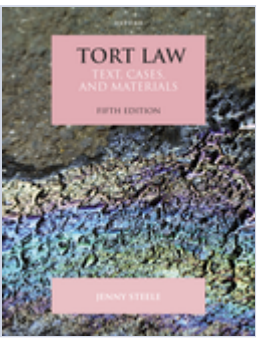

Tort Law: Text, Cases, and Materials (5th edn)
Jenny Steele

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17. Breach of Statutory Duty

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter deals with the action for breach of statutory duty, an action in tort meant to remedy harm caused by a breach of the duty. It first considers the distinctiveness of the tort of breach of statutory duty, with particular reference to the question of whether the breach gives rise to liability at common law. It then looks at case law involving civil liability for breach of industrial safety, citing *Groves v Wimborne (Lord)* [1898] 2 QB 402 and its significance in the context of workplace injuries. It also discusses cases dealing with 'social welfare' legislation and 'public law duties' as well as civil liberties before concluding with an assessment of the effect of the restrictive approach to the action for breach of statutory duty on the tort of negligence.

Keywords: breach of statutory duty, tort, liability, case law, industrial safety, workplace injuries, social welfare, civil liberties, negligence

Central Issues

i) If a statute imposes a duty but does not specify a civil remedy, an action in tort may sometimes be available to remedy harm caused by a breach of the duty. This action in tort will be an action for 'breach of statutory duty'. The duty is defined by statute; but the action is brought at common law.

ii) Historically, the action for breach of statutory duty has been very significant in the context of industrial safety. Outside that area it has been more restricted in scope, and the trend has been to adopt an approach which restricts it further. However, legislation enacted in 2013 will have a major impact on future claims for damages for breach of health and safety statutes and regulations, dramatically reducing recovery in the most significant area in which it has previously been available.

1 Tort and Legislation: The Distinctiveness of the Tort of 'Breach of Statutory Duty'

The tort action for breach of statutory duty is a hybrid between statute (defining the duty) and common law (determining whether the breach is actionable).

Lord Wright, *London Passenger Transport Board v Upson*
[1949] AC 155, at 168

> ... a claim for damages for breach of a statutory duty intended to protect a person in the position of the particular plaintiff is a specific common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty.

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2 The Question of Interpretation: Does the Breach Give Rise to Liability at Common Law?

The authorities in this area are dominated by questions of parliamentary intent and its interpretation. While the general opinion seems to be that the area is confused and unpredictable, the majority of cases can be understood in terms of two contrasting approaches to parliamentary intent. The second, and less restrictive, has been widely applied in 'health and safety' cases. It is here, however, that recent legislative intervention will now restrict the operation of the tort.

2.1 Two Potential Approaches

Lord Simonds, *Cutler v Wandsworth Stadium Ltd*
[1949] AC 398, at 169

> The only rule which in all the circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted.

'What did Parliament intend (or not intend)?' is potentially a very open-ended question. In order to answer it, it is not enough simply to study the statute in its context. We also need to know roughly what we are looking for.

2.2 What Are We Looking for?

The following two distinct approaches are present in the case law explored in this chapter.[1]

Interpretive Approach 1: we are looking for legislative intent to create the cause of action

On this approach, the cause of action in tort for breach of statutory duty depends on there being an intention, on the part of the legislature, *to create* such a common law right of action.

If no intention to create the right of action can be identified, no right of action will be held to exist. If this is what we are looking for, then there is a single question of statutory interpretation:

Did Parliament intend there to be a right of action at common law?

Interpretive Approach 2: we are looking for legislative intent to benefit the claimant

On this approach, the cause of action in tort for breach of statutory duty depends on there being an intention, on the part of the legislature, to *benefit* the claimant or a limited class of people including the claimant.

p. 922 ↵ Here, the right of action arises at common law, in order to give effect to the statutory duty.[2] If this is the correct analysis, there are two questions of statutory interpretation. Both are different from the single question above:

(a) Did Parliament enact the duty with the intention of benefiting the claimant?; and

(b) Is there any reason to think that Parliament intended to exclude the right of action, which is available at common law as a means of enforcing the duty?

Interpretive question (b) will be triggered if (for example) the statute provides for an alternative means of enforcement, such as a criminal penalty. But in principle, this is only one example of the circumstances in which the court may conclude that Parliament intended there not to be a right of action.

Whilst this second approach may seem a manipulation of Parliament's silence on the question of civil remedies, it should be remembered that the courts approached industrial safety legislation in particular in this way for well over a century, with the full knowledge of Parliament, and that successive statutes introducing safety duties will have been enacted on the clear assumption that they would give rise to actions in tort. Very simple statutory language could have been included to reverse the courts' approach in this regard.

Outside health and safety legislation, however, there is a strong trend towards the first interpretive approach, and this has led to *restriction* in availability of the action for breach of statutory duty. In *Peter Campbell v Gordon Joiners Ltd* [2016] UKSC 38, this difference of approach was a central issue.

3 Injuries at Work

We start our extracts with a defining case of civil liability for breach of industrial safety legislation. It exemplifies the second approach introduced in Section 2, in which the right of action is presumed to arise at common law, *provided* the legislature intended to confer a benefit.

3.1 Key Cases

Groves v Wimborne (Lord) [1898] 2 QB 402

The plaintiff was a boy employed in the defendant's Iron Works. By section 5 of the Factory and Workshop Act 1878, certain dangerous machinery had to remain fenced. Relevant machinery was left unfenced, and the plaintiff's arm was caught in the cog-wheels of a steam winch. He was so badly injured that his forearm had to be amputated. There was clearly a breach of section 5. The duty imposed by this section was not subject to reasonable care or to any questions of practicability or efficiency. It was an 'absolute' duty.

The Court of Appeal held that the defendant was liable in damages to the plaintiff. The key difficulty of interpretation arose from the fact that the statute provided sanctions for a breach of duty, in the form of fines
p. 923 and penalties. Should these penalties be taken to show ↵ that Parliament wished to exclude the action at common law which would otherwise arise from breach of the statutory duty?

