

BREACH OF STATUTORY DUTY AND RISK MANAGEMENT IN OCCUPATIONAL HEALTH AND SAFETY LAW: NEW WINE IN OLD WINESKINS?

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And no one puts new wine into old wineskins. If he does, the wine will burst the skins--and the wine is destroyed, and so are the skins. But new wine is for fresh wineskins.¹

If any area of law might be thought to represent an “old wineskin”, it would be the law governing the question of when civil liability for damages arises for breach of statutory duty. Long recognised as doctrinally a distinct action in tort, to be carefully distinguished from the tort of negligence,² the action for breach of statutory duty has indeed suffered the fate of a number of other distinct actions in being largely swamped and sidelined by the “imperial expansion”³ of that newcomer, which apparently sprang into existence fully formed from the head of Lord Atkin in 1936.⁴ While the textbooks still on the whole acknowledge that the action for breach of statutory duty exists, some treat it in such a way as to imply the conclusion that the authors regard as inevitable, that it has been or will soon be completely subsumed by the more recently developed tort.⁵ Indeed, Davis straightforwardly argues that the High Court of Australia should take this step.⁶

An area, however, which is acknowledged to be one where the action still has some vitality, is the law dealing with workplace injury, disease or death. And in this area we have today around the common law world something of a “new wine”. The old regime of precise

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¹ Jesus, as recorded in Mark 2:22 (ESV).

² See Lord Wright in *London Passenger Transport Board v Upson* [1949] AC 155, at 168: “I think the authorities... show clearly that a claim for damages for breach of 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”. This comment resolved the ambiguity on the issue stemming from the House’s previous decision in *Lochgelly Iron & Coal Co Ltd v M’Mullan* [1934] AC 1; as to which see Clerk and Lindsell, *Breach of Statutory Duty* (ch 11) in Clerk & Lindsell on Torts (18th ed, 2000) 248. As recently as 1940 Lord MacMillan in *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] AC 153, at 167-168, had persisted with the view that “a civil action for damages in respect of an accident to a miner alleged to be due to a breach of statutory duty on the part of his employers must... be based on negligence and be subject to the general principles of law which govern actions of damages for negligence” (at 167). But his Lordship’s view was in a minority even then (compare Lord Wright at 177-178), and seen to be over-ruled in the later case of *Upson*.

³ See Brennan J in *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520, and for commentary J Swanton, “‘Another Conquest in the Imperial Expansion of the Law of Negligence’: Burnie Port Authority v General Jones Pty Ltd”, (1994) 2 *Torts Law Journal* 101.

⁴ In *Donoghue v Stevenson* [1932] AC 562, of course. The major areas of tort which have been “absorbed” by negligence include, at least in Australia, the *Rylands v Fletcher* action (subsumed into negligence in *Burnie Port Authority*, above n 3 - though in the UK the House of Lords has persisted in affirming its separate existence, see *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61; [2003] 3 WLR 1467); the action on the case developed in *Beauresert Shire Council v Smith* (1966) 120 CLR 145 (effectively abolished in *Northern Territory v Mengel* (1995) 185 CLR 307); and the special rules governing occupiers liability- see *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479. Another example of the “flattening out” of specific older rules is the High Court’s abolition of the “non-feasance” immunity previously enjoyed by highway authorities in *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

⁵ A fate that has indeed met the tort in Canada: see *The Queen in right of Canada v Saskatchewan Wheat Pool* (1983) 143 DLR (3d) 9. For standard textbooks whose tables of contents conceal rather than reveal the existence of the tort see J G Fleming, *The Law of Torts* (9th ed; North Ryde: LBC Information Services, 1998), where the action is treated under the heading “Statutory standards” in a chapter concerned with the “Standard of Care” in negligence; Tony Weir *Tort Law* (Oxford: Oxford University Press, 2002) where it is buried in a chapter on “Strict Liability”; and B Markesinis & S Deakin *Tort Law* (5th ed; Oxford: Clarendon, 2003), where an excellent treatment is contained in the chapter on “Special Forms of Negligence”. In a recently published summary of the law of torts for students, S Blay *Torts* (Lawbook Co Nutshell series, 5th ed; Pyrmont: Lawbook Co, 2006) the whole topic is dealt with in a few paragraphs squeezed into the end of a chapter entitled “Contributory Negligence” (see p 93).

⁶ See J L R Davis, ‘Farewell to the Action for Breach of Statutory Duty?’ in N J Mullane and A M Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (1998) 69.

risk-specific and workplace-specific regulation having been replaced in the 1970's and 1980's by the "Robens" system of general duty laws,⁷ the late 1990's and the early part of the 21st century have now seen a further move in the legislative model governing workplace safety. Instead of vaguely worded "general duties" we now have the model of "risk management" which permeates health and safety legislation in both the UK and Australia.

Can the old wineskin survive the heady impact of the new wine? The purpose of this paper, after briefly reviewing the general law on the action for breach of statutory duty, is to consider how it has fared under the successive changes in the workplace safety legislative regime in the UK and in Australia. The paper will also consider what future role there is for the action in its current form: whether it ought to be either abandoned or, on the other hand, can be transformed, into a "fresh wineskin".

1. The Action for Breach of Statutory Duty

The civil action for breach of statutory duty has a long history, usually traced back to the second *Statute of Westminster* in 1285, c 50.⁸ The development of the tort in general has been reviewed by others,⁹ and it is not necessary to go over that material here.

The modern view of the criteria for determining whether a statutory obligation creates a civil remedy is usually seen as well summed up in the judgement of Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 3 All ER 353, 364:

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 action for breach of duty.

Similarly, the High Court of Australia said in *Byrne and Frew v Australian Airlines Ltd* (1995) 131 ALR 422, at 429:

A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon its proper construction, intended to provide a ground of civil liability when the breach of obligation causes injury or damage of a kind against which the statute was designed to afford protection.¹⁰

While in recent years attempts to extend the action into new areas have often failed, the action for breach of statutory duty has continued to be used in one area of legislation above all- that of industrial injury and death.

2. Development of the Action in relation to workplace injuries- the UK

In effect the early decision of *Couch v Steel* (1854) 3 E & B 402, 118 ER 1193 was an industrial illness case. Lord Campbell CJ granted a remedy to a seaman who had fallen ill on a journey and suffered damage due to the failure of the ship-owner to maintain a statutorily-prescribed list of medicines. It is interesting to note that even at this early stage of the

⁷ See A Brooks "Risk Management and Consultation Systems: Developments and Disappointments in the New Occupational Health and Safety Legislation in New South Wales" (2002) 24 *Sydney Law Review* 89 for a brief review of the Australian background; R Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials* (2nd ed; Pyrmont: Lawbook Co, 2004) goes into more detail, especially in ch 2. For UK developments see, eg, Hendy & Ford *Redgrave, Fife and Machin's Health and Safety* (2nd ed; London: Butterworths, 1993) and Barrett & Howells *Occupational Health and Safety Law: Text and Materials* (2nd ed; London: Cavendish, 2000).

⁸ See K M Stanton, *Breach of Statutory Duty in Tort*, Modern Legal Studies (1986) at 2, K M Stanton et al, *Statutory Torts* (2003) at 17 (in general, since the 2003 work is a revision and expansion of the 1986 book, references will in future be taken from the later work). G L Fricke, 'The Juridical Nature of the Action Upon the Statute' (1960) 76 *Law Quarterly Review* 240 comments that for many years c 50 of the 1285 statute received little attention, buried in the middle of a number of other major changes to English law.

⁹ See Stanton, Skidmore, Harris & Wright *Statutory Torts* (London: Sweet & Maxwell, 2003), esp ch 2; P D Finn "A Road Not Taken: The Boyce Plaintiff and Lord Cairns' Act" (1983) 57 *Australian Law Journal* 493-507, 571-579.

