Singapore Journal of Legal Studies
[1996] 362 – 388

BREACH OF STATUTORY DUTY – A DIMINISHING TORT

The tort of breach of statutory duty is currently in a somewhat precarious state. In England, the courts in recent years have shown a tendency to refuse claims for breach of statutory duty in almost all cases other than those involving issues of industrial safety. In Singapore, decisions have been reached in which it is doubtful whether the tort has been considered or applied at all.

This article discusses the traditional approaches to the tort of breach of statutory duty, considers its present (and arguably unsatisfactory) position in the law, and examines the prospects for its future as a tort of diminished status and limited application.

I. INTRODUCTION

THE tort of breach of statutory duty has been well-established for centuries. It offers a common law remedy to a plaintiff who has suffered damage at the hands of a defendant in circumstances where the defendant's act has breached a statutory provision. Its scope and potential are immense, and yet its role varies greatly from jurisdiction to jurisdiction; it has had severe, and, at times, apparently arbitrary, restrictions placed on it; and it is increasingly being ignored in favour of the more attractive, yet theoretically less extensive, tort of negligence.

In Singapore, the courts have historically adopted the same fundamental approach to the tort as that traditionally adopted by the English courts, *ie,* the tort has been regarded as being completely separate from that of negligence, and it has offered a remedy for breach of a legislative obligation to an individual aggrieved by that breach. Yet in both jurisdictions – though for somewhat different reasons – the tort is currently in a somewhat beleaguered state. This article will examine the position of actions for breach of statutory duty in both England and Singapore, and it will consider the prospects for its future as an independent tort.

II. The Tort of Breach of Statutory Duty

A. *The Approaches to Actions for Breach of Statutory Duty*

There are three distinct approaches which can be taken when considering how to treat the breach of a statutory obligation for which damages are sought at common law. One approach is to treat the breach simply as *prima facie* evidence of negligence, and to require the plaintiff to sue for damages under the tort of negligence. Under this approach the defendant will still be able to avoid liability for negligence if he can bring evidence to suggest that the breach was not in fact negligent. The first approach is favoured in several North American jurisdictions,[1] notably those which reject the notion that strict liability has a role to play in this area.

A second approach is to take the view that the breach of a statutory obligation effectively assures the plaintiff of a successful action in negligence (subject, of course, to any relevant defences). This approach, which really amounts to negligence *per se*, has been adopted in some other North American jurisdictions, and it can in some ways be said to combine strict liability with negligence.[2] The approach found favour on some occasions in the past with the English courts,[3] and this article will consider whether an argument can be made that something approaching it is beginning to be favoured again.[4]

These two approaches (although principally the second) tend to be referred to as "statutory negligence", since the only action which they offer an aggrieved plaintiff is in the tort of negligence.[5]

1 See, *eg*, *The Queen in Right of Canada* v *Saskatchewan Wheat Pool* (1983) 143 DLR (3d) 9, at 23.

2 Under this approach the failure on the part of the defendant to meet the standard laid down in the statute is automatically regarded as unreasonable behaviour amounting to negligence – so liability, although not strict in the literal sense (since it cannot attach regardless of fault), is nevertheless "strict" in the sense that the defendant who has breached a statutory provision cannot argue that he was *not* at fault (*ie,* that he was *not* negligent).

3 See, *eg*, *Lochgelly Iron & Coal Co Ltd* v *M'Mullan* [1934] AC 1, where Lord Atkin stated, at 9: "All that it is necessary to show is a duty to take care to avoid injuring; and if the particular care to be taken is prescribed by statute, and the duty to the injured person to take care is likewise imposed by statute, and the breach proved, all the essentials of negligence are present".

4 See, discussion *infra*, text at note 44.

5 The two approaches bear a passing resemblance to the concept of *res ipsa loquitur*, under which a plaintiff who is injured by something under the control of the defendant may, in certain circumstances, sue in negligence even though he cannot actually show that the damage occurred through the defendant's negligence. Depending on the approach taken by the court, the effect of using *res ipsa loquitur* may be to establish either a rebuttable, or a virtually conclusive, case in negligence.

The third approach, and one which has, in the past, been widely adopted by English, Australian and local courts,[6] is that of treating an action for the breach of a statutory duty as a distinct tort, with its own elements.[7] Under this approach liability can be strict, since no fault on the part of the defendant is necessary (unless the statute in question requires fault before there can be a breach), and damages will be awarded quite independently of any available action in negligence. However, in order to bring an action for breach of statutory duty as a separate tort, a further, and crucial, requirement must be fulfilled before the court will entertain the claim. The court must be satisfied that the legislature intended, when drafting the legislative provision in question, to create an entitlement to damages at common law for its breach.[8] It is this requirement which poses the greatest problems and which leads to the most uncertainty as to the scope and application of the tort.

B. *How Parliamentary Intention is Determined*

There is no difficulty in determining whether or not the legislature intended the provision to give rise to a common law remedy for breach in circumstances where this is spelt out in the statute itself.[9] However, since most statutes are silent on this question, the courts frequently face the unenviable task of seeking to determine the intention of a draftsman who may well never have given a moment's thought to the question of whether a breach of the provision in question should or should not give rise to an action for damages

6 See discussion *infra*, text at note 57.

7 These elements are the same as those required in an action for negligence – *ie*, duty, breach and causation and remoteness of damage. However, the requirements of the elements in this tort differ from the requirements of the same elements in negligence in a way which reflects the differing nature of the two torts. Duty under the tort of breach of statutory duty requires only that the plaintiff is within the class of persons protected by the statute and breach can be established simply by showing that the statutory provision has been breached. The defendant must also have caused the damage (the plaintiff must not be the sole author of his own misfortune) and the damage must be of the type contemplated by the statute – *ie*, it must be within the scope of the risk.

8 The requirement may not always have been imposed. In older cases, such as *Couch* v *Steel* (1854) 3 E&B 402, the courts were prepared to grant a remedy for breach of statutory duty fairly freely. However, since at least the 1870s (in cases such as *Atkinson* v *Newcastle Waterworks Co* (1877) 2 ExD 441) the need for parliament to have intended a remedy to be available has been recognised. Thus, by the time that the House of Lords came to decide *Culter* v *Wandsworth Stadium Ltd* [1949] AC 398 (*Cutler's case*), Lord Simonds was able to make the classic assertion (at 407) that parliament must have intended to grant a common law remedy for breach and that: "the only rule which ... is valid is that the answer must depend on a consideration of the whole Act and the circumstances ... in which it was enacted."

9 See, *eg*, the Singapore Copyright Act (Cap 63, 1988 Rev Ed), s 119 of which specifically states that aggrieved individuals may sue at common law for breach of its provisions.

in tort. The intention which is thus retrospectively ascribed to parliament is, as a consequence, frequently purely fictional.[10] Because of the artificiality and uncertainty of this process, the United Kingdom Law Commission, when considering the matter more than twenty-five years ago,[11] recommended that there should be an Interpretation Act passed stating that every statute should (in the absence of specific exclusionary wording) be presumed to give rise to a cause of action for breach of statutory duty on the part of an aggrieved individual. This recommendation was, however, never adopted, and the present position (both in the United Kingdom and in Singapore) is far closer to one where most statutes are presumed *not* to give rise to such an action.