A. L. Smith LJ, *Groves v Wimborne* [1898] 2 QB 402, at 406–7

> The Act in question, which followed numerous other Acts in pari materia, is not in the nature of a private legislative bargain between employers and workmen, as the learned judge seemed to think, but is a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit. The first question is what duty is imposed by that Act upon the occupiers of factories and workshops with regard to the fencing of machinery. By s. 5 it is enacted that 'with respect to the fencing of machinery the following provisions shall have effect.' Then by sub-s. 3 of the section, as amended by the Factory and Workshop Act, 1891, s. 6, sub-s. 2, 'All dangerous parts of the machinery, and every part of the mill gearing shall either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed in the factory as it would be if it were securely fenced'; and by sub-s. 4, 'All fencing shall be constantly maintained in an efficient state while the parts required to be fenced are in motion or use for the purpose of any manufacturing process'; and 'a factory in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act.' In the present case it is admitted that machinery on the defendant's premises which came within these provisions was not fenced as required by the Act, and that injury was thereby occasioned to the plaintiff, a boy employed on the works. On proof of a breach of this statutory duty imposed on the defendant, and injury resulting to the plaintiff therefrom, prima facie the plaintiff has a good cause of action. I leave out of the question for a moment the provisions of ss. 81, 82, and 86 of the Act. Could it be doubted that, if s. 5 stood alone, and no fine were provided by the Act for contravention of its provisions, a person injured by a breach of the absolute and unqualified duty imposed by that section would have a cause of action in respect of that breach? Clearly it could not be doubted. That being so, unless it appears from the whole 'purview' of the Act, to use the language of Lord Cairns in the case of *Atkinson v. Newcastle Waterworks Co.* (1877) 2 Ex D 441, that it was the intention of the Legislature that the only remedy for breach of the statutory duty should be by proceeding for the fine imposed by s. 82, it follows that, upon proof of a breach of that duty by the employer and injury thereby occasioned to the workman, a cause of action is established. The question therefore is whether the cause of action which prima facie is given by s. 5 is taken away by any provisions to be found in the remainder of the Act. It is said that the provisions of ss. 81, 82, and 86 have that effect, and that it appears thereby that the purview of the Act is that the only remedy, where a workman has been injured by a breach of the duty imposed by s. 5, shall be by proceeding before a court of summary jurisdiction for a fine under s. 82, which fine is not to exceed £100. In dealing with the question whether this was the intention of the Legislature, it is material, as Kelly C.B. pointed out in giving judgment in the case of *Gorris v. Scott* (1874) LR 9 Ex 125, to consider for whose benefit the Act was passed, whether it was passed in the interests of the public at large or in those of a particular class of persons.

In its day, the huge practical significance of *Groves v Wimborne* was that it provided a remedy to an employee injured at work which could not at that time have been achieved through any other action in tort. The statutory duty was imposed directly upon the employer and was absolute in nature. Therefore, even if a fellow
p. 924 employee was directly responsible for ↵ removing the fencing which had at one time been present, the employer could not escape liability by invoking the 'doctrine of common employment'.[3] *Groves v Wimborne*

opened up an important gap in the protection given to employers by that doctrine, and was compatible with the general legislative effort to protect the safety of workers. The approach in this case was subsequently applied in many others.[4]

The existence of the action has been deeply embedded in the health and safety area, where many statutory provisions designed to ensure safety have also given rise to civil liability. The standard of care applicable to any such action is as defined in the statute, though this question can of course throw up difficult arguments when it comes to interpretation. But the picture changed quite radically in 2013, reversing the trajectory of over 100 years of legal development from the time of *Groves v Wimborne*.

The majority of today's many health and safety regulations are governed by the Health and Safety at Work etc. Act 1974 (HSWA 1974), although there are also a number of other individual statutes in force. Until 2013, section 47(2) of this statute specified that breach of regulations made under the statute were actionable unless the regulation expressly provided to the contrary. Now, however, section 47(2) has been amended. The statutory change goes further than altering the impact of regulations made under HSWA, and affects other health and safety legislation also.

Enterprise and Regulatory Reform Act 2013

> #### 69 Civil liability for breach of health and safety duties
>
> (1) Section 47 of the Health and Safety at Work etc. Act 1974 (civil liability) is amended as set out in subsections (2) to (7).
>
> (2) In subsection (1), omit paragraph (b) (including the *'or'* at the end of that paragraph).
>
> (3) For subsection (2) substitute—
>
> (2) " Breach of a duty imposed by a statutory instrument containing (whether alone or with other provision) health and safety regulations shall not be actionable except to the extent that regulations under this section so provide.
>
> (2A) Breach of a duty imposed by an existing statutory provision shall not be actionable except to the extent that regulations under this section so provide (including by modifying any of the existing statutory provisions).
>
> (2B) Regulations under this section may include provision for—
>
> (a) a defence to be available in any action for breach of the duty mentioned in subsection (2) or (2A);
>
> (b) any term of an agreement which purports to exclude or restrict any liability for such a breach to be void."
>
> ...

p. 925 ↵ It is clear both from the Explanatory Notes and preceding policy documents that the intention is to ensure that employees have remedies only where the employer can be said to have been negligent; it achieves this in the first instance by removing civil liability altogether from certain health and safety statutes and regulations. To which such provisions does the section then apply?

The new section 47(2) removes civil liability—unless and until provided to the contrary—from 'health and safety regulations'. By section 15 of the HSWA 1974, 'health and safety regulations' are defined as regulations that are passed under the framework of that Act. This is therefore a far-reaching change, removing civil liability altogether for the time being, and strict liability it would seem in the long run, from numerous widely used regulations.[5] An example is the Provision and Use of Work Equipment Regulations 1998, which have not only generated many damages claims each year, but have been the subject of interpretation in the House of Lords on a number of occasions, most recently in *Smith v Northamptonshire County Council* [2009] UKHL 27. In such cases, the key question has been whether the cause of the injury suffered by the claimant falls within the parameters of the strict—or even absolute—safety duties set out in the various regulations. So in *Smith*, the question was whether a ramp used on a regular basis by an employee to help a patient from her house to a vehicle was judged not to be 'work equipment'. If so, there would be liability if this equipment should prove to be faulty, irrespective of the cause of its defectiveness. In this instance, it was not held to be work equipment, and so liability was avoided.[6] Section 69 represents a sea change in this area of law.