¹⁰ Per Brennan CJ, Dawson & Toohey JJ.

development of the action, it was used by the court to provide a remedy to an injured worker where the ordinary common law would not. The sailor's primary claim had been that the ship was unseaworthy, and that hence he had an action against the ship-owner; but on the authority of *Priestley v Fowler* (1837) 3 M & W 1, 150 ER 1030 the court held that there was no implied duty on the ship-owner to provide a seaworthy vessel.

This was followed by a number of other decisions holding that where Parliament enacted statutes to do with safety in the workplace, they were generally to be read as giving the right to workers to recover damages for breach of the statute: see, for example, *Britton v Great Western Cotton Co* (1872) LR 7 Ex 130 and the Scottish decision of *Kelly v Glebe Sugar Co* (1893) 20 R 833. The culmination of these cases in the 19th century was the landmark decision of *Groves v Lord Wimborne* [1898] 2 QB 402.

The case is sometimes referred to as the beginning of statutory duty claims for workplace injury, but it is not. It was decided against the background of those other cases. In fact *Groves* is interesting precisely because the statute concerned not only imposed a criminal penalty on an employer in breach, but also gave a discretion to the Secretary of State to divert part or all of the penalty to the injured worker or his family. This allowed the defendant to mount a plausible claim that in this case Parliament had already made a judgement about the appropriate avenue for compensation, and hence excluded the common law action.

All the members of the Court of Appeal disagreed with this argument, and found in favour of the worker. A L Smith LJ said that it "could not be doubted" that there would be a remedy here if no fine were otherwise provided. His Lordship went on to find that this "presumption" was not displaced by the provisions for the fine or its discretionary diversion to the worker, for (1) the money would not necessarily go to the worker; (2) the fine would be set by the magistrate on the basis of the nature of the *breach*, not necessarily the nature of the *injury*; (3) in any case the fine might end up being imposed on a fellow worker, with no assets. *Britton* was cited as a clear precedent for the action. In particular the doctrine of "common employment" was not applicable to this sort of statutory claim as the duty belonged to the master and could not be "shifted" to another person. Rigby LJ agreed. His Lordship started with a presumption of a civil remedy unless excluded; to the reasons offered by A L Smith LJ for not concluding that the private action was removed, he added (4) that the fine would often be so small as to be useless (at a max of £100) as a means of compensation. Vaughan Williams LJ concurred on this point. His comment is an excellent summary of the attitude of the courts at this time: "where a statute provides for the performance by certain persons of a particular duty, and some one belonging to a class of persons for whose benefit and protection the statute imposes the duty is injured by failure to perform it, *prima facie*, and if there be nothing to the contrary, an action by the person so injured will lie against the person who has so failed to perform the duty".¹¹ It would not, his Lordship said, be a conclusive consideration against this rule that the statute provided a penalty, not even (as here) if part of the penalty might be applied to the injured person.¹²

The other aspect of *Groves* that made it so important was the finding of the Court that the doctrine of "common employment" was not applicable to claims based on statutory breach. Common employment was identified by the court as having its basis in the case of *Priestley v Fowler*, which had (for other reasons) stymied the worker's primary claim in *Couch v Steel*. It was the doctrine that a worker could not make a common law claim against an employer where the claim was based on the actions of a fellow-worker, the logic being that a worker impliedly agreed to take the risks of a job occasioned by the carelessness of fellow employees. But all members of the Court of Appeal in *Groves* held that the doctrine was not applicable to statute-based claims. Rigby LJ in particular spent some time on this point. Even at this stage it seems that judges were finding the doctrine unpalatable in negligence cases: see his Lordship's comments in reference to the rule in *Priestley v Fowler*: "the propriety of

¹¹ Above, at 415-416.

¹² His Lordship seemed to suggest the case for removing the presumption would have been stronger if *all* the penalty automatically went to the injured person. But even then it would not have been conclusive- see 417.

[this] exception has sometimes been doubted, but [it] is no doubt well-settled law".¹³ But they certainly refused to extend it to statutory breach. A duty imposed by statute could not be "delegated" off to someone else.¹⁴ In particular the comment of Lord Chelmsford in the Scottish appeal in *Wilson v Merry* (1868) LR 1 HL Sc 326 to the contrary was not binding (the question having been explicitly reserved by the three other members of the House of Lords in that case). A L Smith LJ agreed. Vaughan Williams LJ agreed in relation to this case, although he was slightly more cautious about the doctrine's application in other situations. He wished to leave open the possibility that the doctrine of common employment might have been invoked where the breach of the statute was by the deliberate, as opposed to the careless, act of a fellow servant. His Lordship's comments are best viewed in light of issues about causation- could it be said that the breach *caused* the injury when there was a deliberate decision of a worker involved? But in any case they were not echoed by the majority, who may be taken as deciding that common employment does not apply to an action for breach of statutory duty.

This last finding was, of course, one of the reasons that the action became so popular in relation to industrial injury. So long as the courts were rejecting common law negligence claims where the cause of the accident was the action of a fellow-employee, then it was to the worker's benefit to frame the case as a breach of a statute. By the time Parliament and the courts got around to finally disposing of the common employment defence,¹⁵ the general availability of the breach of statutory duty action in relation to workplace injury had become firmly established.

Thus commentators who otherwise concluded that the action for breach of statutory duty should be abolished or re-written, were at least prepared to concede that it had an important impact in the industrial area. Glanville Williams, in an article that generally attacked the availability of the action, recognised that a not-too-misleading generalisation about the law in 1960 was:

When [penal legislation] concerns industrial welfare, such legislation results in absolute liability in tort. In all other cases it is ignored.¹⁶

There may perhaps be one or two cases which count against this summary. In *Biddle v Truvox Engineering Co Ltd* [1952] 1 KB 101¹⁷, for example, Finnemore J found that a duty as to safety imposed upon the suppliers of a machine was not intended to be civilly actionable. His Honour may have been partly swayed (although he does not say this) by the fact that this was a contribution action by an employer who was clearly liable- that is, in the end a fight between two insurance companies. Perhaps the result might have been different if the employer had been bankrupt and uninsured and the vendor the only source of funds for the injured worker.

In recent years the UK has seen another area where the action for breach of statutory duty has been found not to exist in an area obviously related to industrial safety. In *Todd v*

¹³ Above at 411.

¹⁴ Above at 411.

¹⁵ Perhaps the doctrine (fairly described in Redgrave et al, *Health and Safety* (2nd ed, 1993) at liv, as "an embarrassment to the common law") might be regarded as having been effectively put to rest judicially in *Wilsons & Clyde Coal Co v English* [1938] AC 57. It was formally abolished by the UK Parliament in the *Law Reform (Personal Injuries) Act* 1948. Some Australian jurisdictions acted earlier; in NSW the doctrine was formally abolished by s 65(1) of the *Workers' Compensation Act* 1926; the abolition was continued, "from abundant caution" no doubt, in s151AA of the *Workers' Compensation Act* 1987. Strangely, however, in *Smith v ANL Limited* [2000] HCA 58 the members of the High Court of Australia involved assumed that the doctrine might still be a part of the common law- see para [19] (Gaudron & Gummow JJ), adopted by Hayne J at [117]; [84]-[86] (Kirby J). Still, a specific statutory provision like those mentioned previously applied to exclude the operation of the rule in the particular case, and it seems hard to imagine a situation in Australia today where the rule would not be excluded by some such provision. There is also a hint in Kirby J's comments at [86] that should the issue be presented directly he might be disposed to reconsider whether or not it still forms part of the common law today.

¹⁶ G Williams, 'The Effect of Penal Legislation in the Law of Tort' (1960) 23(3) *Modern Law Review* 233 at 233.

¹⁷ Referred to in Williams, above n 20, at 254. Williams' comment at n 69 is: "the decision... does not harmonise with the general attitude adopted in industrial cases".