The task of determining whether or not parliament can be said to have intended a particular piece of legislation to give rise to an action for damages at common law has, historically, been approached by applying various presumptions. However, most , if not all, of these presumptions are rather vague, have been used in contradictory ways, or have failed for other reasons to prove reliable, and as a result there is no sure way to anticipate what conclusion a court is likely to reach on the question of parliamentary intent in a particular case. Indeed, Lord Denning once observed that: "You might as well toss a coin to decide" the matter.[12]

(i) *Inadequacy of the statutory remedy*

One of the oldest presumptions relates to the adequacy or otherwise of the statutory remedy. In cases where the statute imposes a duty but offers

[10] The problem of determining parliamentary intent does not arise in the same form in cases of statutory negligence, where there must be a pre-existing common law duty in the tort of negligence before the relevant statutory provision can be used to determine whether or not that duty has been breached. The existence or otherwise of this common law duty thus determines whether the breach of a statutory provision can or cannot give rise to a cause of action on the part of an aggrieved individual. In statutory negligence cases it can thus be argued that the need to search for the "fictional" legislative intent is avoided. On the other hand, as Michael A Jones in his *Textbook on Torts* (4th ed, 1993) points out at 297, this connection between the statutory provision and the existing common law can be seen as creating "a presumptive parliamentary intent that when a statute fits the rule (*ie*, covers the same ground as an existing common law rule) breach will give rise to civil liability". Seen in this light, even cases of statutory negligence involve an assumption as to parliamentary intent, and one which is arguably no less fictional than that sought in cases where breach of statutory duty is being treated as a separate tort.

[11] Law Com No 21, 1969. The proposal was included in the Interpretation of Legislation Bill 1980, but this bill was subsequently withdrawn.

[12] *Ex p Island Records Ltd* [1978] Ch 122, at 135. See, too, the leading article by Glanville Williams, "The Effect of Penal Legislation in the Law of Tort" (1960) 23 MLR 233 at 247, in which Williams states: "In effect, the judge can do what he likes, and then select one of the conflicting principles stated by his predecessors in order to justify his decision."

no remedy or penalty for its breach at all, and states no other means of enforcement, it tends to be assumed that a common law remedy *will* be available, since otherwise "the statute would be but a pious aspiration".[13] Generally, the opposite is also true, and in cases where the statute *does* provide for a remedy or penalty and/or a means of enforcement, it is assumed that the common law *will not* supplement this.[14] There have, however, been cases where, even though the statute in question has provided a remedy, the courts have seen fit to add a further remedy in tort. The best known example of this is probably to be found in *Groves* v *Lord Wimborne*[15] where, even though the relevant legislation (relating to industrial safety) provided for a fairly substantial fine, part or all of which could be applied for the benefit of the person injured by breach of the statute's provisions, the Court of Appeal nevertheless granted the plaintiff additional damages at common law on the grounds that the statutory remedy was inadequate. It must be recognised, though, that, for various reasons, *Groves' case* cannot be seen as typical and can be explained on other grounds,[16] so its significance in this respect is limited. There are certainly few other cases in which a similar conclusion as to the inadequacy of the statutory remedy has been reached.

[13] *Per* Lord Simonds in *Cutler's case, supra,* note 8, at 407. See, too, the Malaysian case of *Hu Sepang* v *Keong On Eng & Ors* [1991] 1 MLJ 440. However, statutes which contain no mechanism for enforcement are not common, and some commentators argue that to create a common law remedy with respect to statutes of this kind is inappropriate, since they frequently concern public bodies which require a considerable degree of discretion. See Buckley "Liability in Tort for Breach of Statutory Duty" (1984) 100 LQR 204, at 217 *et seq*, and the discussion of this point in Jones, *supra* note 10, at 292. For a good general, discussion of the area, see too KM Stanton *Breach of Statutory Duty as a Tort* (1986).

[14] See, *eg*, *Wentworth* v *Wiltshire County Council* [1993] 2 WLR 175 and the much earlier case of *Atkinson* v *Newcastle Waterworks Co*, *supra*, note 8. See, too, the local case of *Toh Muda Wahab* v *Petherbridge* (1905) 9 SSLR App 1), where it was held that no action (except for any action independent of the statute) could lie for injuries sustained through non-performance of a duty imposed by statute when the statute already imposed penalties for such non-performance. The *dictum* of Lord Diplock in this respect in *Lonrho Ltd* v *Shell Petroleum Co Ltd and Another (No 2)* [1982] AC 173 at 185 (*Lonrho's case*) should also be noted. Lord Diplock, quoting the judgment of Lord Tenterden in the old case of *Doe d Murray* v *Bridges* (1831) 1 B & Ad 847 at 859, stated that: "where an Act creates an obligation, and enforces the performance in a specified manner ... that performance cannot be enforced in any other manner."

[15] [1898] 2 QB 402 (*Groves' case*).

[16] In *Groves' case*, the fact that the statutory penalty would not necessarily be applied for the benefit of the injured person (since this was subject to the discretion of the Secretary of State) and the fact that the fine reflected the severity (or lack thereof) of the offence, rather than the severity of the injury, clearly influenced the court in the plaintiff's favour. Moreover, the case can be analysed as one in which the plaintiff fell within a "protected class" (that of factory employees) – and the protected class category is one in which a presumed parliamentary intent has, at least historically, been more readily recognised. See discussion *infra*, note 21.

(ii) *Inadequacy of the common law remedy*

Another presumption, and one which is really the other side of the same coin, is the presumption that there should be a remedy in tort for breach of a statutory obligation only where the existing common law remedies are inadequate. Thus, where the common law provides a remedy in the relevant area, the courts tend to take the view that there should be no additional remedy for breach of statutory duty. So, for example, in *Phillips* v *Britannia Hygienic Laundry Co Ltd*[17] the Court of Appeal found that there could be no action for breach of statutory duty under regulations governing the state of repair of vehicles on the highway since there was already a cause of action available at common law (under the then developing tort of negligence). The existing common law actions upon which plaintiffs are forced to rely will frequently be less advantageous than an action for breach of statutory duty (since those actions do not normally offer the benefit of strict liability), but the courts effectively tend to take the view that the restrictions imposed by the existing remedies are deliberate, and that the tort of breach of statutory duty should not, therefore, be used to fill in gaps which are there for a reason.

This presumption has never, though, been particularly useful or decisive. In situations where the courts wish to provide a remedy based on strict liability, as, for example, in the case of employers' liability in the area of industrial safety legislation – the only area in which the ability to sue for breach of statutory duty is virtually guaranteed[18] – they do so quite readily even though other common law actions (notably in negligence) are available. And there is no rule in tort law that a plaintiff should have no action under one tort simply because other torts which might assist him exist.[19] Many commentators suggest that the real test where this presumption is concerned is whether the action for breach of statutory duty will undermine or merely supplement the existing common law remedy. If the former, the action should not be allowed; if the latter, then there can be no objection to it.[20]

[17] [1923] 2 KB 832 (*Phillips' case*). For a local application of *Phillips' case*, on similar facts, see *Tan Chye Choo & Ors* v *Chong Kew Moi* [1970] 1 MLJ 1.

[18] See discussion *infra*, note 26 *et seq*.

[19] There are many situations in which a plaintiff's cause of action may be covered by two or more torts – *eg,* actions for damage to property, where the torts of negligence, private nuisance (and the rule in *Rylands* v *Fletcher*) and public nuisance may all be applicable.

