southern Rhodesia Act 1965 were designed to remedy the mischief constituted by the Unilateral Declaration of Independence ('UDI') which had been made by the Smith regime in Southern Rhodesia. They were not intended to give a cause of action to individuals who suffered economic damage through breach of the orders. As Fox LJ said-

I cannot think they were concerned with conferring rights either on individuals or the public

at large. Their purpose was the destruction, by economic pressure, of the UDI regime in Southern Rhodesia; they were instruments of state policy in an international matter.' {From an unreported judgment in the court below cited approvingly by Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173 at 186. }

Physical injury Where Parliament is dealing with a new or increased social mischief involving high risk to the personal safety of individuals, the likelihood is that it intends the law to give them adequate protection. {*Black v Fife Coal Co Ltd* [1912] AC 149 at 165; *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 413. For social mischiefs see Code s 292. }

Example 12 In *Groves v Lord Wimborne* [1898] 2 QB 402 the defendant was in breach of a statutory duty to fence dangerous machinery, for which the Act only laid down a fine of ,100. As a consequence of the breach the plaintiff workman suffered serious injury. *Held* The plaintiff was entitled to damages. The fine was not recoverable by the injured party and 'the legislature cannot have seriously intended that whether the workman suffered death or mutilation the liability of the master should never exceed ,100'. {*Per Rigby LJ* at 414-5. }

Example 13 The Road Traffic Act 1930 was passed to deal with the growing danger to life and limb posed by motor cars on public roads. Section 35(1) required the owner of a car to be covered by third-party insurance, a penal sanction being laid down. In *Monk v Warbey* [1935] 1 KB 75 the plaintiff was injured by a negligent driver to whom the owner had lent his car, and who was not covered by his insurance policy. *Held* The plaintiff was entitled to recover damages from the owner. Maugham LJ said (at 85-86)-

'There is sufficient ground for coming to the conclusion that s 35 was passed for the purpose of giving a remedy to third persons who might suffer injury by the negligence of the impecunious driver of a car ... It was within the knowledge of the Legislature that negligence in the driving of cars was so common an occurrence with the likelihood of injury to third persons that it was necessary in the public interest to provide machinery whereby those third persons might recover damages ...' {See also *Couch v Steel* (1854) 3 E & B 402 (defendant bound under statutory penalty to keep medicines on shipboard for health of crew: seaman who suffered through breach held entitled to recover damages). Cf *Vallance v Falle* (1884) 3 QBD 109 (defendant bound under statutory penalty to hand over seaman's discharge certificate: no civil remedy for breach). }

12. Does breach of the duty require a certain state of mind, for example deliberate intention, recklessness or carelessness? If so was the defendant (or where relevant the defendant's employee or agent) in that state of mind? If not, the breach tort does not arise.

There are dicta to the effect that every breach of statutory duty imports negligence. {In *Caswell v Powell Duffryn Colliery Co* [1940] AC 152 at 168 Lord Macmillan stated as a general proposition that 'if the plaintiff can show that there has been a breach of the statute he has established the existence of negligence. It remains for him to prove that the accident was due to that negligence'. } However the better view is that, in the absence of an express indication in the statute laying down the duty, the question is what state of mind is by implication required by the legislature? A further point is that it is preferable in this context to refer to carelessness rather than negligence, to avoid confusion with the tort of negligence. {See *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353. For the applicability of the tort of negligence see clause 16 and note thereon below. }

Where the enactment laying down the statutory duty imports a mental element it is necessary to ask whether the defendant was in the required state of mind. Some statutory duties impose strict liability, while others are not broken unless there is carelessness. What the latter impose is a duty to take reasonable care, a

qualification which may be express or implied.

Example 14 An example of an express provision is the Occupiers' Liability Act 1957 s 2. This imposes on occupiers of land what it calls the 'common duty of care', defined as a duty to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe. Here the plaintiff cannot recover without proof of carelessness (or of course recklessness or deliberate intention).