Adams [2002] 2 Lloyd's Rep 293; [2002] EWCA Civ 509 four fishermen drowned in circumstances which, it was claimed, amounted to a breach of r 16 of the *Fishing Vessel (Safety Provisions) Rules* 1975. The Court of Appeal (Thorpe and Mance LJ, and Neuberger J) found that these regulations, which were conceded to have been made for the purposes of ensuring the safety of fishermen, were not intended to give rise to civil liability. *Todd* was politely but trenchantly criticised in the later decision of a differently constituted Court of Appeal in *Ziemniak v ETPM Deep Sea Ltd* [2003] 2 Lloyd's Rep 214; [2003] EWCA Civ 636, the analysis of which is much to be preferred.

In *Ziemniak* the injured worker was a marine engineer testing a lifeboat when injured through the snapping of a support chain, in circumstances involving a breach of provisions of the *Merchant Shipping (Life-Saving Appliances) Regulations* 1980. Kay LJ delivered the judgement of the Court, in which Parker and Aldous LJ concurred. He held that on all the usual criteria, the legislation was such as to give rise to civil liability. Clearly passed for the protection of seamen, there was an added factor here in that, because the ship was not on the open sea, there was not even a criminal penalty applicable to the breach. *Groves v Lord Wimborne* seemed directly on point. Provisions like this are present all through the general industrial safety laws dealing with safety on land, and have long been held to create civil liability.¹⁸ There was even evidence that the original statute under which the regulations were drawn up, the *Merchant Shipping Act* 1970, was deliberately intended to bring safety at sea in line with safety on land.¹⁹ The only countervailing argument here was that the 1974 *Health and Safety at Work etc Act* specifically deals with the issue of civil liability arising under its regulations, in s 47(2), whereas none of the merchant shipping acts do. But his Lordship dismissed this as a weak argument from silence, saying that "Parliament must have been aware of the approach of the Courts where there was no reference to civil liability [ie that they were prepared to impose it in case of industrial safety legislation] and must have intended that this legislation would be treated in the same manner".²⁰

But how did his Lordship deal with *Todd's case*? Clearly he was personally of the view that *Todd* was wrongly decided.²¹ Some of the cited comments of Neuberger J in *Todd* would if accepted undermine the basis for *Groves v Wimborne* to be followed at all. And it was difficult to distinguish *Todd*, especially since it turned out that the fishing regulations (held in *Todd* to be as a whole not able to be used as a basis for civil liability) contained a provision almost identical to the one being considered in *Ziemniak*. But in the end Kay LJ did distinguish *Todd*, on the basis that Parliament "must have" intended a different regime to apply to fishermen than to the general seafaring worker. His Lordship referred to Neuberger J's reference to the very specific scheme for certification of fishing boats, noting that there was no equivalent scheme involved here.

There seems no doubt this issue will have to be resolved by the House of Lords. It would be very unsafe for the fishing industry to rely on the apparent blanket exemption from civil liability issued by *Todd*; Kay LJ in *Ziemniak* offers very good reasons for that case to be over-ruled. Colin Ettinger in a case note on *Ziemniak* recognises the difficulties in *Todd* and concludes (justifiably): "In spite of the decision in *Todd*, it is now difficult to envisage legislation imposing health and safety requirements that will not be found to give rise to a civil action in the event of a breach".²²

¹⁸ Above, at para [41].

¹⁹ Above, at paras [44]-[45].

²⁰ Above, at para [48]. There is also a stronger argument here. The *Health and Safety at Work Act* 1974 only contains a specific provision in s 47(2) clarifying that civil liability arises under the regulations, because it contains an unusual provision in s 47(1) *excluding* liability under the general provisions of the Act itself (discussed below). Where there is no such exclusion in the merchant shipping legislation, there was no occasion to refer to the regulations.

²¹ Above, at paras [49]-[50]; eg "I am not entirely persuaded by all of the reasoning contained in the judgement of Mr Justice Neuberger in that case".

²² "Case Comment- Personal Injury- Accidents at Work" (2003) JPIL (Sep) C108-109.

3. The Australian experience

For many years Australian courts as a matter of both principle and comity almost invariably accepted English authority on the common law as binding. So it is not surprising that from the earliest occasions on which the question arose, the courts in Australia accepted both that there was a possible civil action in relation to breach of a statutory duty, and also on the authority of such decisions as *Groves v Wimborne*, that this was especially so in the case of industrial safety legislation.

For example, in an early decision of the High Court in *London and West Australian Exploration Co Ltd v Ricci* (1906) 4 CLR 617, the authority of *Groves* was accepted by the whole Court. In the unusual circumstances of the case, however, an action for breach of statutory duty was denied: the Act under which the action was brought having when first enacted contained specific provisions as to civil liability, it could not be argued that there was any Parliamentary intention to allow civil recovery under other provisions (despite the fact that the initial civil recovery provisions had now been repealed.) *Groves* continued to be accepted as good authority in subsequent decisions of the High Court: see, for example, *Mallinson v Scottish Australian Investment Co Ltd* (1920) 28 CLR 66,²³ *Royal Insurance Company Limited v Mylius* (1926) 38 CLR 477,²⁴ *Bourke v Butterfield and Lewis Limited* (1926) 38 CLR 354, and *Eastern Asia Navigation Co Ltd v Fremantle Harbour Trust Commissioners* (1951) 83 CLR 353, at 387. Many decisions of State courts upheld damages awards based on breach of statutory duty following *Groves*.

Some of the most influential comments of the High Court on the subject are contained in *O'Connor v S P Bray Ltd* (1936) 56 CLR 464.²⁵ There Dixon J (as he then was) acknowledged the difficulty that courts have had in determining Parliamentary intention to allow a civil remedy, but said:

Whatever wider rule may ultimately be deduced, I think it may be said that a provision prescribing a specific precaution for the safety of others in a matter where the person upon whom the duty laid is, under the general law of negligence, bound to exercise due care, the duty will give rise to a correlative private right, unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears.²⁶

His Honour went on to find that a provision requiring safety equipment to be installed on a lift could be enforced through a civil action, although noting at the same time that not every provision of the regulations in question was able to be enforced in this way.²⁷

In more recent times the most extensive discussion of the doctrine of breach of statutory duty by the High Court is to be found in the decision in *Byrne and Frew v Australian Airlines Limited* (1995) 185 CLR 410, (1995) 131 ALR 422, (1995) 69 ALJR 797. The case involved the claim (among others) that a provision of an industrial award should be enforceable by a civil claim for breach of statutory duty. The High Court rejected the claim. Brennan CJ, Dawson & Toohey JJ said:

A cause of action for damages for breach of statutory duty arises where a statute which imposes an obligation for the protection or benefit of a particular class of persons is, upon proper construction, intended to provide a ground of civil liability when the breach of the obligation causes injury or damage of a kind against which the statute was designed to afford protection.

Here the legislation concerned was not merely passed for the benefit of employees, and in particular the fact that it provided alternative mechanisms for the civil enforcement of

²³ Where *Groves* was followed to provide a remedy for a worker denied award wages where the statute did not seem to provide one.

²⁴ An unusual case not involving an industrial injury, where *Groves* was distinguished as the statute concerned was held not to provide a remedy to individuals.

²⁵ Although the decision does not cite *Groves* itself directly.

²⁶ Above, at 478.

²⁷ Above, at 479.

award breaches made it clear that Parliament did not intend to allow general actions for breach of statutory duty.

McHugh & Gummow JJ, in a concurring judgement, seemed to suggest that the provisions of the Australian Constitution might make the implication of a civil action for breach of statutory duty under a Commonwealth statute more difficult. Their point, not fully elaborated, seemed to be that where the provisions of judicial power were to be invoked, the implication of the structure of the Constitution (in particular the separation of powers) would require a Parliamentary intention to grant a civil remedy to be very clearly spelled out.