[20] See, *eg*, Rogers, *Winfield and Jolowicz on Torts* (14th ed, 1994) at 197, and Jones (*supra*, note 10) at 294. However, as Glanville Williams pointed out in his article, *supra*, note 12, at 247, (and as Jones notes at 295) there is no clear reason why the courts generally take the view that an action for breach of statutory duty will *not* undermine the common law in cases involving industrial safety, but that it *will* do so where road traffic – and other

(iii) *Protected class of plaintiffs*

A more commonly espoused presumption is that there should be an action for breach of statutory duty only when the plaintiff falls within a specific and limited class of persons whom the statute is designed to protect. Even judges who have rejected the possibility of actions for breach of statutory duty in almost all other circumstances have tended traditionally to recognise the possibility of suing as part of a protected class. Lord Diplock, for example, in his judgment in *Lonrho's case*, expressed in very clear terms the fact that although he would *not* normally accept that breach of a statutory duty would give rise to an action in tort on the part of an aggrieved individual, there were two exceptions to this rule, one of which was "... where on the true construction of the Act it was 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."[21] According to this view, where the plaintiff can bring himself within the finite and ascertainable group of persons for whose benefit the statute was passed, he will be entitled to sue for breach of statutory duty.[22] Where, however, the statute protects the public as a whole,[23] or where the purpose

– cases are involved. There have, in fact, been a handful of road traffic cases in which actions for breach of statutory duty *have* succeeded, but the rationale for allowing the actions in these cases is far from clear. In *Monk* v *Warbey* [1935] 1 KB 75 (*Monk's case*), the plaintiff was the victim of an accident caused by the negligence of an uninsured driver, and he succeeded in his action against the owner of the car. He had sued the driver successfully in negligence, but the driver did not have the means to compensate him. That case can, perhaps, be analysed as a rare situation in which the common law was *not* undermined by offering a remedy for breach of statutory duty in a road traffic case, since the action for breach of statutory duty in fact only enabled the victim to receive damages for the injuries which he had sustained as a result of a negligent act. The same cannot be said, though, of the few other road traffic cases where actions for breach of statutory duty have succeeded – see, *eg*, *London Passenger Transport Board* v *Upson* [1949] AC 155 (*Upson's case*), discussion of which can be found *infra*, text at note 65 *et seq*.

21 *Supra*, note 14, at 185. The other exceptional situation in which Lord Diplock considered that an individual would be able to sue for breach of statutory duty was where a member of the public suffers special or particular damage as a result of the breach of a statute conferring a public right (*ibid*). For discussion of this exception, see Stanton, *supra,* note 13, at 50-51.

22 *Groves' case* (*supra*, note 15) can be interpreted as having been decided using this presumption as well as that of the inadequacy of the statutory remedy. Note, though, that Rogers in *Winfield and Jolowicz on Torts* (*supra*, note 20) points out (at 194) that Lord Diplock's *dictum* with regard to this presumption was already out-dated when he made it, and that, except with regard to industrial safety cases, the protected class approach has been on the decline for some time.

23 See, *eg*, *Phillips' case* (*supra*, note 17) where the regulations concerned were for the benefit of all road users. Note, however, the criticism by Atkin LJ in that case of the use of this

of the statute is not to benefit the plaintiff but to achieve some other aim,[24] then the plaintiff's action will fail.

The problem in practice is that, industrial safety cases aside, it has become very difficult in recent years, even where the statute in question clearly identifies a group of persons as being protected, to find cases in which the courts are prepared to hold that the statute actually intends a cause of action to be accorded to the aggrieved individual.[25] This unwillingness on the part of the courts to regard a person's presence within a protected class as a sufficient ground for imputing a statutory intention to allow him to sue considerably reduces the impact and usefulness of the test. Indeed, as will be discussed below, in the English courts in the past few years, so many cases have failed even where the class of protected persons is clearly identifiable, that Glanville Williams' observation: "When it concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases, it is ignored",[26] seems even more accurate today than when it was written in 1960.

III. The Current Role of the Tort in the English Courts

Statistically, actions for breach of statutory duty continue to play a very significant role in the United Kingdom, principally because of the large

criterion as a means to determine whether or not there should be an action for breach of statutory duty. He expressed the view (at 841) that: "it would be strange if a less important duty which is owed to a section of the public can be enforced by an action, while a more important duty which is owed to the public at large cannot be so enforced". Rogers in *Winfield and Jolowicz on Torts* (*supra*, note 20) expresses the opinion (at 194) that Atkin LJ's views significantly undermine the force of the protected class approach.

[24] As, *eg*, in *Lonrho's case* (*supra*, note 14), where the aim of a statute imposing sanctions against Rhodesia was to precipitate the downfall of the illegal regime, not to protect businessmen who were economically disdvantaged by its breach, and *Cutler's case* (*supra*, note 8), where the aim of a statute requiring bookmakers to be allowed admission to dog tracks was to offer a service to the betting public, not to protect individual bookmakers from wrongful exclusion from racetracks. Similar reasoning was used in the local case of *Straits Steamship Co Ltd* v *Attorney General* [1933] MLJ 170, where the aim of the statute was to regulate merchant shipping by requiring vessels to employ duly certificated officers and not to protect individual shipowners who found it difficult to compete with companies who breached the statute by failing to employ such officers.

[25] Historically, there *have* been examples of actions other than those involving industrial safety legislation succeeding – see, *eg*, *Solomons* v *Gertzenstein Ltd* [1954] 2 QB 243, where visitors to premises where fire regulations were breached were found to have a cause of action, and *Upson's case* (*supra*, note 20 and text *infra*, at note 65 *et seq*), where pedestrians using a pedestrian crossing appear (somewhat oddly) to have been regarded as falling within a protected class and thus able to sue for breach of statutory duty.

[26] *Supra*, note 12, at 233.

number of industrial safety cases which are litigated there. However, as has already been indicated, the proportion of successful breach of statutory duty cases outside this category, which was always small at best, appears to be becoming ever smaller.

A. *The Trend in Recent Years*

If one looks at a series of diverse cases in recent years – cases which are connected only by the fact that they do not concern industrial safety – the intolerance of the courts towards actions for breach of statutory duty is quite apparent. The movement against recovery outside the area of industrial safety, obviously already well-entrenched when Williams was writing in the early 1960s,[27] appears to have been strengthened by the much-quoted judgment of Lord Diplock in *Lonrho's case* at the beginning of the 1980s – in which his Lordship emphasised the general non-availability in tort of actions for breaches of statutes which provide other mechanisms for enforcement.[28]

That the courts are now almost universally unwilling to recognise breaches of statutory obligation as being actionable by individuals who are not suing under industrial safety legislation can be seen in three notable decisions in the late 1980s and early 1990s. In each of the decisions, all delivered by Lord Bridge, the House of Lords rejected unequivocally the claims of various plaintiffs whose claims were by no means implausible.

In *Calveley* v *Chief Constable of Merseyside Police*[29] the House held that police officers under investigation could not sue those investigating them for breach of the Police Act and its associated regulations.[30] Lord Bridge (who gave the judgment of the court) accepted that the duty imposed by the legislation was for the benefit of persons in the position of the officers under investigation, but he considered that the legislation was not intended to offer the aggrieved officers actions for compensation. The duty was, in Lord Bridge's view, imposed as a procedural step, and the officers' only remedy for its breach was judicial revew.[31] His Lordship also expressed the view that the type of damage suffered (anxiety, vexation and injury to reputation) was not compensable. Nor, on the facts of the case, was the claim which the officers brought for economic loss (which was held not to be foreseeable). His analysis in this respect was dealt with as part of

[27] *Ibid.*
[28] See *supra*, note 14.
[29] [1989] 1 AC 1228 (*Calveley's case*).
[30] The Police Act 1964 and the Police (Discipline) Regulations 1977.
[31] *Supra*, note 29, at 1237.

his analysis of the type of damage for which compensation could be awarded under the tort of negligence, and he apparently took the view that exactly the same principles applied to both torts.[32]

Two years later, in *Pickering* v *Liverpool Daily Post and Echo plc*,[33] the House of Lords rejected a claim for damages by a man who was detained under the Mental Health Act[34] (following serious sexual offences which he had committed against young girls). He sought compensation from newspapers which, in contravention of the Act, had published details of his application for discharge. Their Lordships took the view that it was not enough to show that the legislation was designed to protect the plaintiff. This was a necessary, but not a sufficient, criterion for bringing an action for breach of statutory duty. Lord Bridge, again focusing on the type of injury involved, stated:

> 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 a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss ... publication of unauthorised information about proceedings on a patient's application for discharge to a mental health tribunal, though it may in one sense be adverse to the patient's interest, is incapable of causing him loss or damage of a kind for which the law awards damages.[35]

In the same year, the House of Lords decided another breach of statutory duty case, which again involved a consideration of the type of damage involved. In the conjoined appeals in *Hague* v *Deputy Governor of Parkhurst Prison and others* and *Weldon* v *Home Office*,[36] their Lordships held that the Prison Act and the Prison Rules[37] could not have been intended to give individual prisoners aggrieved by their breach a cause of action for breach of statutory duty, even though the rules had clearly been designed for the protection and benefit of prisoners. The alleged breaches related, in one case, to the wrongful imposition of solitary confinement for a sustained period and, in the other, to the wrongful placing of a prisoner in a strip

32 *Ibid*, at 1238.
33 [1991] 2 AC 370 (*Pickering's case*).
34 Mental Health Act 1983.
35 *Supra*, note 33, at 420.
36 [1991] 3 WLR 340 (*Hague and Weldon's case*).
37 The Prison Act 1952 and the Prison Rules 1964.

cell overnight.[38] Both actions were based on deprivation of liberty and of risks to the prisoners' health, rather than on actual physical damage. Lord Bridge considered that the rule in question (relating to segregation of prisoners) was "to give an obviously necessary power to segregate prisoners who are liable for any reason to disturb the orderly conduct of the prison generally".[39] In his opinion, where the power had been exercised wrongly, but in good faith, it was "inconceivable" that the legislature should be regarded as having intended the prisoner to be able to sue for its breach. In reaching this conclusion, however, he also observed that not only was recognisable damage required before an action for breach of statutory duty could succeed – but in virtually every action in which plaintiffs suing as part of a protected class had been successful, they had suffered personal injuries.

It is understandable that, in most breach of statutory duty cases, the plaintiff seeks damages to compensate him for actual physical harm which he has suffered (usually in the form of personal injury). Since the majority of breach of statutory duty cases relate to industrial safety situations, one would hardly expect otherwise. However, the fact that *most* claims for damages will involve physical injury of some kind is no reason to deny claims in the types of cases where such a form of injury is not relevant.

An action for breach of statutory duty should not undermine the existing common law, but why is there a risk of this happening simply by offering a remedy for a type of injury which cannot be quantified in physical or economic terms? Although, generally speaking, tort law does not offer compensation for pure mental or physical distress, there are well-established exceptions to this rule. Where a fundamental right – such as that of bodily integrity – is intentionally infringed, it has always been accepted that an invasion of that right is actionable *per se*. Breach of statutory duty is, of course, a strict liability tort, at what is normally seen as the other end of the spectrum from the intentional torts, and most breach of statutory duty cases involve defendants who have not been at fault (in the sense of acting intentionally or negligently) at all. It would clearly be wrong to make a defendant liable for breach of statutory duty when he has not been at fault and has caused no tangible damage – there is no argument about that. Where, however, it can be shown that the defendant *was* at fault, and, moreover, that he actually *intended* to breach the statute and infringe the right in question, then there can be no reason to deprive the plaintiff of a cause of action simply because no physical or economic damage can be shown.

[38] Both prisoners also sued, unsuccessfully, for false imprisonment, and Weldon, in addition, brought an action for assault and battery.

[39] *Supra*, note 36, at 350. Lord Jauncey expressed similar views (*ibid,* at 359-360).

In some situations of this kind, an alternative action for misfeasance in public office may, it is true, be available – but this will not always be the case.[40] Where the breach of a stautory provision deliberately infringes a fundamental right, it ought to be possible to bring an action for breach of statutory duty without proof of damage, and, indeed, in some old cases the courts were prepared to grant a remedy in such circumstances.[41] It is by no means clear whether such a deliberate infringement of fundamental rights could actually have been established in *Calveley's case*, *Pickering's case* or *Hague and Weldon's case* – but the fact that their Lordships were not even prepared to recognise the possibility of an action for breach of statutory duty being successful in such circumstances indicates a narrowness in dealing with the tort which is not encouraging.[42]

What, then, is the explanation for their Lordships' decisions in these cases (and in other cases decided during the same period)?[43] If one adopts the traditional approach of treating breach of statutory duty and negligence as distinct torts, then the suggestion that the tort of breach of statutory duty will come to the aid of a plaintiff *only* where the damage which he has suffered is of the same type as that which he would be required to establish under the tort of negligence (*ie,* personal injury, property damage, or, exceptionally, economic loss) can be criticised as blurring the lines between the two torts to an unnecessary and unjustifiable degree. On the other hand, if one were to adopt the alternative approach – that breach of statutory

[40] Under this tort, which was first recognised in *Bourgoin SA* v *Ministry of Agriculture, Fisheries and Food* [1986] QB 716, but has been little used, such actions lie when a public official acts without justification and with the intention to injure the plaintiff and/or with the knowledge that he is infringing an individual's rights.

[41] See, *eg*, *Ashby* v *White* (1703) 2 Ld Raym 938. The case involved a returning officer who, in breach of a statute governing elections, wrongfully refused to register the plaintiff's vote. Clearly in that case no tangible damage was sustained, but the fact that the "fundamental" right to vote had been breached was sufficient to give rise to a an action for breach of statutory duty. (The law has since changed, and it is no longer possible to sue in such circumstances). See too *Ferguson* v *Earl of Kinnoull* (1842) 9 Cl & Fin 251, where the House of Lords held the refusal on the part of the defendant to fulfil his statutory obligation to determine the suitability of the plaintiff, a minister of religion, for a living to which he had been presented to be actionable *per se*. For discussion of breach of statutory duty actions being available without proof of tangible damage, see, too, Fordham, "Falsely Imprisoning the Legally Detained Person – Can the Bounds of Lawful Detention Ever be Exceeded?" [1991] SJLS 348, at 367.

[42] Margaret Brasier in *Street on Torts* (9th ed, 1993) makes this point at 409. It must be conceded, though, that few other commentators appear to be concerned about the concept of resricting this tort to cases where tangible damage of the kind generally recognised in tort has been caused. See, *eg*, Jones, *supra*, note 10, at 291 and Winfield & Jolowicz, *supra*, note 20, at 192-193.

[43] See, *eg*, *Murphy* v *Brentwood District Council* [1991] 1 AC 398.

duty merely offers sufficient proof of breach of the common law duty of care to enable the plaintiff to bring an action in the tort of negligence – then this criticism would become irrelevant. It may well be that what has actually been taking place in the House of Lords in recent years has been a trend (albeit unacknowledged) towards treating cases involving breaches of statutory duty – except where industrial safety statutes are concerned – as something almost approaching statutory negligence,[44] where there is an inseparable link between breaching the duty under the statute and breaching the common law duty of care (since breach of the first will allow an action in tort for breach of the second), but where no additional, independent, action will be available.

It should, however, be pointed out that this possible interpretation of the decisions reached by the House of Lords in recent years does not accord with the interpretation which the members of the House would themselves be likely to favour. That their Lordships still, at least ostensibly, regard breach of statutory duty as a truly separate tort is apparent if one looks at the most recent decision in this area – that of *X and others (minors)* v *Bedfordshire County Council and others*.[45] However, that case, too, suggests a narrowing down of breach of statutory duty as a distinct tort, and reinforces the general impression that it now stands in the shadow of the tort of negligence.

B. *The Case of X and Others*

The case of *X and others* was actually a conjoined appeal dealing with five separate claims brought by various individuals against three local authorities, involving allegations of, in two cases, the abuse of children and, in the remaining three cases, the failure to offer educational facilities sufficient to meet the needs of children.