Arguably, in terms of the principles being set out the still more far-reaching provision is the new section 47(2A). This affects legislation other than HSWA 1974 itself, some of it very long-standing. Its ambit depends upon the meaning of an 'existing statutory provision'; and this phrase is defined in section 53(1) of the HSWA as referring to the statutes listed in Schedule 1. The list includes some of the most significant and long-established legislation in this area, including the Factories Act 1961, the direct descendant of a number of earlier statutes. While civil liability under HSWA is a relatively new phenomenon which has advanced in response to European law, civil liability for breach of duties set out in these other statutes is far older and is the consequence of developments in the national courts. Altogether, section 69 significantly reduces—to the point of reversing—the significance of *Groves v Wimborne* in its primary zone of application after 115 years of undiminished influence.

Some reasons for this change are indicated in the Explanatory Notes to the legislation. The aim is to avoid over-application of health and safety measures because of a perception that civil liability will be imposed for 'technical breaches' (by which it appears is meant, breaches not involving fault). At first reading in the House of Lords, the provision was removed from the Bill. In an instructive debate, it was pointed out that the strict liability provisions generally avoided costly litigation over whether there had been any lack of care. Equally, strict liability could be argued to be fair in this context because the employer generally has greater access to evidence which would be relevant to the negligence standard. In these respects, a shift back to negligence is a retrograde step. However, the provision was reinstated by the House of Commons, and passed through the Lords at the second attempt.

p. 926 ↵ The remaining question is of course how much difference in practice this large change in applicable principles will make. On the face of it, it completely alters the landscape of civil liability in the employment context, and it seems likely that its influence will indeed be profound. However, there are some potential avenues to civil liability which may take on new importance after section 69. First, it has been pointed out that

the Employers' Liability (Defective Equipment) Act 1969, which has not been much needed given the development of civil liability under HSWA regulations, is unaffected because it is not 'health and safety' legislation as defined in HSWA. It imposes liability on employers where equipment is faulty through the negligence of others.[7] Second, the employer's non-delegable duties to employees (to provide a safe place and system of work, safe staff and equipment) are likely to become increasingly important. These duties, outlined in Chapter 9 and most famously embodied in the decision in *Wilson and Clyde Coal v English* [1937] 3 All ER 628, impose strict liability at common law, but rest ultimately on the negligence of someone employed by the defendant.

A third possibility is that the tort of negligence itself may provide the route to a relatively strict form of liability in this context, by operating in combination with the regulations themselves.[8] The regulations have not been repealed, but set out duties which are the subject of criminal penalties. An argument has been put that at least where those regulations set out tests turning on what is 'reasonably practicable', they should be relevant to understanding what will amount to 'reasonable care', because a reasonable employer would not breach these duties. This is a route to 'reinvigorating the common law', in combination with the regulations, and the possibilities are illustrated by the Supreme Court's decision in *Kennedy v Cordia* [2016] UKSC 6; [2016] 1 WLR 597. Here, the Supreme Court emphasized the existence of duties to conduct risk assessments *at common law*, as well as under applicable regulations. Conducting such risk assessments is part of the actions of a reasonable employer. It is possible that constructive action by the courts will once again come to determine whether injured employees can recover damages in civil claims where evidence of 'carelessness' in the usual sense is lacking. It is indeed a case of 'back to the future'.

4 General Evolution

In some contexts, the law has developed away from the position stated in *Groves v Wimborne*. In this section we examine the courts' evolving approach to interpretation of legislative intent.

4.1 Sanctions and Other Means of Enforcement

The Court of Appeal in *Groves v Wimborne* decided that the existence of a modest statutory fine did not displace the civil action. The role of sanctions and alternative remedies is often considered with reference to the following judicial comment. (The case from which this comment is derived had nothing to do with the action for breach of statutory duty in tort. It was concerned with the status of a lease under which the
p. 927 statutory manner of paying rent ↵ had not been complied with. The question was whether an alternative way of paying the rent was good enough to safeguard the rights of a successor to the lessee.)

Doe d Bishop of Rochester v Bridges
[1824–1834] All ER 167 (1831)

> … 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. If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.

This statement has been taken to suggest that there cannot be an action for breach of statutory duty if some other means of enforcement of the duty exists. In *Cutler v Wandsworth Stadium* [1949] AC 398, Lord Simonds referred to the above passage from *Doe v Bridges*. But he also relied upon *Groves* and the subsequent case of *Black v Fife Coal Co Ltd* [1912] AC 149, acknowledging that the existence of a penalty was not *decisive*.

In *Cutler*, Lord Simonds also stated a *positive* presumption flowing from the *absence* of any other means of enforcement:

Lord Simonds, *Cutler v Wandsworth Stadium*, at 170

> … if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, 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.

This presumption too may be rebutted in a suitable case.

4.2 The Importance of Statutory Interpretation in *Groves v Wimborne*

On the second interpretive approach outlined above, the *starting* point should be the purpose of the statute. Was the statute intended to benefit the claimant (or a class of people including the claimant)? *Cutler v Wandsworth* itself is a good illustration of this.

Cutler v Wandsworth Stadium [1949] AC 398

The plaintiff was a bookmaker. He brought an action against the occupier of a licensed dog-racing track for failing to provide him with space on the track where he could carry out book-making, in accordance with section 11(2)(b) of the Betting and Lotteries Act 1934. Criminal penalties were specified for failure to comply with this provision. The House of Lords held that no civil action was available on the part of the plaintiff in respect of a breach of this duty.

p. 928 **Lord Simonds, *Cutler v Wandsworth Stadium*, at 409**

> ... I have no doubt that the primary intention of the Act was to regulate in certain respects the conduct of race tracks and in particular the conduct of betting operations thereon. If in consequence of those regulations being observed some bookmakers will be benefited, this does not mean that the Act was passed for the benefit of bookmakers in the sense in which it was said of a Factory Act that it was passed in favour of the workmen in factories. I agree with Somervell LJ that where an Act regulates the way in which a place of amusement is to be managed, the interests of the public who resort to it may be expected to be the primary consideration of the legislature. If from the work of regulation any class of persons derives an advantage, that does not spring from the primary purpose and intention of the Act.