Their Honours challenged, in fact, the concept of “Parliamentary intention” if that were viewed as an inquiry into the subjective purposes of members of Parliament. Instead, they adopted as a general principle the comments of Kitto J in the earlier case of *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397:

The legitimate endeavour of the courts is to determine what inference really arises, on a balance of considerations, from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed, the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation.

Their Honours found that the “balance of considerations” here was very much against individual workers being able to enforce award provisions by a separate common law action.

While the Australian courts, like those in the UK, have recently usually resisted the extension of the breach of statutory duty action into new areas,²⁸ what of the accepted view that the action is almost always available in relation to legislation dealing with safety?

This traditional approach was followed by the Supreme Court of Queensland in *Schiliro v Peppercorn Child Care Centres P/L* [2000] QCA 18 in relation to s 28 of *Workplace Health and Safety Act* 1995 (Qld), a “general duties” provision in the Queensland safety legislation, where it was held that the section was intended to create a duty enforceable by civil action.

[26] There is nothing in this material, taken in the historical context already set out, that suggests that the Act, insofar as it is directed at employee safety, is inconsistent with the creation of a civil cause of action; the Act is to emphasise prevention rather than cure but the scope and intent of the existing legislation is to remain unchanged. The language of obligation in s 28 and of ‘discharge of obligations’ in s 24, s 26 and s 27 fits comfortably with the concept of civil liability. It would have been a simple matter for the legislature to exclude civil causes of action as has been done in many other jurisdictions. These considerations combine to support the inference that s 28, like s 9 of the 1989 Act,²⁹ creates a civil cause of action.

In *Tabulo v Bowen Shire Council* [2004] QSC 38, esp at [51], it was again assumed that the general duties provisions of the Queensland legislation created a civil action.

Similarly, in the Supreme Court of Tasmania, in *Allen v Western Metals Resources Ltd & Anor* [2001] TASSC 19, Blow J commented:

15 Whilst the regulations provided that breaches thereof were punishable by fine, it is clear that, as is usual for industrial safety regulations, they were intended to confer private rights of action in tort: *O'Connor v S P Bray Ltd* (1937) 56 CLR 464; *Darling Island Stevedoring and*

²⁸ See, for example, the denial of civil liability by single judge decisions in *Williams v The Minister, Aboriginal Land Rights Act 1983 & Anor* [1999] NSWSC 843, *Cubillo v Commonwealth* [2000] FCA 1084 (in relation to welfare decisions taken concerning Aboriginal children removed from their parents, what has become known as the “stolen generation”), and *Hopkins v State of Queensland* [2004] QDC 21 (again, in relation to a decision by child welfare authorities); by the Victorian Court of Appeal in *Gardiner v State of Victoria* [1999] VSCA 100 (provision requiring an employer to provide employment to an injured worker who was once again fit to work not actionable); and by the NSW Court of Appeal in *Armstrong v Hastings Valley Motorcycle Club Ltd* [2005] NSWCA 207 (provision requiring a motor-racing circuit to be licensed did not impose specific requirements and hence was not civilly actionable.)

²⁹ The previous general safety legislation, the *Workplace Health & Safety Act* 1989 (Qld), s 9 of which had been held to be civilly actionable in *Rogers v Brambles Australia Limited* [1998] 1 Qd R 212.

Lighterage Co Ltd v Long (1957) 97 CLR 36; *Dunlop Rubber Australia Ltd v Buckley* (1952) 87 CLR 313.

While not a workplace safety case, *Toomey v Scolaro's Concrete Constructions Pty Ltd (in liq) & Ors (No 2)* [2001] VSC 279 also illustrates the tendency of the courts to find that provisions directed to physical safety should allow civil actions. In that case the provisions of the Australian Building Code as to the height of a balustrade had been breached, causing severe physical injury to the plaintiff, who fell to the ground. Eames J in the Supreme Court of Victoria ruled that the provisions (incorporated by reference into the Victorian *Building Act* 1993) gave rise to a civil action when breached.

In *Slivak v Lurgi* [2001] HCA 6 all the members of the High Court involved in that decision³⁰ generally assumed that there would be a right to take a civil action based on a specific OHS statute. Gaudron J affirmed the rule of construction as correct in unambiguous terms: "As a general rule, legislation which imposes duties with respect to the safety of others is construed as conferring a right of civil action unless a contrary intention appears."³¹

However, the joint judgement of Gleeson CJ, Gummow & Hayne JJ may suggest that this formerly assured result might not always follow. The relevant passage is worth quoting in full (footnotes are those provided by the court):

27 It is common ground that s 24(1)(a) [of the *Occupational Health, Safety and Welfare Act* 1986 (SA)], (to which for present purposes s 24(2a)(a) is appendant) does more than impose a duty for which the sanction is a fine imposed in a prosecution for breach. These provisions are designed to protect, among others, persons in the position of Mr Slivak; the designer must ensure, so far as is reasonably practicable, that the structure is designed so that those required to erect the structure are, in doing so, safe from injury and risks to health. It is assumed that the legislature "intended" that persons injured as a result of non-observance of this duty have a good cause of action against the designer.

28 The authorities considered by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* show that what is involved is a matter of statutory construction, in the absence of an express conferral of a private cause of action.³² Only State legislation is involved in this appeal so the particular considerations respecting matters inexplicitly "arising under" federal law, adverted to in *Byrne*³³, are not present here. However, in all these cases, the lack of specificity in the interpretative criteria applied brings with it what Scalia J has identified as the dangerous assumption³⁴:

"that, even with the utmost self-discipline, judges can prevent the implications they see from mirroring the policies they favor".

29 It was one thing to discern a positive implication in the efforts of the nineteenth century legislatures respecting private acts for the construction of public infrastructure, a matter adverted to in *Byrne*³⁵. Likewise when the common law doctrines of common employment and contributory negligence flourished, to the prejudice of plaintiffs. While those considerations have largely passed into history, the impact of modern "outsourcing"³⁶

³⁰ Gleeson CJ, Gaudron, Gummow, Hayne & Callinan JJ. It is perhaps unfortunate that the Bench did not include McHugh J, who has long had a reputation as one of Australia's leading authorities on workplace compensation litigation, especially through his Honour's share in the important (if now outdated) textbook on the area, Glass, Douglas & McHugh *The Liability of Employers in Damages for Personal Injury* (2nd ed; Sydney: Law Book Co, 1979).

³¹ Above, at [49]. Callinan J at [67] also affirmed the existence of a private right of action with little comment.

³² See Bennion, "Codifying the Tort of Breach of Statutory Duty", (1996) 17 *Statute Law Review* 192.

³³ (1995) 185 CLR 410 at 458. See also the similar doubts expressed with respect to United States federal law in the judgments of Powell J in *Cannon v University of Chicago* 441 US 677 at 730-742, 745-747 (1979) and Scalia J in *Thompson v Thompson* 484 US 174 at 191-192 (1988). See further *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 at 58-59 [157]-[158].

³⁴ *Thompson v Thompson* 484 US 174 at 192 (1988). See also Posner, "Economics, Politics, and the Reading of Statutes and the Constitution", (1982) 49 *The University of Chicago Law Review* 263 at 278-279; Chemerinsky, *Federal Jurisdiction*, 3rd ed (1999), §6.3.3.

³⁵ (1995) 185 CLR 410 at 459-460.

³⁶ See *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 at 583 [17], 588 [36], 612-615 [109]-[117].

is not yet fully explored in the case law. Here, it is the abolition by South Australian legislation of what would have been Mr Slivak's common law rights which has enlivened the concededly successful search for a statutory norm of private liability.