In the first abuse case, a mother who alleged that her child had wrongly been taken from her by the local authority because it was supected that her companion had sexually abused the child sought damages to compensate herself and the child for the anxiety neurosis which had resulted from their ordeal. In the second abuse case, where the local authority was alleged wrongly to have failed to remove children from the parents who ill-treated and neglected them, the children sought damages for illness and impairment of their health and proper development. In both these claims, the compensation sought was, therefore, for personal injuries in the form of physical damage and/or nervous shock. At trial level the claims were struck out as

[44] See, *supra*, note 4 for discussion of statutory negligence.
[45] [1995] 2 AC 633 (the case of *X and others*).

disclosing no reasonable cause of action, and the Court of Appeal upheld this finding.

In the first education case, the claim alleged that a local authority had failed to provide special education for a child whose parents then had to pay to send the child to a special school in the private sector, and the parents were therefore seeking compensation for the school fees thus incurred. In the second education case, the local authority had allegedly failed to assess and treat a child's learning difficulties (which were consistent with dyslexia) with the result that the child's educational attainment, and thus his employment prospects, had been severely limited, and the claim was to compensate the child for his lack of education and job prospects. In the third education case, the allegation was that a child of at least average ability had wrongly been placed in a series of special schools where his intellectual development had been stifled, with the result that he had been placed at a disadvantage in seeking employment, and his claim, too, related primarily to his lack of employment prospects. All three of these claims, therefore, involved actions for economic loss. The trial judge struck out all three claims as disclosing no reasonable cause of action. On appeal, the Court of Appeal held that the claims for breach of statutory duty had rightly been struck out but that the claims for negligence were not unarguable or incontestably bad and should be allowed to proceed.

The plaintiffs in the abuse cases and the education authorities in the education cases appealed to the House of Lords. The plaintiff in one of the education cases cross-appealed. Lord Browne-Wilkinson, giving the judgment of the court, categorised these private law claims against public authorities in this way:

(A) actions for breach of statutory duty *simpliciter* (*ie,* irrespective of carelessness);

(B) actions based solely on the careless performance of a statutory duty in the absence of any other common law right of action;

(C) actions based on a common law duty of care arising either from the imposition of the statutory duty or from the performance of it;

(D) actions for 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 was unlawful.[46]

[46] *Ibid*, at 730-731.

Category (D) Lord Browne-Wilkinson immediately dismissed as not being at issue on the facts of the various appeals, since there was no question of any of the acts or omissions being done either with the knowledge that statutory provisions were being breached or with the intention to harm the children concerned.[47] That left three categories – all concerned to varying degrees with breach of statutory duty and negligence – to be considered.

Of these categories, category (B) related to situations in which a statutory duty might be breached carelessly, and a plaintiff might then wish to sue for that careless behaviour even if there were to be no existing common law duty of care, and thus no available action in negligence. This odd twilight zone between suing for breach of statutory duty and suing for negligence was dismissed by his Lordship as giving rise to no cause of action at all independently of either category A (a straightforward action for breach of statutory duty) or category C (an action in negligence),[48] and need not be discussed further.

In category (C) Lord Browne-Wilkinson examined the common law duty of care in the tort of negligence and considered the circumstances in which such a common law duty could be established by reference to an existing statutory duty. His Lordship was clearly *not* concerned here with anything which could be said to approach statutory negligence, since his emphasis was on the role of breach of statutory duty in establishing the *duty* of care, rather than on its role in establishing *breach* of that duty. The main significance of his Lordship's analysis in this respect is the way in which his views on the existence of a duty of care in negligence on these facts appear to have influenced his parallel reasoning with regard to the claim for breach of statutory duty.[49]

The remaining category, (A), referred to by Lord Browne-Wilkinson as "breach of statutory duty *simpliciter*", was (self-evidently) the category under which his Lordship examined the tort of breach of statutory duty. It must be acknowledged in this respect that, in dealing with the concept of breach of statutory duty, Lord Browne-Wilkinson appears to have adopted the traditional approach of treating it as an independent, free-standing tort giving rise to strict liability on the part of the defendant. Nowhere in his analysis is there any suggestion that a claim for breach of statutory duty has any

[47] For discussion of misfeasance in public office, see *supra*, note 40.

[48] Lord Browne-Wilkinson considered that the proposed action arose as a result of "confusion between the ability to rely on a statutory provision as a defence and the ability to rely on it a founding a cause of action" (*supra*, note 45, at 732). In his opinion, the confusion was to be attributed to a *dictum* by Lord Blackburn in *Geddis* v *Proprietors of Bann Reservoir* (1878) 3 App Cas 430 at 455-456 about the actionability of careless acts pursuant to a statutory duty or power being taken out of context.

[49] See discussion, *infra* text at note 56 *et seq*.

connection at all with the tort of negligence (indeed the deliberately distinct categorisation of the two suggests quite the opposite). Yet, in its own way, Lord Browne-Wilkinson's judgment continues the process of undermining the tort of breach of statutory duty and confirms the reluctance of the courts to allow actions under it to succeed.

In dealing with the various claims, Lord Browne-Wilkinson treated the two categories (education and abuse) separately. With regard to the education claims, he took the view that although some of the claims – those based on the need to provide special schooling for children with special educational needs – *were* brought by members of a limited class for whose protection the statutory provisions were enacted, there was nothing in the relevant Acts[50] to demonstrate a parliamentary intention to give those children a statutory right of action for damages. Under the legislation, too much was left to be decided by the relevant local authority to indicate that Parliament intended to confer a private right of action. Where the abuse cases were concerned, his Lordship concluded that all the relevant statutes were concerned to establish an administrative system designed to promote the social welfare of the community. Although conceding that, where these claims, too, were concerned, the legislation at the heart of the dispute[51] had been introduced primarily for the protection of a limited class – children at risk – he did not consider this in itself to be sufficient to give rise to a cause of action on the part of those aggrieved by its breach. Thus in neither the education nor the abuse cases was the fact that the claimants fell into a protected class sufficient to provide them with a cause of action for breach of statutory duty. His Lordship's decision in this respect is consistent with Lord Bridge's reasoning in *Calveley's case*, *Pickering's case* and *Hague and Weldon's case*, and reinforces the view that being within a protected class (even a class as sensitive and deserving as that of children at risk for whom legislation is specifically designed) is no longer of much use to anyone who cannot show that he is a factory employee protected by industrial safety legislation.

Lord Browne-Wilkinson explained his conclusion that being part of a protected class was insufficient to give rise to a cause of action by reference to various factors. Where the abuse cases, in particular, were concerned, his Lordship indicated that, given the type of legislation, the sensitive matters with which it was concerned, the inadequacy of the information available to those making decisions under it, and the disputed nature of the facts involved in the decision-making process:

[50] The Education Acts 1944 and 1981.

[51] The Children and Young Persons Act 1969, the Child Care Act 1980 and the Children Act 1989.

> ... it would require exceptionally clear statutory language to show a parliamentary intention that those responsible for carrying out these difficult functions should be liable in damages if, on subsequent investigation with the benefit of hindsight, it was shown that they had reached an erroneous conclusion and therefore failed to discharge their statutory duties.[52]

His Lordship went on to refer to the fact that the various Acts in dispute (again, particularly those in the abuse cases) also depended largely on the subjective judgment of the local authorities concerned, and/or to the authority taking "reasonable steps" to do certain things or making "such inquiries as they consider necessary".[53] In the circumstances, he concluded that; "[t]o treat such duties as being more than public law duties is impossible",[54] and he went on to criticise an earlier case in which it had been held that a statute *could* create a private law cause of action even if the duty were dependent upon the defendant first having formed a subjective belief.[55]

On the facts of the particular cases with which Lord Browne-Wilkinson was concerned in the case of *X and others*, it might well have been very difficult to show that the relevant statutory duties had actually been breached. Where (as in those cases) breach is not a matter of strict liability, but depends instead on persons failing to take necessary steps or, even more vaguely, failing to make such inquiries as *they* consider necessary, it will not be possible to establish breach without evidence of unreasonable behaviour (and even with such evidence the task might be a hard one given the wide discretion involved). But the effect of Lord Browne-Wilkinson's reasoning seems to be that because on the facts it would have been difficult, given the subjectivity of the various cases, to determine whether there had actually been a *breach* of any of the relevant statutory duties, it was therefore impossible for the aggrieved individuals concerned to argue that they were owed any actionable *duty* under the statutes in the first place. Why should this be so?