In more recent years, parliamentary intention has been interpreted in a different way. Here we extract two very significant cases. The approach taken in the second of these, *Ex p. Hague*, is clearly incompatible with the *Groves* case, although the actual outcome could be reconciled with it. The first of the two, extracted next, is more subtle. Is it compatible with *Groves*, or not?

Lonrho v Shell Petroleum (No 2) [1982] AC 173

Lonrho invested considerable sums in the construction and operation of an oil pipeline to take oil from Mozambique to Southern Rhodesia. The pipeline was completed in January 1965. In November 1965 the government of Southern Rhodesia declared unilateral independence. Measures were put in place prohibiting trade with Southern Rhodesia, including the supply of oil. Lonrho argued that Shell and others had continued to supply oil to Southern Rhodesia although this was prohibited. If so, this would be in breach of the Southern Rhodesia (Petroleum) Order 1965, and a criminal offence. Lonrho further argued that they suffered financial loss through this breach of the Order on the part of Shell, since their actions enabled the regime in Rhodesia to resist international pressure, prolonging the need for sanctions and causing Lonrho to make significant losses. Here, we extract the part of Lord Diplock's judgment which deals with the action for breach of statutory duty.[9]

Lord Diplock, *Lonrho v Shell Petroleum (No 2)*
[1982] AC 173, at 185–6

> The sanctions Order … creates a statutory prohibition upon the doing of certain classes of acts and provides the means of enforcing the prohibition by prosecution for a criminal offence which is subject to heavy penalties including imprisonment. So one starts with the presumption laid down originally by Lord Tenterden C.J. in *Doe d. Murray v. Bridges* (1831) 1 B. & Ad. 847, 859, where he spoke of the 'general rule' that 'where an Act creates an obligation, and enforces the performance in a specified manner … that performance cannot be enforced in any other manner'—a statement that has frequently been cited with approval ever since, including on several occasions in speeches in this House. Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to this general rule.
>
> p. 929 ↵ The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation. …
>
> The second exception is where the statute creates a public right (i.e. a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J. in *Benjamin v. Storr* (1874) L.R. 9 C.P. 400, 407, described as 'particular, direct, and substantial' damage 'other and different from that which was common to all the rest of the public.'…
>
> My Lords, it has been the unanimous opinion of the arbitrators with the concurrence of the umpire, of Parker J., and of each of the three members of the Court of Appeal that the sanctions Orders made pursuant to the Southern Rhodesia Act 1965 fell within neither of these two exceptions. Clearly they were not within the first category of exception. They were not imposed for the *benefit or protection* of a particular class of individuals who were engaged in supplying or delivering crude oil or petroleum products to Southern Rhodesia. They were intended to put an end to such transactions. Equally plainly they did not create any public right to be enjoyed by all those of Her Majesty's subjects who wished to avail themselves of it. On the contrary, what they did was to withdraw a previously existing right of citizens of, and companies incorporated in, the United Kingdom to trade with Southern Rhodesia in crude oil and petroleum products. Their purpose was, perhaps, most aptly stated by Fox L.J.:
>
> > "I cannot think that they were concerned with conferring rights either upon individuals or the public at large. Their purpose was the destruction, by economic pressure, of the U.D.I. regime in Southern Rhodesia; they were instruments of state policy in an international matter."

At first sight, Lord Diplock appears to have adopted a general presumption *against* a civil right of action. But on inspection, this presumption is not general at all, but is *specific* to cases where another means of enforcing the duty (including a criminal penalty) is contained in the statute. The entire discussion in this extract therefore fits into question (b) in the second interpretive approach set out in Section 2.

Even here, where a statutory means of enforcement (a criminal sanction) exists, Lord Diplock went on to explain that there are two ways in which the presumption against a common law action for breach of statutory duty might be rebutted. The first of these exceptions is where the obligation is imposed for the benefit or protection of a particular class of individuals. This would clearly include a case like *Groves*. But if *Groves v Wimborne* is correct, then Lord Diplock has his rules and exceptions the wrong way around. The *general rule* should be that there is an action for breach of a duty, if that duty is intended to benefit the claimant: the possible *exception* is that if there is a statutory penalty, it should be considered whether Parliament intended this to be the only means of enforcement.

Lord Diplock's approach is inclined to *broaden* the scope of the action. If 'conferring a benefit' is an exception to the general rule, then how is the intention of Parliament to be further considered? There seems to be no room for an exception to this exception. It is probably Lord Diplock's interpretation which has led to the impression (otherwise plainly untrue) that the presumptions applying in *Groves* do not involve interpretation of the will of Parliament, but give rise to automatic liability (see the argument put for the plaintiff in *Ex p. Hague*, below).

p. 930 ↵ The second of Lord Diplock's exceptional categories is much more difficult to interpret, but it turns on the *creation of legal rights to be enjoyed by all of Her Majesty's subjects*. It is notoriously unclear what Lord Diplock had in mind here, not least because the case he cites (*Benjamin v Storr*) is a case of public nuisance, not of breach of statutory duty.[10] This category has not developed since *Lonrho*.[11]

The following case more clearly shows a departure from the approach in *Groves v Wimborne*, but it does not seek to cast doubt upon that case itself.

R v Deputy Governor of Parkhurst, ex p. Hague [1992] 1 AC 58

The plaintiffs, who were lawfully detained in prison, argued that they had been subjected to treatment which was in breach of Prison Rules. In the case of Hague (the first plaintiff), it was alleged that he was segregated from other prisoners in breach of the Rules, and that this breach was subject to an action for breach of statutory duty.[12]

The crucial question is set out in the following passage:

> **Lord Jauncey**
>
> Mr Sedley for Hague submitted that there had been a breach of the prison rules which sounded in damages. In a carefully reasoned argument to which I hope that I do justice in paraphrasing he argued that a breach of statutory duty unaccompanied by a statutory remedy or penalty affords a right of action to a person injured thereby where the plaintiff belongs to a class which the statutory provision was intended to protect, and the breach has caused the plaintiff damage of a kind against which the provision was intended to protect him. In support of this proposition he relied on *Groves v. Lord Wimborne* [1898] 2 Q.B. 402 and *Cutler v. Wandsworth Stadium Ltd* [1949] A.C. 398. Where such a situation existed, as it did in the present case, no question of legislative intent arose. …
>
> Mr Laws on the other hand maintained that the first question to be considered was what rights, if any, Parliament intended to confer in passing the statute and that matters such as availability of other remedies merely assisted the resolution of that question and were not in themselves decisive. He also relied on *Groves v. Wimborne* and *Cutler v. Wandsworth Stadium Ltd* Mr Laws argued that the Secretary of State had no power under section 47 of the Prison Act 1952 to make rules which conferred private rights on individuals.