Their Honour's comments are clearly intended to express some doubts about the continued drawing of implications of civil rights from criminal statutes, even in the workplace safety area. These comments were noticed in *Complete Scaffold v Adelaide Brighton Cement & Anor* [2001] SASC 199, where Doyle CJ in the Full Court of the Supreme Court of South Australia commented:

[46] No-one argues that if the *OHSW Act* applies and if ABC was in breach of a statutory obligation, Mr Henry has no cause of action against ABC for damages. Accordingly, I proceed on the basis that he does have a cause of action, even though I have some reservations about the notion that legislation of this kind should be treated, almost as a matter of course, as giving rise to a cause of action sounding in damages: see the observations of Gleeson CJ, Gummow and Hayne JJ in *Slivak v Lurgi (Aust) Pty Ltd* (2001) 177 ALR 585, [2001] HCA 6 at [27]-[29]. No doubt the attitude of the parties was determined by the fact that in two previous decisions this Court has treated the *OHSW Act* and Regulations made under it as giving rise to a cause of action in damages for failure to comply with the Act or with the Regulations, the cause of action being available against an occupier of premises: *Le Cornu Furniture and Carpet Centre Pty Ltd v Hammill* (1998) 70 SASR 414 and *Cox Constructions Pty Ltd v Dawes* (1999) 73 SASR 557.

Thus there can be seen to be at least a note of caution being sounded at the highest levels as to whether the assumption that a civil action will almost automatically be available can be relied on. These doubts may be reinforced when account is taken of the fundamental shift in the nature of occupational health and safety legislation in the last 25-30 years.

4. New Wine- Changes in the model of workplace safety regulation

In recent years there has been a change in the philosophy of workplace safety legislation. Brookes, Johnstone, and others discuss this in more detail,³⁷ but for the purposes of this discussion it will be helpful to briefly summarise the development as occurring in three stages.

The **first** stage, the "traditional" form of safety legislation under which many cases have been decided, involved legislation which was specifically directed at certain hazards, often restricted in scope to certain workplaces, and prescriptive in the sense that it laid down a fairly precise rule to be obeyed. Paradigm examples of this sort of legislation, used on many occasions in civil actions, are laws requiring the fencing of dangerous machinery, or specifying that appropriate measures be taken where there is a danger of a fall from a particular height.

The **second** stage, what we might call "Robens-type" legislation, flowed from the 1972 Report of the UK Committee on Safety and Health at Work, known after the chairman of the committee as the Robens Report. Legislation following this model (in particular in the UK the *Health and Safety at Work etc Act 1974* in its initial form) was characterised by general duties, a wide coverage of almost all workplaces, and obligations which were expressed in much more general terms. In Australia this model was represented by the "second wave" of legislation enacted in most States and Territories during the 1980's, such as the *Occupational Health and Safety Act 1983* (NSW).³⁸ It was sometimes described as legislation that focussed on the "result" (a safe and healthy workplace) rather than the "production process". It typically imposed a general duty such as to "ensure the safety" of workers. In most cases the Robens-type legislation is still in force, although sometimes (as in NSW) it has undergone some minor amendments and updating.

³⁷ See above n 7; for the UK the history of changes is traced succinctly in J Hendy & M Ford, *Redgrave Fife & Machin Health and Safety* (2nd ed; London: Butterworths, 1993) li – lxiii.

³⁸ This Act was replaced in September 2001 by the *Occupational Health and Safety Act 2000*. But the 2000 Act was clearly intended to continue the "Robens" model of legislation, the major changes to the Act being an attempted simplification of drafting and the addition of some extra duties such as the duty to consult employees.

The **third** stage of legislation has not replaced the earlier stage, but has generally been added to it. This type of legislation focuses more on systems than on results- it is obviously concerned to produce the same result, but the means of getting there is spelled out in terms of procedures to be followed. In particular the language often used is that of “risk management”. In the UK this model is represented by the *Management of Health and Safety at Work Regulations 1999*; in Australia its clearest legislative embodiment is probably the *NSW Occupational Health and Safety Regulation 2001*. We may say that whereas the first stage was concerned with issues arising in the “production process”, this third stage deals with the “management process”. It usually involves a fairly structured process of “risk assessment” procedures which are to be followed.

An important element in the development of safety legislation in recent years in the UK has been the influence of the European Union directives on safety, in particular the so-called “framework directive” 89/391.³⁹ This overall directive required EU member states to move very much in the direction of “risk management” provisions, and was followed by six so-called “daughter” directives that were all implemented in 1993 through a series of regulations. Further directives have continued to produce further regulations.

The question that is raised by this (highly simplified) summary of these changing models of legislation is whether the courts can continue to apply the well-developed principles of the breach of statutory duty action, to the new models.

In relation to the second stage, “Robens” legislation, the issue has sometimes been resolved by a specific Parliamentary decision not to allow a civil action for breach of one of the “general” duties imposed by the primary statutes.

In the UK *HSW Act 1974*, for example, s 47(1)(a) makes clear the UK Parliament’s intention that certain provisions of the Act *not* give rise to a civil action:

Nothing in this Part shall be construed- as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by sections 2 to 7 or any contravention of section 8...

The sections concerned are general duty provisions covering the duties of employers, self-employed persons, controllers of workplace premises, manufacturers of articles and substances, and employees, to others at work. A similar provision excluding civil liability for breach of general duty provisions is to be found in some of the Australian legislation; for example, s 32(1) of the *Occupational Health and Safety Act 2000* (NSW) [the *OHS Act 2000*].⁴⁰

Presumably the logic behind the decision not to allow general duties provisions to create civil liability was that, as these provisions mostly replicated the common law duty of care (rather than providing specific guidance on what should be done), it was unnecessary to complicate matters by allowing a civil action to be based on them. On the other hand, this logic is not universally accepted; in Australia other jurisdictions have chosen not to rule out civil actions based on the general duties. In Queensland, for example, the lack of a specific exclusionary provision has led the courts there to conclude that there is indeed a civil action based on the general duties provisions: see *Rogers v Brambles Australia Ltd* [1998] 1 Qd R 212, [1996] QCA 437, followed in *Schiliro v Peppercorn Child Care Centres P/L* [2000] QCA 18. In South Australia the main general duties legislation there has also omitted any exclusion of civil liability.⁴¹

³⁹ For a detailed treatment of these developments see Redgrave, above n 37, at lviii ff.

⁴⁰ This exclusion was also found in the earlier “Robens” legislation in NSW, the *Occupational Health and Safety Act 1983*, s 22(1).

⁴¹ For examples of civil cases under the *Occupational, Health, Safety and Welfare Act 1986* (SA) see *Slivak v Lurgi*, [2001] HCA 6; (2001) 205 CLR 304, *Complete Scaffold v Adelaide Brighton Cement & Anr* [2001] SASC 199; *Sander v Remm Construction, Bauer & Debnam* [2001] SADC 18. The South Australian legislation governing workers compensation, however, has excluded altogether common law actions taken by employees, so there are comparatively few such cases. Those that have been brought usually relate to more “obscure” provisions such as those deeming certain contractors to be employees, or those relating to the duties of designers of buildings.

In the UK and NSW scope for civil actions, however, has not been completely removed. The legislation in those jurisdictions allows for civil actions to be based on provisions of the *regulations* authorised by the head Acts.⁴² In this respect there is an important difference between the two jurisdictions, however. The UK has chosen to give a specific positive indication that civil actions based on the regulations are authorised, in s 47(2) of the *HSW Act*:

Breach of a duty imposed by health and safety regulations shall, so far as it causes damage, be actionable except in so far as the regulations provide otherwise.

In NSW, however, a more “neutral” form of words has been adopted in the *OHS Act* 2000 s 32(2):

Subsection (1) [excluding actionability under the general duties provisions of the Act] does not affect the extent (if any) to which a breach of duty imposed by the regulations is actionable (including any regulation that adapts a provision of this Part).