It may well be that what actually happened in this case was that Lord Browne-Wilkinson looked at the position with regard to the tort of negligence and effectively mirrored that position when considering the relevance of the tort of breach of statutory duty. Although, as his Lordship conceded, there *can* be a duty of care in negligence in situations where a decision

52 *Supra*, note 45, at 747.
53 See, *eg*, s 47 and Sch 2 of the Children Act 1989, *supra*, note 51.
54 *Supra*, note 45, at 748.
55 The case concerned was *Thornton* v *Kirklees Metropolitan BC* [1979] 2 All ER 349. See the criticism and discussion of this case by Buckley, *supra*, note 13, at 217 *et seq*.

"is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority",[56] it is notoriously difficult to establish a duty in such circumstances, and his Lordship held that, in none of the conjoined appeals in *X and others*, could a duty of care actually be established. This was because, even if the cases were not rendered unjusticiable on policy grounds (a matter of which he was clearly not convinced), it would nevertheless not be just and reasonable to impose a common law duty of care in circumstances where discretionary powers were conferred by Parliament for social welfare purposes. Having reached the conclusion that there could be no duty of care in negligence – which meant that consideration of whether or not any hypothetical duty of care had been breached was irrelevant – his Lordship seems to have decided that there could be no duty under the tort of breach of statutory duty either, so that deciding whether or not there was sufficient evidence of breach of the applicable statutes was also irrelevant. Without really examining *why* the position under the two torts should be the same, his Lordship – like Lord Bridge in *Calveley's case*, *Pickering's case* and *Hague and Weldon's case* – seems to have taken the view that it *was*. It is quite possible that the same basic reasons – of policy – did in fact underlie the decisions with regard to both torts in the case of *X and others*, but the impression which one gains from looking at this decision is that, these days in England, an action for breach of statutory duty is extremely unlikely to succeed where an action for negligence fails.

IV. The Current Role of the Tort in the Singapore Courts

In Singapore the tort of breach of statutory duty also seems to be under threat, though in somewhat different circumstances from those in the England.

As elsewhere, industrial safety cases have always formed the backbone of actions for breach of statutory duty in both Singapore and Malaysia.[57]

[56] *Supra*, note 45, at 736.

[57] See, *eg*, *Toh Muda Wahab* v *Petherbridge* , *supra*, note 14, *Seng Chong Metal Works Ltd* v *Lew Fa* [1966] 2 MLJ 63, *Wong Soon San* v *Malayan United Industrial Co Ltd* [1967] 1 MLJ 1, *Tan Sin Chong* v *Hong San Kwong Onn Chuan Foundry* [1968] 1 MLJ 62, *Ng Kay Thiam & Anor* v *Redhill Paper Converters Ltd* [1971] 2 MLJ 256, *Tay Cheng Teck* v *Tropical Produce Co Pte Ltd* [1971] 2 MLJ 247, *Mohamed Husin* v *Shum Yip Leong Rubber Works Ltd* [1972] 1 MLJ 17, *Wee Bian Hock* v *Keppel Shipyard (Pte) Ltd* [1979] 1 MLJ 13, *Ong Beng How* v *Guan Seng Sawmill (Pte) Ltd* [1979] 1 MLJ 8, *Ho Teck Fa* v *Looi Wah t/a Looi Construction* [1981] 1 MLJ 162, *Goh Eng Chye* v *Amalgamated Lumber Sdn Bhd* [1982] 2 MLJ 180, and *Soon Pook Seng, Arthur* v *Oceaneering International Sdn Bhd* [1993] SLR 600.

Historically, *some* actions have been initiated in other areas – for example, the old case of the Court of Appeal of the Straits Settlements in *Straits Steamship Co Ltd* v *Attorney General*,[58] where an action was brought by the operators of vessels who were economically disdavantaged when other vessels were exempted from shipping regulations requiring them to have duly certificated officers, and the decision of the Privy Council in *Tan Chye Choo* v *Chong Kew Moi*,[59] in which, on facts very similar to those in the decision of the English Court of Appeal in *Phillips' case*, an action for breach of statutory duty was brought with regard to the unroadworthiness of a motor vehicle. However, both those claims were ultimately unsuccessful. The only successful non-industrial safety case (though only at a preliminary level) to be decided as a breach of statutory duty action was the Malaysian decision of *Hu Sepang* v *Keong On Eng and Others*[60] in which the High Court refused to strike out an action brought against the police by a person who claimed that they had failed to render him assistance while he was being assaulted.

There have, however, been examples in Singapore in recent years of the courts deciding non-industrial safety cases turning on the application of statutory provisions as if they were simply actions in negligence, or, alternatively, actions in which it is not necessary to decide the matter specifically under the umbrella of either negligence or breach of statutory duty. These cases are interesting for their complete lack of attention even to the idea of the tort of breach of statutory duty. An example is to be found in the case of *Ng Weng Cheong* v *Soh Oh Loo & Another*,[61] a 1993 decision of the Singapore Court of Appeal.

A. *Ng Weng Cheong's Case*

In *Ng Weng Cheong's case*, the plaintiff was a pedestrian, who was knocked down by a bus when crossing the road at a pedestrian crossing. At the time of the accident, the lights were against him. The case originated in the District Court, where no mention was made of the applicable legislative provisions – the Road Traffic (Pedestrian Crossings) Rules.[62] When the matter reached the High Court, leave was given to consider the possibility that these rules had been breached. The relevant rules were rule 5, which stated that: "the driver of every vehicle approaching a pedestrian crossing shall, unless he

[58] *Supra*, note 24.
[59] *Supra*, note 17.
[60] S*upra*, note 13.
[61] [1993] 2 SLR 336 (*Ng Weng Cheong's case*).
[62] 1982, rr 5, 6 and 7.

can see that there is no pedestrian thereon, proceed at such speed as will enable him to stop his vehicle before reaching the crossing", and rule 7, which went on to oblige drivers to give precedence to any pedestrian "who is about to enter or has entered such crossing" even where they (the drivers) "may already have received a signal to proceed". Although the judicial commissioner, Tan Teow Yeow, considered the rules, he decided the case as one of negligence. He held that, because it was an offence to cross a road in Singapore when the pedestrian crossing light was against the pedestrian, the defendant driver of the bus (who was sued together with his employer) was entitled to presume that his way was clear. For this reason, the driver could not have been negligent. The learned judicial commissioner even expressed the view that to have ruled otherwise than he did would have amounted to the imposition of strict liability.

On appeal by the plaintiff, the Court of Appeal[63] held that the effect of rules 5 and 7 was to require all drivers to be able to stop before reaching pedestrian crossings, and to give precedence to all pedestrians on such crossings. For these reasons, the defendant driver *could* be held liable to the pedestrian. On the facts, the Court of Appeal held that the driver *was* liable (notwithstanding the fact that the plaintiff had committed an offence), although the plaintiff's damages were reduced by 70% to take account of his contributory negligence.