These possible approaches, set out by rival counsel, almost precisely reflect the two interpretive approaches we outlined at the start of this section. However, there is one crucial difference, which is that the argument put for Hague implies that no reference to Parliamentary intention is required in a case where the statute
p. 931 confers a benefit, and there is no penalty or ↵ other means of enforcement specified in the statute. This would make the action for breach of statutory duty *automatic* in such a case. As we have explained, any such implication is at odds with the reasoning in *Groves*.

In the event, this ambitious argument backfired. Throughout his judgment, Lord Jauncey took it that *any* reference in the authorities to statutory intention disproved the approach urged by the plaintiffs, and proved the approach urged by the defendants. Every authority consulted referred, of course, to the importance of parliamentary intention; and Lord Jauncey did not distinguish which *sort* of intention (to create a right of action, or to benefit the claimant) was required.

Lord Jauncey concluded with an approach that is at odds with *Groves v Wimborne*:

> **At 170**
>
> My Lords, I take from these authorities that 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.
>
> The Prison Act 1952 is designed to deal with the administration of prisons and the management and control of prisoners. It covers such wide-ranging matters as central administration, prison officers, confinement and treatment of prisoners, release of prisoners on licence, provision and maintenance of prisons and offences. Its objects are far removed from those of legislation such as the factories and coal mines Acts whose prime concern is to protect the health and safety of persons who work therein. Section 47 empowers the Secretary of State to make rules in relation to many of the matters with which the Act is concerned and is in the following terms, inter alia:
>
> > "(1) The Secretary of State may make rules for the regulation and management of prisons, remand centres, detention centres and Borstal institutions respectively, and for the classification, treatment, employment, discipline and control of persons required to be detained therein."
>
> I find nothing in any of the other sections of the Act to suggest that Parliament intended thereby to confer on prisoners a cause of action sounding in damages in respect of a breach of those provisions. To give the Secretary of State power in section 47 to confer private law rights on prisoners would therefore be to allow him to extend the general scope of the Act by rules.

Lord Jauncey says here that the crucial issue is always whether the legislature intended that private rights of action should be conferred. But in both *Groves* and *Lonrho*, and also other decisions quoted by Lord Jauncey such as *Black v Fife*, the question is whether the duty seeks to confer, not a right of action, but *a benefit* (which in the safety legislation takes the form of *protection from harm*) upon the claimant. Lord Jauncey here takes the step from the second interpretive approach we outlined at the start of this section, to the first. In later decisions, at least outside the health and safety field, it has consistently been said that the crucial question is *whether the legislature intended to confer a right of action*.

As for *Hague* itself, the selection of interpretive approach might have been decisive, if it had been found that
p. 932 the legislature *did* intend to benefit prisoners through the relevant ↵ Prison Rule (by setting limits to acceptable treatment). But the purpose of the relevant Prison Rule as the House of Lords interpreted it was not, in any event, to benefit the prisoner:

Lord Bridge, at 160

> The purpose of the rule, apart from the case of prisoners who need to be segregated in their own interests, is to give an obviously necessary power to segregate prisoners who are liable for any reason to disturb the orderly conduct of the prison generally. The rule is a purely preventive measure.

In later case law, *Ex p. Hague* has been explained as a case where the relevant Rules were 'regulatory in character'. Therefore, like *Lonrho*, the case could have been disposed of simply by saying that the purpose of the statutory duty was not to benefit the plaintiff. The status of this and the following case, and the continuing relevance of *Groves v Wimborne*, were brought into issue in *Campbell v Peter Gordon Joiners Ltd* [2016] UKSC 38, extracted in Section 6.

5 Further Restrictions: 'Social Welfare' Legislation and 'Public Law Duties'

5.1 Key Cases

X v Bedfordshire CC [1995] 2 AC 633

This was a defining case in respect of the duty of care in negligence in the context of statutory *powers* (Chapter 5). It was an equally important case in respect of the action for breach of statutory duty.

The appeals heard together by the House of Lords comprised two cases raising child protection matters; and three cases raising issues of educational malpractice. The applicable child protection legislation involved statutory duties, as well as statutory powers. It was therefore argued that in the child protection cases, there was (in addition to the negligence action) an action for breach of a statutory duty. This, like the negligence claim, was rejected.

Lord Browne-Wilkinson, *X v Bedfordshire CC*, at 731–2

> The principles applicable in determining whether such statutory cause of action exists are now well established, although the application of those principles in any particular case remains difficult. 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. However, 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. … Although the question is one of statutory construction and therefore each case turns on the provisions in the relevant statute, it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing
> p. 933 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. Although regulatory or welfare legislation affecting a particular area of activity does in fact provide protection to those individuals particularly affected by that activity, the legislation is not to be treated as being passed for the benefit of those individuals but for the benefit of society in general. Thus legislation regulating the conduct of betting or prisons did not give rise to a statutory right of action vested in those adversely affected by the breach of the statutory provisions, i.e. bookmakers and prisoners: see *Cutler's* case [1949] A.C. 398; *Reg. v. Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 A.C. 58. The cases where a private right of action for breach of statutory duty have been held to arise are all cases in which the statutory duty has been very limited and specific as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions.