In addition an amendment to the Act has been added to allow the Government to take action to prevent civil claims under certain regulations. Section 39A of the *OHS Act* 2000⁴³ now provides:

39A Civil liability under regulations

The regulations may provide that nothing in a specified provision or provisions of the regulations is to be construed:

- (a) as conferring a right of action in any civil proceedings in respect of any contravention, whether by act or omission, of the provision or provisions, or
 - (b) as conferring a defence to an action in any civil proceedings or as otherwise affecting a right of action in any civil proceedings,
- but the failure of the regulations to so provide in respect of a provision is not to be construed as conferring such a right of action or defence.

So far no exclusionary regulations of this sort have been made.⁴⁴

The extent “if any” to which a breach of the regulations is actionable, then, where this new power has not been used to specifically exclude particular regulations from actionability, seems to be left up to the courts applying the established principles for breach of statutory duty actions. Until recently in NSW, the courts have rarely needed to rule directly on the actionability of regulations made under the *Occupational Health and Safety Act* (either the previous 1983 version or the current, 2000, version). This seems to have been because the pre-Robens, first stage, legislation was still in force, and the wealth of precedent allowing that legislation to be used as the basis for civil liability could be relied on. So up until quite recently the NSW courts have still been required to interpret, among other provisions, s 27 of the *Factories, Shops and Industry Act 1962* (dealing with fencing of dangerous machinery),⁴⁵ s 40 of that Act relating to safe means of access to work,⁴⁶ and the provisions of the

⁴² In NSW under the 1983 *OHS Act* there was a further complication- civil actions were allowed, pursuant to s 22(2) of that Act, for breaches of the “associated OHS legislation” as well as the regulations. This “associated” legislation comprised the “pre-Robens” legislation such as the *Factories, Shops and Industries Act 1962* and the *Construction Safety Act 1912* and associated regulations. The current *OHS Act 2000* does not continue this exemption, simply because the associated legislation has now been repealed and replaced by provisions of the *OHS Regulation 2001*.

⁴³ Inserted with effect from 1 August 2003 by the *Workers Compensation Legislation Amendment Act 2003* (NSW) (No 29 of 2003) Sched 3[1].

⁴⁴ For this reason, the comment in the 2nd ed of R Johnstone, *Occupational Health and Safety Law and Policy* (2004) at para [9.140], on p 614, that “the OHSA (NSW), s 39A, provides that provisions in the regulations cannot be the basis of an action for breach of statutory duty”, is inaccurate.

⁴⁵ See, for example, *Zarb v Visyboard Pty Ltd* (unrep; Sup Ct NSW, James J; 13 July 1995)

⁴⁶ See *Markuse v Western Sydney Area Health Service* (Sup Ct NSW, Grove J; 30 July 1992); *Archer v George Weston Foods Ltd* (Supreme Court of New South Wales; Dunford J; 24 November 1995); *Reynolds v Plaspak Pty Ltd* (Supreme Court of NSW, Court of Appeal- Mason P, Priestley JA, Grove AJA: 15 October 1997); *Wood v Ansett Transport Industries Operation Pty Ltd* (Supreme Court of New South Wales Common Law Division,

Construction Safety Regulations 1950 relating to falls on construction sites.⁴⁷ Those pieces of legislation have now been repealed, since 1 September 2001, and so the question of whether the provisions of the new regulations are actionable becomes more pressing for plaintiffs.

One exception to the failure of plaintiffs to rely on provisions of the new (“Robens-style”) legislation in breach of statutory duty actions is the case of *Waters v Trojan Tyres (NSW) Pty Limited* [2003] NSWCA 246. There the employee pleaded a breach of the (since repealed) *Occupational Health & Safety (Floors, Passageway & Stairs) Regulation 1990* in conjunction with a negligence claim. The trial judge ruled that the regulation was not applicable (the area where the employee slipped over being in the open rather than in a building, his Honour concluded that it was not a “floor” and hence not covered by the Regulation). But on appeal the alternative claim in common law negligence was successful, and the Court of Appeal specifically declined to rule on the interpretation of the regulation. The question of the actionability of the regulation does not seem to have been raised at either the trial or on appeal.

Given that the post-Robens model of legislation, and the risk management model, have been implemented in the UK for some years, it is worth considering how the UK courts have responded to claims for civil damages under these provisions, before turning to consider the Australian situation in more detail.

5. The new legislation and the civil action in the UK

How, then, have the UK courts interpreted the new forms of safety legislation when considering civil action based on that legislation?

Sellar in a recent article notes that in Scotland at least there has been some consideration of whether the change in form of legislation ought to lead to a change in interpretation.⁴⁸ He notes that initially Lord Reed in *English v North Lanarkshire Council* 1999 SCLR 310 at 319 described an approach to the new EU-inspired regulations based on the approach of the courts to the former *Factories Acts* as “fundamentally misconceived”, and went on:

[T]he European directives on health and safety at work differ materially from the Factories Acts in important respects. For example, obligations under the Factories Acts tend to be qualified by reference to what is reasonably practicable, whereas the directives generally impose obligations which are expressed in unqualified terms; and the structure of the directives tends to follow a sequential analysis of any hazard and the ways in which it may cause an injury, so that some obligations may be secondary to others.

However, as Sellar notes, the UK courts have in fact subsequently drawn on decisions on the wording of the previous legislation where that wording has been used in the new regulations. This practice led Lord Reed to restate his views on the relationship between the old and the new in *Gallagher v Kleinwort Benson (Trustees) Ltd* 2003 SCLR 384 at 401:

[W]here the new regulations adopt the language used in the older regulations under the Factories Acts, or *a fortiori*, where the new regulations refer expressly to provisions of the

Howie AJ: 15 December 1997); *State Rail Authority of New South Wales v Barnes* [2001] NSWCA 133; and see the claim under s 34 of the Act which succeeded in *Stanley v Advantage Personnel Pty Limited & Anor* [2003] NSWSC 911.

⁴⁷ See *Antanasios Valmas v Trevor Nyman* (12 November 1996; Supreme Court of New South Wales; James J); *Scott v S & E Visser Pty Ltd* [2000] NSWSC 265; *Rauk v Transtate Pty Ltd*; *Restile Pty Ltd v Transtate Pty Ltd* [2000] NSWSC 1020; *Almeida v Universal Dye Works Pty Limited & Ors* [2000] NSWCA 264; *Zahner v Andreas Pty Limited & Boral Building Services Pty Ltd* [2001] NSWCA 352; *Maggiotto Building Concepts Pty Ltd v Gordon* [2001] NSWCA 65; *Kolodziejczyk v Grandview Pty Ltd* [2002] NSWCA 267; *Bhambra v Roet* [2003] NSWCA 393; *Zauner Constructions Pty Ltd v Harvey & Anor* [2004] NSWCA 8; *Todorovic v Moussa* [2005] NSWCA 8; *Millington v Wilkie t/as Max Wilkie Plumbing Services* [2005] NSWCA 45; *Rawson Homes Pty Ltd v Donnelly* [2005] NSWCA 211; *F & D Normoyle Pty Ltd v Transfield Pty Ltd t/as Transfield Bouygues Joint Venture* [2005] NSWCA 193; *Lenz v Trustees of the Catholic Church* [2005] NSWCA 446 (where the regulations were found to be applicable to the situation of a volunteer); *Booksan Pty Ltd v Wehbe* [2006] NSWCA 3.

⁴⁸ M Sellar, “European Regulations and the Burden of Risk” (2004) 26 *Scots Law Times* 161-165.

Factories Acts, authorities on the interpretation of the Factories Acts may continue to be relevant.

Some of these subsequent decisions should be mentioned, even if only briefly. We may consider two different types of actions- actions based on the breach of general duties in relation to outcomes in the workplace (whether expressed broadly or more narrowly); and secondly actions based on a failure to undertake “risk management” procedures.