Example 15 An example of an implied provision is the Metropolis Management Act 1855 s 72. This imposed on the vestry a duty of properly cleaning the sewers vested in them by the Act. In *Hammond v Vestry of St Pancras* (1874) LR 9 CP 316 a civil action was brought for breach of this duty. *Held* No action would lie without proof of carelessness. Brett LJ said (at 322)-

'It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care or skill could obviate. The duty, notwithstanding, may be absolute, but if so, it ought to be imposed in the clearest possible terms.' {In *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 367 Lord Browne-Wilkinson said that a plaintiff could not recover for carelessness in the performance of a statutory duty unless the duty of care arose at common law (that is apart from the statute). However it is undoubtedly the case that on its true construction an enactment *may* be found to confer a right of action in such a case even though no duty of care exists at common law. It depends on the wording. }

In the absence of any indication that a foreseeability test is being imposed by the enactment in question, such a test is not to be taken as applied. This distinguishes the tort of breach of statutory duty from the parallel tort of negligence.

Example 16 *Larner v British Steel plc* [1993] 4 All ER 102 concerned a claim under the Factories Act 1961 s 29 (duty to provide a safe place of work). Peter Gibson J said (at 112): 'It would ... seem wrong to me to imply a requirement of foreseeability, as the result will frequently be to limit success in a claim for breach of statutory duty to circumstances where the workman will also succeed in a parallel claim for negligence; thus it reduces the utility of the section'.

If Parliament did not intend to give a civil remedy for breach of the statute, the fact that the person bound to perform the duty acted maliciously will not in itself create a remedy. {*Davis v Bromley Corpn* [1908] 1 KB 170. }

13. Does the question whether a breach of the duty was committed depend on the exercise of some person's discretion or judgment? If so, it is likely that only a public law remedy was intended, since the decision was what the law calls subjective.

In *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 379 Lord Browne-Wilkinson said that various enactments designed to protect children depended on the subjective judgment of the local authority. He added: 'To treat such duties as being more than public law duties is impossible'. This conclusion is strengthened where an ombudsman has been entrusted with supervisory duties. {Ibid at 382, 392.} See further the note below on clause 15. {For a detailed examination of the juristic nature of an enactment conferring a discretion or calling for the exercise of judgment see Bennion, "How they all got it wrong in *Pepper v Hart*", [1995] *British Tax Review* 325. }

14. Is the duty one of a general administrative or regulatory nature imposed on a public authority? If so, the breach tort is unlikely to arise.

Where an enactment is purely regulatory, contravention of a duty laid down by it is unlikely to give rise to an action for breach of statutory duty.

Example 17 Lord Goff said in *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 167 that the Prison Rules 1964 {SI 1964/388.} 'are regulatory in character and were never intended to confer private law rights on prisoners in the event of their breach'. {See also *Cutler v Wandsworth Stadium Ltd* [1949] AC 398. }

Lord Browne-Wilkinson said in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 364 'it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty'.

Lord Jauncey of Tullichettle stated the overall principle regarding the inferred creation of private law remedies as follows-

'... it must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment.' {*R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 170. This dictum was cited by Sir Thomas Bingham MR in *E (a minor) v Dorset County Council* [1994] 3 WLR 853 at 866. }

This is echoed by Lord Browne-Wilkinson: 'The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action'. {*X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 364. } However it is submitted that these dicta, which deny the presumption referred to above in the note on clause 1, are expressed too widely and should be confined to duties of the kind mentioned in subsection (14). {It is in this narrower context that Lord Browne-Wilkinson's doubts concerning the decision in *Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626 (see *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 379) should be understood. }

15. If the duty is imposed on a public authority, does it concern the formulation of policy or the carrying out of an operational function? In the former case the breach tort is unlikely to arise. In the latter case it is likely to arise.

The courts have drawn a distinction between 'policy discretion' conferred by statute and 'operational powers' so conferred. {*Lonrho plc v Tebbit* [1991] 4 All ER 973, affd [1992] 4 All ER 280. } The latter involve the implementation, rather than the taking, of policy decisions. If they are implemented improperly then, on usual tort principles, a person suffering damage will be entitled to recover. On the other hand where Parliament has entrusted policy to an organ of the state such as a government minister or a local authority it is not for the courts to intervene save where, on public law principles, there has been a failure of justice. {For the principles in question see Code s 329. } Lord Browne-Wilkinson said-

'Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not the courts, to exercise the discretion; nothing which the authority does within the ambit of the discretion can be actionable at common law. If the decision complained of falls outside the statutory discretion, it *can* (but not necessarily will) give rise to a common law liability. However if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on

such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist.'{*X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 371. Emphasis in original. }

Other common law remedies

16. It may constitute the tort of negligence if a person purporting to perform a statutory requirement, or exercise a statutory authority, contravenes a duty of care arising otherwise than under the statute (that is at common law). Similarly with other torts such as nuisance. The reason is that the power or authority is taken not to extend to malfeasance or misfeasance in its purported exercise which is actionable apart from the statute. In other words the statute provides no defence.