Lord Browne-Wilkinson followed the *Ex p. Hague* approach, and thought this consistent with all of the previous case law (including *Groves v Wimborne*). Indeed, he seems to go even further, clearly stating (as Lord Jauncey did not) that there is a presumption *against* a right of action, and that it must be established that Parliament intended such a right to exist, if the action is to succeed. Equally clearly, we can see from earlier that Lord Browne-Wilkinson thought that the statutory duties arising in a 'scheme of social welfare' are not generally of a type that would give rise to an action in tort. They are too broad and imprecise, and their aim is to benefit the public at large, rather than a specified class of individuals.

The right of action was denied, because the duties in question *were not of the right sort*. In particular, they rely upon the exercise of discretion or judgment. Although they are intended to protect children such as the plaintiffs, they are no more than 'public law duties', and their enforcement should be at public law.

The restrictive approach in *X v Bedfordshire* where social welfare legislation is concerned has been adopted by later courts, for example, in *O'Rourke v Camden* [1998] AC 188: the duty under section 63(1) of the Housing Act 1985 to provide temporary accommodation to homeless individuals was enforceable only through judicial review. It was in the nature of a public law duty, and the availability of judicial review ensured that the duty would not be reduced to a 'toothless regime' or 'pious aspiration' in the absence of a damages remedy.

Significant recent cases where an argument based on breach of statutory duty was quickly dismissed because the approach to 'public law duties' is now so well established are *Mitchell v Glasgow City Council* [2009] UKHL 11 (statutory duties on local authorities as social landlords are not actionable at private law as they are solely public law duties—the issue here being control of another tenant) and, very similarly, *X & Y v London Borough of Hounslow* [2009] EWCA Civ 286.

6 Recent Cases: Which Approach?

Cullen v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 39; [2003] 1 WLR 1763

The claimant was arrested on suspicion of an offence of withholding information relating to the murder of a police officer. He later pleaded guilty to an offence. While being questioned, his right of access to a solicitor
p. 934 was deferred four times. Such deferrals were permitted by ↵ the Northern Ireland (Emergency Provisions) Act 1987, but in contravention of that Act, no reasons for the deferrals were given. The claimant brought an action for damages in respect of the failure to give reasons.

The majority of the House of Lords (Lords Hutton, Millett, and Rodger) held that the claimant had no right of action for breach of statutory duty. There was a joint dissent by Lords Bingham and Steyn. This dissent distinguished *Ex p. Hague* and *X v Bedfordshire*. The 1987 Act should be taken to *confer a right* on individuals in the position of the claimant; and there were no grounds for displacing the presumption that an action would therefore lie at private law. This general approach, which starts with the purpose and nature of the legislation and identifies it as conferring a benefit in the nature of a right upon the claimant, is compatible with *Groves v Wimborne* and the second interpretive approach outlined earlier.

The decision of the majority may or may not have been directly influenced by the presumption against actionability expressed in *X v Bedfordshire*. No presumption against the right of action was explicitly invoked, but the majority concluded that the duty was a 'public law' duty, and the appropriate means of enforcing the duty was through an application for judicial review.[13] It is possible that a different conclusion would have been drawn if the claimant had suffered tangible loss or injury (see Lord Rodger at [86]).

Campbell v Peter Gordon Joiners Ltd [2016] UKSC 38

This case directly raised the correct approach to take in cases of breach of statutory duty. It also concerned the independently important question of whether there is a common law remedy for an injured employee where there has been a breach of the employer's duty to insure its liabilities to him. This duty is contained in the Employers' Liability (Compulsory Insurance) Act 1969. The action was not brought against the company, which was insolvent. In the absence of a relevant insurer, the action was brought instead against a director of the company on the basis that he had failed to insure. The primary duty to insure is contained in section 1(1) of the 1969 Act; criminal penalties are set out in section 5, and include penalties on directors and others.

Employers' Liability (Compulsory Insurance) Act 1969

> ### 1. Insurance against liability for employees
>
> (1) Except as otherwise provided by this Act, every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business ...
>
> ...
>
> p. 935 ### 5. Penalty for failure to insure
>
> An employer who on any day is not insured in accordance with this Act when required to be so shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale; and where an offence under this section committed by a corporation has been committed with the consent or connivance of, or facilitated by any neglect on the part of, any director, manager, secretary or other officer of the corporation, he, as well as the corporation shall *be deemed to be guilty of that offence* and shall be liable to be proceeded against and punished accordingly.

The issues divided the Supreme Court. The majority judgment of Lord Carnwath took an approach based on close reading of the statutory language. In doing so, he did not go so far as to accept some observations of the court below, to the effect that *Groves v Wimborne* no longer represents the modern law, and that Lord Diplock's presumptions in *Lonrho* had been modified by later authorities including *X v Bedfordshire* and *ex p Hague*. Neither, however, did he completely dismiss them; rather, he was 'content to assume' that *Lonrho* remained a reliable guide. The dissenting judges, however, roundly dismissed the observations, pointing out that the later authorities dealt specifically with public law duties: Lord Toulson regarded the suggestion as 'startling'. Despite the majority's assumption that *Lonrho* still offered a reliable guide, their approach was based on close reading in order to glean Parliamentary intent. The essential difficulty, for the majority, was that despite the imposition of a penalty on directors, the duty itself was imposed not on them, but on the company.

Lord Carnwath, *Campbell v Peter Gordon Joiners*
[2016] UKSC 38

> 12 For my part I find it unnecessary in this appeal to engage in discussion of the extent to which Lord Diplock's formulation has been modified by later authorities. I would only observe that the statements of Lord Browne-Wilkinson and Lord Jauncey referred to by Lord Brodie were made in the context of cases concerning liability of public authorities, which may raise rather different issues. I am content to assume (without deciding) that Lord Diplock's words remain a reliable guide at least in relation to statutory duties imposed for the benefit of employees. I would also proceed on the basis (agreeing in this respect with Sir John Megaw in *Richardson's* case [1995] QB 123, 135C-D) that the duty of the employer under section 1 of the 1969 Act was imposed for the benefit of the employees, in the sense indicated by Lord Diplock.
>
> 13 This however is not enough for Mr Campbell. The essential starting point for Lord Diplock's formulation is an obligation created by statute, binding in law on the person sought to be made liable. There is no suggestion in that or any other authority that a person can be made indirectly liable for breach of an obligation imposed by statute on someone else. It is no different where the obligation is imposed on a company. There is no basis in the case law for looking through the corporate veil to the directors or other individuals through whom the company acts. That can only be done if expressly or impliedly justified by the statute.