An important definitional issue arises here: what counts as a “risk management” provision? For the purposes of this discussion a provision or series of provisions that requires a specified *management process* to be followed will be classified as “risk management”. A provision that requires a specified *result*, however, will be a “general duty” provision.⁴⁹

(a) Actions based on general duties under the regulations

A number of actions in the UK continue to be based on provisions of the regulations imposing broad-ranging duties in relation to work equipment and other issues. In general these decisions tend to raise the same sort of issues as have been raised over many years in relation to the standard “pre-Robens” legislation.

Many cases are still concerned with applying the relevant statutory standard to the facts of the particular case: see, for example, *Harper v Staffordshire County* [2003] EWHC 283, dealing with r 12(3) of the *Workplace (Health Safety and Welfare) Regns 1992* which requires the floor to be “kept free from... any article or substance which may cause a person to slip, trip or fall”, subject to a defence of “reasonable practicability”⁵⁰; *Hislop v Lynx Express Parcels* 2003 SLT 785, dealing with the *Provision and Use of Work Equipment Regs 1992* r 6⁵¹; and *Horton v Taplin Contracts Ltd* [2003] ICR 179, [2002] EWCA Civ 1604, on a number of provisions including the *Provision and Use of Work Equipment Regs 1992* rr 5, 20 and the *Construction (Health Safety and Welfare) Regulations 1996* r 5(2)⁵². Sometimes the scope of the regulation is in doubt: for example, do the *Workplace (Health Safety and Welfare) Regulations 1992* operate only for the benefit of employees who are injured by their breach,⁵³ or do they also cover injury to contractors⁵⁴ or members of the public?⁵⁵ In determining whether work equipment is “suitable” under PUWER 1998 reg 4 is an employer

⁴⁹ For an overview of various models of OHS regulation, see E Bluff & N Gunningham, “Principle, Process, Performance or What? New Approaches to OHS Standards Setting” in Bluff, Gunningham & Johnstone (eds) *OHS Regulation for a Changing World of Work* (Sydney: Federation Press, 2004) 12-42.

⁵⁰ The school concerned was held to be liable where a teacher slipped down some stairs after stepping on a piece of food left by a child; the burden fell on the defendants to show it was not reasonably practicable to guard against food on the stairs. For two reasons his Honour held that they failed: (1) the doors between the dining room and this area of the school, while they were usually locked, seem to have been open on this day; (2) the cleaners at this point were not instructed to clean the area immediately after lunch.

⁵¹ Employee injured when the radiator cap of the lorry he was driving blew off while he was inspecting it; the Second Division (Lord Justice Clerk Gill, Lords Osborne and Weir) held that there was no need to prove the way in which the radiator had failed; it was sufficient to show that the cap blew off, since this clearly meant that the employer had not ensured that the equipment was in “an efficient state, in efficient working order and in good repair”. Followed *Millar v Galashiels Gas Co Ltd* 1949 SC (HL) 31, 1949 SLT 223 and *Stark v Post Office* [2000] ICR 1013 on the absolute nature of the obligation- see [15].

⁵² Employee injured where a fellow employee in a fit of rage overturned the scaffolding on which he was standing. Claim rejected as the relevant regulations were qualified by “practicability” and “foreseeability”, and the action of the fellow-worker was unforeseeable; in any event it was suggested that it was so significant in the causal chain of events that it was a *novus actus* and hence there was no causal link between any breach of the regulations and the injury.

⁵³ As held by the Court of Appeal in *Ricketts v Torbay Council* [2003] EWCA Civ 613; and see also *Layden v Aldi GMBH and Co KG* 2002 SLT (Sh Ct) 71.

⁵⁴ As was assumed to be the case by a differently constituted Court of Appeal (injury to the employee of a contractor) in *King v Rico Support Services Ltd and Yorkshire Traction Co Ltd* [2001] PIQR P15; *King* does not seem to have been cited to the court in *Ricketts*.

⁵⁵ *Mathieson v Aberdeenshire Council* 2003 SLT (Sh Ct) 91; the Sheriff (Mr GK Buchanan) followed the previous Scottish cases of *Banna v Delicato* 1999 SLT (Sh Ct) 84 and *O'Brien v Duke of Argyle's Trs* 1999 SLT (Sh Ct) 88, to hold that the regulations were not restricted only to employees. But these cases should probably now be regarded as over-ruled, at least for Scotland, by the decision of the First Division, Inner House, Court of Session in *Donaldson v Hays Distribution Services Ltd* [2005] ScotCS CSIH 48.

entitled to weigh up the cost of the equipment?⁵⁶ Sometimes the meaning of a particular word is at issue: what standard, for example, should be applied to equipment which is required to be “suitable” under the *Provision and Use of Work Equipment Regs 1992*?⁵⁷ Is a device being used by an employee to work on a vehicle a piece of “work equipment” within the meaning of r 6 of PUWER?⁵⁸

A recent important case on the reach of the legislation is *Fytche v Wincanton Logistics Plc* [2003] EWCA Civ 874, [2003] ICR 1582.⁵⁹ A workman was provided with steel-capped boots to protect against the risk of falling objects or collision with obstacles. He was out on duty on a very cold and snowy day when ice water entered the boot through a small hole near the toecap (but on the leather part of the boot). As a result he contracted frostbite in one toe and suffered injury. He took an action on the basis of a breach of reg 7 of the *Personal Protective Equipment at Work Regulations 1992*, which requires an employer to “ensure that any [Personal Protective Equipment] provided to his employees is maintained... in an efficient state, in efficient working order and in good repair.”

The majority of the Court of Appeal (Waller & Kay LJ) held that the worker could not recover. They accepted that the duty was an “absolute” one following *Stark v The Post Office* [2000] PIQR 105 (ie not qualified by practicability). But the danger against which the regulation was intended to guard was the danger of crushing from heavy or hard objects, not the danger presented here. Waller LJ said:

the regulations were not concerned with risks other than those necessitating protective equipment, and in particular no absolute duty was intended to be imposed by regulation 7(1) in relation to such risks.⁶⁰

His Lordship held that an action in common law negligence would of course still be available in relation to “the condition of the part of the boot that supports the toecap”, but as the hole had been found to be unforeseeable that did not avail here. Kay LJ generally agreed. Lindsay LJ dissented. His Lordship mainly argued on the basis that the rule proposed by the majority involved fine distinctions that would be productive of litigation. It was better to take the common sense view that the boot as a whole was the “protective equipment”, and that any defect in the boot which resulted in damage was actionable.⁶¹ The complex redefinition of the provisions which the majority were led to formulate, could not be supported by the plain text of the regulations.⁶²

There are brief comments on the case in notes by Lewis & Walsh⁶³ and Smith⁶⁴. Smith correctly points out that the logic of the case really takes us back to *Gorris v Scott* (1874) LR 9 Ex 125, the much-criticised “sheep overboard” case, which stands for the rule that the harm suffered by the plaintiff must be within the “scope” of the harm that the legislation was seeking to avoid. The majority are actually very careful not to be seen to be citing the case, preferring instead to take their legal justification from a textbook (Clerk &

⁵⁶ No, according to the detailed analysis of the provisions in light of the underlying European directives given by Sir David Edward in the Scottish Inner House decision of *Skinner v Scottish Ambulance Service* 2004 SLT 834. Sellar, above n 48 discusses the case in some detail in his article, and mentions that Sir David spent 14 years as a judge of the European Court of Justice between 1989-2003.

⁵⁷ See *Yorkshire Traction Company Ltd v Searby* [2003] EWCA Civ 1856, where the court concluded that the standard of “suitability” was not breached even where an injury was foreseeable due to lack of the equipment; in that case, concerned with safety screens for bus drivers to guard against assaults by passengers, the court also needed to take into account the claimed risks created by the screen, and the unwillingness of some bus drivers to use the screens.