The decision in this case is significant for several reasons. The first is that, although the case was intrinsically tied up with the relevance of the applicable rules, at no stage does anyone involved appear to have made any reference to the tort of breach of statutory duty as such. In fact, in the Court of Appeal, no specific reference (other than in referring to the decision of the High Court) was made to the tort of negligence either.[64] The Court simply decided that breach of the rules gave rise to liability in tort, but did not consider it necessary to elaborate further.

This approach is perhaps a little surprising, particularly in view of the fact that the decision of the Court of Appeal in *Ng Weng Cheong's case* was based closely on the decision of the House of Lords in *Upson's case*[65] – which is one of the rare breach of statutory duty cases outside the area of industrial safety in England to have been successful, and is also a case in which statutory provisions relating to pedestrian crossings were con-

63 Rajendran, Warren LH Khoo and Karthigesu JJ.

64 Interestingly, though, the editorial summary notes at the head of the report in the Singapore Law Reports *do* treat the case as one of negligence. See *supra*, note 61.

65 *Supra*, note 20.

66 The decision of the judicial commissioner in the High Court also discussed *Upson's case* at some length, but considered it to be distinguishable on the basis that jaywalking was not an offence in England at the time when the case arose, whereas it was an offence in

cerned.[66]

Upson's case involved a pedestrian (the plaintiff) who was knocked down at a pedestrian crossing by a bus. The driver of the bus (for whose act the plaintiff sought to make the defendant Board liable) did not see the pedestrian because his view was obscured by a taxi-cab standing on the crossing. The relevant legislative provisions, the Pedestrian Crossing Places (Traffic) Regulations[67] were not pleaded at trial by the plaintiff, and the trial judge, Humphreys J, decided the case purely as an action for negligence. He held that the bus driver had been negligent in failing to check to see whether anyone stepped out in front of the taxi-cab, but that the plaintiff had been 50% contributorily negligent in not looking at the lights which controlled the traffic before she emerged past the cab. In the Court of Appeal, the regulations were referred to for the first time, and the majority of the court (the Master of the Rolls dissenting) held the defendant Board liable for breach of statutory duty (with damages reduced to take account of the plaintiff's contributory negligence). In the House of Lords all five Law Lords were of the opinion that, since the defendant's employee had breached the relevant provisions, the defendant should be liable for breach of statutory duty. Two of their Lordships[68] also considered that negligence had been established, one[69] did not, and two[70] did not consider the question essential to deciding the case.

The case is one which merits consideration in its own right – and not merely in relation to the way in which it was applied in *Ng Weng Cheong's case*. It is an unusual decision in more than one respect. Although no issue of industrial safety was involved, the entire membership of the House of Lords assumed automatically that breach of the relevant provisions was sufficient to give rise to a cause of action for breach of statutory duty. As has been discussed above, such an approach is now very rare – courts generally require one or other of the relevant presumptions to be satisfied in deciding whether or not the breach of a statutory provision can give rise to an action in tort by an aggrieved individual. Even at the time when

Singapore when *Ng Weng Cheong's case* arose. See *infra*, text at note 74 *et seq* for discussion of the Court of Appeal's criticism of this reasoning.

67 1941, regs 3, 4 and 5.

68 Lords du Parcq and Morton (*supra*, note 20, at 176 and 180).

69 Lord Porter (*ibid*, at 162).

70 Lords Uthwatt and Wright. Lord Wright took the view that the torts of breach of statutory duty and negligence were clearly different torts, and appears to have decided the case purely on the basis of breach of statutory duty. Lord Uthwatt, although declining to decide the issue of negligence, seems to have suggested that he might have found the defendant's employee to have been negligent had it been necessary to decide the case (*ibid,* at 169 and 173).

the case was decided, in the 1940s, the approach taken by the House of Lords was far from typical. Moreover, if one applies to the case the most commonly used (although rarely determinative) applied presumption – that of the plaintiff falling within a protected class – it is very difficult to see why the plaintiff in *Upson's case* should have succeeded in her claim. Rather than being a member of a finite and specific class, the plaintiff was a pedestrian. Since every member of the public will, at one time or another, fall within that class, one would have expected the House of Lords to have found that she had no basis for her claim, unless, that is, they had rejected the protected class approach entirely.[71] Yet none of their Lordships apparently considered this matter at all, either to approve or to reject it. Each of them jumped straight from the conclusion that the regulations had been breached to the finding that the defendant Board was liable in tort for this breach.

Upson's case is also interesting for the discussion which it contains by at least one judge of the distinction between actions for negligence and actions for breach of statutory duty. Lord Wright, quoting his own judgment in *Caswell* v *Powell Duffryn Associated Collieries Ltd*,[72] agreed that the two actions shared superficial similarities, including the requirement placed on the plaintiff under each tort of establishing the breach of a duty owed to him. However, his Lordship observed:

> ...a claim for damages for breach of a statutory duty intended to protect a person in the position of the 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... whatever the resemblances, it is essential to keep in mind the fundamental differences of the two classes of claim ... One duty does not in truth enhance the other, though the same damage may be caused by action which might equally be characterised as ordinary negligence at common law or as breach of the statutory duty ... There is always a danger if the claim is not sufficiently specific that due consideration of the claim for breach of statutory duty may be prejudiced if it is confused with the claim in negligence.[73]

Neither the fact that *Upson's case* was treated by all five Law Lords as

[71] Their Lordships could have rejected the protected class presumption using the reasoning of Atkin LJ in *Phillips' case*. See *supra*, notes 17 and 23.

[72] [1940] AC 152.

[73] *Supra*, note 20, at 168-169.

a case of breach of statutory duty, nor fact that the case contained a caution to keep the torts of breach of statutory duty and negligence distinct and separate were referred to by the Court of Appeal in *Ng Weng Cheong's case*. This may, of course, have been because the Court of Appeal took the view that *Upson's case* should never have been decided as an action of breach of statutory duty in the first place, since, as has been pointed out, the decision in this respect was an unusual – even a questionable – one, given the fact that the case involved no issue of industrial safety and no obviously protected class. This does not, however, seem a very likely explanation. Apart from some discussion concerning the fact that the Singapore rules were more onerous from the driver's point of view than were the English regulations, the Court of Appeal in *Ng Weng Cheong's case* appears to have approved, applied and followed *Upson's case*, though the precise basis on which it was applied is somewhat ambiguous. In giving the judgment of the Court of Appeal, Warren LH Khoo J simply summarised the ground for liability in *Upson's case* as being the fact that "[A]ll the members of the House of Lords were unanimously of the view that ... the driver was guilty of a breach of [the] reg[ulation]".[74] This is, of course, a perfectly accurate description of the decision in *Upson's case*, but it makes no reference to the question of whether the breach of the relevant regulation gave rise to liability in negligence or in breach of statutory duty.

Similar ambiguity attaches to the decision in *Ng Weng Cheong's case* itself. The judgment of Warren LH Khoo J referred to the decision of the High Court, and quoted part of the judicial commissioner's judgment referring to the fact that he decided the case in negligence. But, while explaining why the Court of Appeal disagreed with the weight given by the judicial commissioner to the fact that it was an offence for a pedestrian to cross a road with the lights against him in Singapore, and why the Court of Appeal did not consider that to absolve the defendant of liability under the relevant rule, no view was expressed on whether or not the case ought actually have been decided as one of negligence in the first place. The decision, involving a similar leap of reasoning to that in *Upson's case*, was that the defendant had breached the rules and was therefore liable. Unlike *Upson's case*, however, where the decision was clearly based on breach of statutory duty, the exact basis for that liability in *Ng Weng Cheong's case* was not made clear.