p. 936 ↵ Dealing with a fairness-based argument of Lord Drummond Young in the court below, Lord Carnwath continued:

> 18 With respect to him, I do not find these observations helpful in resolving the issue before us, which depends not on general questions of fairness, but on the interpretation of a particular statutory scheme in its context. The fact that the company can only act through its officers tells one nothing about their potential liability to third parties for its acts or failures. The judgment of Atkin LJ to which he refers affirms the rule (supported by reference to a statement of Lord Buckmaster in *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, 476) that directors are not in general liable for the tortious actions of the company. The scope of a potential common law claim against a director for ordering or procuring such a tortious act is not in issue in this case, which turns entirely on alleged liability under the statute. This requires the court to pay due respect to the language and structure used by Parliament, rather than to preconceptions of what its objectives could or should have been. …

In para [12], Lord Carnwath does lay to rest the particularly suspect reasoning of Stuart-Smith LJ in the earlier, similar case of *Richardson v Pitt-Stanley* [1985] QB 123. Here, Stuart-Smith LJ had argued that the purpose of the 1969 Act was not solely to benefit employees, but also to benefit employers: insurance is generally intended to benefit the assured. This missed the point that the statute was one of *compulsory* insurance, to avoid the problem of uncompensated injuries to employees. Here, Lord Carnwath (like the dissenting judges) prefers the

interpretation of Megaw LJ, who dissented in that case. However, Lord Carnwath's approach to statutory interpretation leads to the same result: there is no personal duty on the director, despite the imposition of criminal penalties where there is a failure to insure.

The minority judges, Lord Toulson and Baroness Hale, rejected this approach as unduly formalistic, and gave stronger support to the continuing authority of *Groves v Wimborne* and *Lonrho*. Their favoured approach was based on a purposive, rather than detailed reading of the statutory language. As with *Groves* and *Lonrho*, the intention to benefit the claimant was decisive.

Lord Toulson, *Campbell v Peter Gordon Joiners Ltd*
[2016] AC 1513

> 29 In his dissenting judgment in *Richardson v Pitt-Stanley* [1995] QB 123, 135, Sir John Megaw ... said:
>
> "With great respect, I find it difficult to believe that the parliamentary draftsman would have intended to make provision that there should be no civil right or remedy by using the formula of section 1 of the Employers' Liability (Compulsory Insurance) Act 1969, 'shall insure', followed by section 5 'shall be guilty of an offence'; as contrasted with the formula of declaring an act or omission to be unlawful and then separately providing a criminal penalty for the breach."
>
> I agree.
>
> 30 The approach which commends itself to the majority concentrates on the form of the language. It is argued that the structure of the Act is such that the only duty created by it is explicitly placed on the company by section 1(1), and that the mechanism by which a director or other officer of the company is deemed to be guilty of a breach of that duty is consistent with and supports that proposition. I have set out the alternative approach, which looks at the function and substantive effect of the deeming provision in real terms. The choice between a formal approach and a functional approach in the interpretation and application of statutory language is an aspect of the choice between formalism and realism which has been a fruitful subject since as long ago as the publication of *Holmes's The Common Law* in 1881. In deciding which approach is preferable, the context matters. The present context is legislation for the protection of a vulnerable group, a company's employees. In that context I regard the functional approach as more appropriate. I cannot improve on Lord Drummond Young's pithy statement, in his dissenting opinion in this case 2015 SLT 134, para 47 that in the context of legislation aimed at employee protection the formalist approach is 'excessively conceptual; it focuses on differences of structure that do not reflect the basic objectives of the statute'.
>
> ...

p. 937

It is interesting that Lord Toulson sees in the dispute about statutory duties a much wider debate between 'formalism', and 'realism': should courts look at the form of statutory language, or at the intended and actual effect of the law? He went further, and acknowledged that the role of the courts in this context cannot be simply confined to interpreting statutory language: courts must take some responsibility for making decisions that the legislature has not debated:

> 35 As Lord Kinnear's statement indicates, the cause of action is at common law (except in cases where a statute expressly creates a civil right of action). The cause of action which was held to exist in *Groves v Lord Wimborne* [1898] 2 QB 402 was created by the court. It was founded on a statute but it was the court that determined that breach of the provisions of the Act should be actionable at the suit of the injured party for whose protection the provisions were intended. The conventional jurisprudence is that the court's function is to ascertain as a matter of interpretation whether Parliament intended that there should be civil liability, but that understates the role of the courts in cases where the legislation is silent on the point. In such cases 'the judges face hieroglyphs without a Rosetta Stone', to borrow a metaphor of Judge Richard Posner writing extrajudicially (*Divergent Paths—The Academy and the Judiciary*, Harvard University Press (2016), p 172). Judge Posner candidly and correctly states that the judges' role in such cases is the active role of filling gaps left by the legislature.

The decision of the majority contrasts with the position in relation to compulsory motor insurance. In *Monk v Warbey* [1935] 1 KB 75, the owner of a car had lent it to a friend, who was not covered by a policy of liability insurance. The friend through his negligence caused injuries to the plaintiff. Because the driver of the car was uninsured and could not meet the claim for damages, the plaintiff brought an action against the car owner, based on his breach of statutory duty:

p. 938

Road Traffic Act 1930, section 35(1)[14]

> ... it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the user of the vehicle ... a policy of insurance ... in respect of third party risks ...

This claim for breach of statutory duty was successful. The Court of Appeal perceived that the purpose of the Act was to ensure that judgments in relation to personal injury sustained on the roads could be met. This being so, the Road Traffic Act is to be treated as relating to health and safety.[15] The minority in *Campbell* felt that the Employers' Liability (Compulsory Insurance) Act 1969 should be treated in the same way. But the majority distinguished *Monk v Warbey* on the rather formalistic basis that the statutory duty is differently worded.