Negligence The tort of negligence at common law will arise where the statutory provisions are merely part of the setting giving rise to a duty of care. {*Capero Industries plc v Dickman* [1990] 2 AC 605; *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353.} For example if persons are conducting a school or hospital they owe a common law duty of care to pupils or patients whether or not the institution is being run under statutory powers. {*X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 392-393.} The only possible difference is that if it is being run under statutory powers the statute may lay down rules which modify or abrogate duties which would arise at common law. This must be distinguished from the cause of action that may arise where a statutory duty is performed carelessly in circumstances where the enactment imposing the duty is taken to require the exercise of proper care. {See subsection (12) of this section and note thereon above.}

This liability in negligence has been recognised in a long line of authorities culminating in *Murphy v Brentwood District Council* [1991] 1 AC 398, which concerned the careless failure of a local authority to observe building regulation requirements. In it the House of Lords restricted the scope of the alleged liability in negligence by overruling its own previous decision in *Anns v Merton London Borough* [1978] AC 728 and denying the remedy in cases of economic loss. In consequence, the liability is now probably limited to injury to the person or to health. {It seems that a reference to physical damage to property should be added here, since 'economic loss' is used in a sense that does not include such damage: see *Murphy v Brentwood District Council* [1991] AC 398 at 487, where Lord Oliver said 'The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not'. Cf *Capero Industries plc v Dickman* [1990] 2 AC 605 at 617, where Lord Bridge said 'It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another thing to avoid causing others to suffer purely economic loss'. See also *Larner v British Steel plc* [1993] 4 All ER 102, noted at Code p 48.}

Liability under the tort of negligence (as opposed to the breach tort) may arise where a statutory power is conferred on a person and that person negligently fails to exercise the power.

Example 18 A highway authority failed to exercise its power under the Highways Act 1980 s 79 to require a neighbouring occupier to remove part of a bank obstructing the view at a junction, even though the authority knew of the danger and had indeed taken steps to exercise that power, which it did not pursue when the occupier failed to respond. *Held* The authority was not liable in negligence at common law for failing to pursue the exercise of the power, whereby the respondent suffered loss from a resulting accident. {*Stovin v Wise (Norfolk County Council, third party)* [1996] 3 All ER 801.}

Other torts Where a person is authorised by statute to do an act which would otherwise be actionable at common law (for example in nuisance), it is inferred that the exemption from liability is intended to apply

only where the act is performed 'with all reasonable regard and care for the interests of other persons'. {*Allen v Gulf Oil Refining Ltd* [1981] AC 1001, *per* Lord Wilberforce at 1011.} If therefore it is performed carelessly the statutory exemption will not apply and the liability will be the same at common law as if no statutory authority had been given. {*X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353, *per* Lord Jauncey of Tullichettle at 362.} Lord Browne-Wilkinson said-

It is well established that statutory authority only provides a defence to a claim based on a common law cause of action where the loss suffered by the plaintiff is the inevitable consequence of the proper exercise of the statutory power or duty: see *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001. Therefore the careless exercise of a statutory power or duty cannot provide a defence to a claim based on a free-standing common law cause of action, whether in trespass, nuisance or breach of a common law duty of care. {*X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 366.}

Concluding note

The task of formulating a statutory code is complicated by uncertainty regarding the amount of detail that should be included. I have written on this before. {See *Statute Law* (3rd edn, 1990), pp 74-77; "The technique of codification" [1986] Crim LR 295; "The Law Commission's Criminal Law Bill: no way to draft a code" [1994] Stat LR 108.} I am not sure I have got the amount of detail right here, but the difficulty is relieved somewhat if one is allowed to include explanatory notes alongside the text. Although the traditional drafting method is to confine the legislative statement to the text itself I now believe there is much to be said for what might be called the twin-track method. By this the code or act would comprise both the "cutting edge" of the actual legislative enactments and the equally authoritative explanatory notes. Both should of course be framed by the same drafter and presented in the same document, as with the present article. This is necessary because they are in effect parts of one text, to be construed as a whole. {For construction as a whole see Code s 355.}

Finally I should mention that the report of the House of Lords decision in *Stovin v Wise (Norfolk County Council, third party)* [1996] 3 All ER 801 became available only at proof stage, too late for me adequately to revise Example 18 on page 208.