This may appear to be a hypercritical observation. There is, however, a serious legal point behind it. If the defendant driver in *Ng Weng Cheong's case* was being held liable for breaching the statutory requirement to give precedence to pedestrians on crossings (even those who were crossing

[74] *Supra*, note 61, at 339.

illegally), and if this liability was (as the judicial commissioner suggested it would be) a matter of strict liability, then this ought really to have been acknowledged by the Court of Appeal. If, on the other hand, the defendant was being held liable not for breach of statutory duty but for negligence, then the Court of Appeal ought to have indicated the way in which the defendant's conduct had fallen below the common law standard of care. All that their Honours actually held was that the defendant had breached the rules, and was therefore liable. *If* they *were* actually deciding the case in negligence, then this would mean that they were equating breach of the rules with negligence. As the judicial commissioner pointed out, however, the relevant rules impose obligations which can be breached without any carelessness at all.[75] In most circumstances, failure to drive at a speed which will enable the driver of a vehicle to stop before reaching a pedestrian crossing probably will involve negligence, but this will not necessarily be so in every case. So the practice of treating such breaches as automatically actionable involves entering a halfway house between negligence and breach of statutory duty – in fact, it really amounts to making findings of statutory negligence.

B. *PP* v *Gan Lim Soon*

It is noteworthy that a criminal case, decided (on very similar facts) just after *Ng Weng Cheong's case*, treated the same rules in a similar, though not an identical, way. In *PP* v *Gan Lim Soon*,[76] a bus driver knocked down and killed a school girl on a pedestrian crossing. The bus driver was charged under section 304A of the Penal Code[77] with doing a negligent act not amounting to culpable homicide. When the matter first came before the District Court, it was held that there was no case to answer. The High Court allowed the prosecution's appeal from this decision, and the case was remitted back to the District Court to call upon the bus driver to enter his defence. He elected to remain silent and offered no witnesses. The District Court nevertheless acquitted him (largely because of the conflicting and contradictory evidence of witnesses), and the prosecution then appealed to the High Court. In the High Court Yong Pung How CJ concluded that the driver was guilty of the charge.

In reaching his decision, the Chief Justice made some observations about the undue weight which the distict judge had accorded to the discrepancies between the accounts of the two witnesses, particularly given that both agreed that the lights were in the pedestrian's favour when the accident occurred.

[75] See *supra*, text at note 62.
[76] *Public Prosector* v *Gan Lim Soon* [1993] 3 SLR 261.
[77] Cap 224, 1985 Rev Ed.

His Honour went on to say that, even if there was any doubt about that, there was no doubt about the fact that the pedestrian was actually on the crossing when the accident occurred. He then asked what the law was in such a situation, and turned straight to the Pedestrian Crossing Rules.[78] Since rule 5 requires every driver approaching a pedestrian crossing to drive at a speed which enables him to stop at the crossing unless he can actually see that there is no one on it, and rule 7 gives precedence not only to pedestrians already on the crossing, but also to those entering it (even where the lights are against them), the Chief Justice concluded that, if a vehicle were to collide with a pedestrian at a pedestrian crossing, then there could be no question but that the pedestrian had the legal right of way. He continued:

> In the present case, the body of the deceased pedestrian, who had the right of way, was in the middle of the crossing ... when the bus collided with her. In the circumstances, this simple fact alone is *prima facie* evidence of the respondent's negligence, and, if not explained, is sufficient to support the respondent's conviction upon the charge under section 304A ... by failing to give way to the pedestrian and thereby colliding with her.[79]

Since the driver offered no explanation, the Chief Justice convicted him of the offence.

In *PP* v *Gan Lim Soon* we therefore also see the jump from the statutory provision being breached to the person breaching that statutory provision being held responsible for something other than the breach itself – in this case for criminal negligence. There are, however, two major differences between this case and that of *Ng Weng Cheong*. The first is that the Chief Justice (in view of the nature of the criminal charge) made it very clear that his decision turned on whether or not he considered that the driver had acted negligently. As has been pointed out, it is not absolutely clear from *Ng Weng Cheong's case* whether that case was actually decided as one of negligence at all. Even assuming that *Ng Weng Cheong's case was* decided as one of negligence, however, there is another significant difference between the two cases. In *Ng Weng Cheong's case*, breach of the rules was regarded as giving rise to automatic liability. In *PP* v *Gan Lim Soon*, on the other hand, the Chief Justice treated the breach merely as *prima facie* evidence of negligence – evidence which could be rebutted by the driver. Although used in a criminal, rather than a civil, context, this reasoning process closely resembles the "lesser"statutory negligence approach taken

[78] *Supra*, note 62.
[79] *Supra*, note 76, at 264.

in many North American jurisdictions of treating breaches of statutory duty not as wrongs giving rise to independent causes of action, not even as conclusive proof of negligence, but merely as evidence of negligence, allowing actions – though not actions guaranteed of success – under that tort.

As a small jurisdiction, few opportunities to consider matters involving breaches of statutory duty arise in Singapore, and it is perhaps premature to refer to these two decisions as indicating any kind of trend. Until more cases are litigated, the matter is on hold. Nevertheless, viewed together, *Ng Weng Cheong's case* and *PP* v *Gan Lim Soon* certainly seem to suggest a recent tendency on the part of the local courts to regard breaches of statutory obligations as matters relevant to actions in negligence, rather than as the bases for actions in their own right. This may not turn out to be particularly significant, especially if (as is probable) this tendency is restricted to cases outside the area of industrial safety, where the chances of actions for breach of statutory duty succeeding have always been slim, and, if the English position is anything to go by, are likely to become increasingly so. However, the departure from even considering breaches of statutory duty as offering the possibility of alternative causes of action to those in negligence cannot be said to augur well for the tort.

V. Conclusion

However one looks at it, the future of breach of statutory duty as a wide-ranging and self-sufficient tort appears less than promising. Although there is little doubt that the tort will continue to flourish in industrial safety situations, where the profit made by the employer and the risks taken by his employee make the imposition of strict liability easy to justify, it appears that its days as a tort of more general application are effectively over. In England, it is now almost impossible to persuade a court that being in any class outside that of factory workers gives one a right to sue for breach of statutory duty at all. Although the precise reasons for this are unclear, there does appear to be a connection between this and the current unwillingness of the courts to allow actions in negligence. There is even the possibility that the English courts are veering towards a position where breaches of statutory duty will be relevant more as examples of statutory negligence than anything else. In Singapore, the situation is rather different. Actions here appear to be succeeding in the tort of negligence even when based on breaches of strict liability statutory provisions – provisions which one might have expected to give rise to actions for breach of statutory duty.

The fact situations behind the various decisions in England and Singapore contain so few parallels that it cannot be said that there is either any consistency or any inconsistency between the trends in the two jurisdictions.

They have arisen in different circumstances and have concerned different issues. What *can* be said is that the combined effect of the decisions in both jurisdictions has been to place actions for breach of statutory duty on the sidelines of tort law. The practical consequences of this may, of course, actually be very small. Cases will either succeed or fail under the tort of negligence rather than under the tort of breach of statutory duty. If the same number of cases will succeed, and the same number will fail, as would have been the case even if the tort of breach of statutory duty were to have been used, then perhaps there is no point in labouring the issue.

On the other hand, this is yet another tort which is being threatened by the ever-increasing supremacy of the tort of negligence. It cannot be good for tort law to place all its eggs in one basket, to focus on one cause of action at the expense of all others, and to blur the lines between fault and strict liability in the process. If things continue in this way, we will soon have to accept that what used to be recognised in both England and Singapore as the independent, discrete and valuable tort of breach of statutory duty has either been relegated to the status of an action for statutory negligence or been reborn simply as "the industrial safety tort".

MARGARET FORDHAM*

* BA (Dunelm), Solicitor, England & Wales and Hong Kong; Teaching Fellow, Faculty of Law, National University of Singapore.