7 The Ambit of the Tort

Once it is shown that the duty is actionable, the duty itself is defined by the statute, and this will determine the relevant liability standard. This may be strict, or it may be dependent on a failure to take reasonable care. The Law Reform (Contributory Negligence) Act 1945 applies to actions for breach of statutory duty, so that damages may be reduced to reflect relative fault on the part of the claimant.

7.1 Damage of the Type the Duty Was Intended to Prevent

In the much-cited case of *Gorris v Scott* (1874) LR 9 Exch 125, it was emphasized that the only recoverable damage in an action for breach of statutory duty is damage of the sort that the duty was designed to prevent. Here, the defendant ship owner was under a statutory duty to keep cattle penned when in transit on board his ship. The reason for this duty was the avoidance of disease. The claimant's sheep were left unpenned, in breach of the duty, but they did not catch a disease—they were swept overboard. There was no liability, because it was not the purpose of the statute to protect from this sort of danger.

8 Conclusions

i. The action for breach of statutory duty raises questions about the partnership between courts and legislature. For over a hundred years, courts have developed remedies at common law for employees
p. 939 who have been injured by breaches of statutory duty. Typically, this has meant adding a right to compensation to existing criminal penalties. In a radical move, Parliament in 2013 removed civil liability from the majority of health and safety statutes and regulations, thus markedly confining the significance of this action.

ii. Outside the area of liability to employees, a more restrictive approach has been seen in recent years. Arguably, this is confined to cases where there is a broad, public duty which cannot be said to benefit a specified class of individuals. However, the right approach to interpreting statutory language and Parliamentary intent continues to trouble the courts, leading to a divided Supreme Court in the recent case of *Campbell v Peter Gordon Joiners*. The minority judgment of Lord Carnwath suggests a connection between the dispute in these cases, and much broader issues about formalist and realist approaches to adjudication. Overall, there is no doubt that Parliamentary intention is fundamental to the action for breach of statutory duty; the dispute is over which sort of intention is required, and how closely—or purposively—statutory language needs to be read in order to derive the answer.

Further Reading

Foster, N., 'Private Law and Public Goals: The Continuing Importance of the Action for Breach of Statutory Duty' (delivered to the 'Obligations IV' conference, Singapore, 23–25 July 2008; <http://works.bepress.com/neil-foster/11 *<http://works.bepress.com/neil-foster/11>*>).

Limb, P., and Cox, J., ‘Section 69 of the Enterprise and Regulatory Reform Act 2013—plus ça change?’ (2014) JPIL 1.

Matthews, M. H., ‘Negligence and Breach of Statutory Duty’ (1984) 4 OJLS 429.

Roy, A., ‘Without a Safety Net: Litigating Employers’ Liability Claims after the Enterprise Act’ (2015) JPIL 15.

Stanton, K., *Breach of Statutory Duty* (London: Sweet & Maxwell, 1986).

Stanton, K., ‘New Forms of the Action for Breach of Statutory Duty’ (2004) 120 LQR 324–41.

Stanton, K., Skidmore, P., Harris, M., and Wright, J., *Statutory Torts* (London: Sweet & Maxwell, 2003).

Tomkins, N., ‘Civil Health and Safety Law after the Enterprise and Regulatory Reform Act 2013’ (2013) JPIL 203.

Williams, G., ‘The Effect of Penal Legislation in the Law of Tort’ (1960) 23 MLR 233.

Notes

[1] Our coverage is of course selective. For more extensive examination of the action and its development see K. Stanton, *Breach of Statutory Duty in Tort* (2nd edn, Sweet & Maxwell, 1986).

[2] ‘Benefit’ to the claimant may certainly include protection from harm (*Groves v Wimborne* (later in this section)); it may also perhaps include the conferral of rights whose invasion is actionable per se (*Cullen v RUC*, Lords Bingham and Steyn, dissenting (Section 6)).

[3] This doctrine held that an employee could not bring an action in respect of the tort of a fellow employee (of the same master). The doctrine no longer exists in any form. See further Chapter 7, in respect of *volenti non fit injuria* (willing acceptance of risk).

[4] See in particular the decision of the House of Lords in *Butler v Fife Coal Co Ltd* [1912] AC 149.

[5] For a sense of how widely the regulations have been the subject of court decisions, readers may glance at M. Jones (ed.), *Clerk and Lindsell on Torts* (23rd edn, Sweet & Maxwell, 2020), chapter 12.

[6] For discussion see N. Tomkins, ‘Work Equipment and Duties on Employees’ (2010) Journal of Personal Injury Law 1–9.

[7] N. Tomkins, ‘Civil Health and Safety Law After the Enterprise and Regulatory Reform Act 2013’ (2013) JPIL 203.

[8] We explored the capacity of the tort of negligence to produce relatively strict forms of liability in Chapter 11.

[9] See also Chapter 2 for discussion of the case in relation to civil conspiracy.

[10] It is important to notice that one of Lord Diplock’s more puzzling pronouncements—that ‘a mere prohibition on members of the public generally … is not enough’ *relates specifically to this narrow category of case*. Lord Diplock does *not* say here that failure to abide by a prohibition imposed on the general public cannot ever amount to a breach of duty; nor even that it cannot ever give rise to an action for breach of statutory duty. He simply says that such a prohibition will not suffice to create legal rights on the part of the public generally (whatever that might mean).

[11] The authors of the leading work on breach of statutory duty say that 'little is known' about this category, and that 'No action has been successfully based on these words since they were uttered' (Stanton et al, *Statutory Torts*, 2.024, p. 38).

[12] The prisoners also brought actions for false imprisonment (see Chapter 2). These actions also failed: the change in conditions of imprisonment could not make their imprisonment unlawful.

[13] As the dissenting judges pointed out, this may not be a very practicable remedy in the circumstances: 'There are formidable problems in a detainee applying for judicial review when he has been denied access to a solicitor' (at [20]).

[14] The equivalent provision is now s 143 of the Road Traffic Act 1988.

[15] This is reinforced by the decision in *Bretton v Hancock* [2005] EWCA Civ 404; (2005) RTR 22. The statutory duty under s 143 Road Traffic Act 1988 does not exist for the purpose of reimbursing economic losses in the form of liability through contribution (Chapter 7).