⁵⁸ No, according to the Court of Appeal in *Hammond v. Commissioner of Police for the Metropolis* [2004] EWCA Civ 830, [2005] P.I.Q.R. 1.

⁵⁹ For the appeal to the House of Lords see discussion below.

⁶⁰ Above, at para [20].

⁶¹ Above, at paras [31]-[32].

⁶² Above, at para [37].

⁶³ (2004) 148/4 *Solicitor's Journal* 97.

⁶⁴ (2004) 154.7114 *New Law Jnl* 171.

Lindsell) and coyly noting that the proposition there is “developed... with citation of certain authorities”.⁶⁵ With respect the dissent of Lindsay LJ is convincing.

The House of Lords, however, affirmed the decision on appeal: see *Fytche v Wincanton Logistics plc* [2004] UKHL 31; [2004] 4 All E.R. 221; [2005] PIQR P5. The House found against the worker, in a very close 3-2 decision (Lord Walker of Gestingthorpe in particular commented at [46] that he had reached his view in the majority “with rather more hesitation” than Lord Hoffmann who delivered the main majority judgement). The majority (Lord Nicholls of Birkenhead agreeing with a brief comment) took the view that in an action under the *PPEW Regulations* the boot needs to be viewed as a piece of “personal protective equipment” which has been issued to deal with a specific risk, and that there is no breach of the regulations where that risk has not eventuated. In particular the obligation under reg 7, to maintain the boots in “good repair”, while on the surface breached here, must be restricted to an obligation to continue the effectiveness of the protection against the specific risks for which the boot was issued. The dissenters, Lord Hope of Craighead and Baroness Hale of Richmond, made a very strong case that it was contrary to both policy and acceptable principles of interpretation to so restrict the regulation. Baroness Hale in particular analysed the context of the *PPEW Regulations* against both previous regulations and the current “six-pack” of European-based laws, and noted that it is clear that equipment which is provided must not only protect against the specific risk identified by the employer, but must itself be safe.

There are contrasting views on how the overall context of the regulatory scheme affects the content of the duty in this case. For the majority the fact that protective equipment is issued after a “risk assessment” process seems to provide a reason for restricting the interpretation of the requirement that the equipment be “in good repair”, to a consideration of whether it meets the precise risk previously identified. Indeed, Lord Walker shows a touching faith in the compliance of businesses with legislation when he comments at [55]:

The whole business of providing the equipment is (as already noted) concerned with the identification and assessment of risks. In any properly run business the risks will be fully documented (probably by reference to official publications) in a form which can be explained (and must be clearly explained—see regulation 9 (1) (a) and (2)) to the employees affected by the risks. The inquiries which Lindsay J refers to ([in his dissenting judgement in the Court of Appeal at] p 1591, para 35) should therefore be unnecessary, since the answers should already be on file.

On the other hand Baroness Hale notes at [58]-[59] that while in theory “prevention is better than cure” and employers will be making these assessments, the reality is that where precautions have not been effective enforcement and compensation are required. In particular the logic of assuming that prior steps in the process have been properly taken falls down. Why should the employer’s liability be restricted to the equipment’s suitability for protection against risks which he has actually identified? Should a dull or slow-witted employer receive more protection than a far-seeing employer who predicts a wider range of risks?

[68] Nor am I impressed by the argument that the whole obligation to provide this equipment assumes that the employer has conducted an assessment of risk. That is true. But it does not mean that the extent of his liability under these regulations should be limited by the results of his own risk assessment... The employer may or may not have assessed the risks properly. He may or may not have identified the right risks. It would be odd indeed if an employer who had identified the wrong risks should be in a better position than an employer who had identified the right ones.

One Note of the decision of the House comments that there will be many who will agree with Her Ladyship’s dissent in this case, but “in the longer term, however, few cases will fail on the narrow point decided here”.⁶⁶

⁶⁵ *Fytche*, above, per Waller LJ at [18].

⁶⁶ “Case Comment” in [2004] 3 *Journal of Personal Injury Law* C137-139.

That this prediction may be correct can be seen in the decision of the Court of Appeal in *Ball v Street* [2005] EWCA Civ 76, [2005] PIQR 22. Briefly, the logic of the *Fytch* majority was said by the defendant to apply to a situation where a tine from a “haybob” machine had flown off and injured the plaintiff by penetrating his eye. *Fytch* applied, it was claimed, because even with the tine missing the machine was “suitable” for doing the job of baling hay, and hence it could not be said to be not in “good repair” within the meaning of the *Provision and Use of Work Equipment Regulations 1998* (PUWER).

The Court of Appeal (Potter, Longmore and Jacob LJ) rejected this submission. The terms of the regulation were similar to the terms of earlier legislation which had been interpreted as imposing “absolute” obligations. The purpose of the legislation was not to require the machinery to be in “good repair” for the commercial purposes for which it was used; rather, the legislation imposed that duty so as to prevent injury to person using it, and it should be interpreted in that way- Potter LJ, at [44]. The situation was distinguished from that considered in *Fytch*, where Lord Walker in particular had stressed that the legislation in question there dealt with protective equipment which was designed to cope with a specific risk. Here the regulations were dealing with “general considerations of safety” rather than particular risks- see para [57], and hence any part of the equipment which created a risk breached the legislation. As Longmore LJ noted at [77]:

[R]egulations made in respect of specifically “protective” equipment cannot readily be correlated to the more general regulations made in respect of the provision and use of “work” equipment. The obligation to maintain equipment at work is only partly to maintain it in the state in which it was “suitably” provided in the first instance but must also extend to maintaining it in a state in which the worker is not, in fact, to be injured; if the maintenance need only be done to deal with risks foreseeable at the time the equipment is provided that would do much to diminish the utility of health and safety legislation altogether.

(b) Actions based on risk management provisions

A number of actions have started to appear in which, as well as the more familiar issues, risk management provisions have played a role in the decision.

Dugmore v Swansea NHS Trust and anor [2003] PIQR 15, [2002] EWCA Civ 1689 is a good example of such a case. Ms Dugmore was a nurse who, while working for the Swansea Hospital in the 1990's, developed sensitivity to latex, due to being required to use latex gloves. Later while working for the other defendant, Morriston NHS Trust, she experienced a relapse by picking up a box in which latex gloves had been stored. Her action in common law negligence failed, as on the evidence it was not reasonably foreseeable before 1993 (when her condition developed) that exposure to latex would produce this result. Her statutory duty action was based on r 7(1) of the *Control of Substances Hazardous to Health Regulations 1988* (COSHH) which required an employer to “ensure that the exposure of his employees to a substance hazardous to health was either prevented or, where this was not reasonably practicable, adequately controlled”. This specification of a process of successive steps- (1) prevent, or, if not reasonably practical, (2) adequately control – is a common feature of the risk management form of legislation.⁶⁷

The definition of “substance hazardous to health” effectively merely required that the substance be *in fact* hazardous, not that this be foreseeable. Similarly, “adequate” was not to be judged on grounds of foreseeability but on grounds of effectiveness.

The Court of Appeal (Hale LJ as she then was delivered the judgement on behalf of the court) held that r 7 had been breached and had caused the injury. The wording of r 7 left it in no doubt that the word “controlled” was not subject to “reasonable practicability”. On the question of foreseeability her Ladyship reviewed a number of previous decisions on similar

⁶⁷ In NSW, see the procedures mandated in Chapter 2 of the *OHS Regulation 2001*, clauses 9ff: identify risks, assess hazards, eliminate or control, etc. For another case involving a regulation with this “staged” structure see *O'Neill v DSG Retail Ltd* [2002] EWCA Civ 1139, [2003] ICR 222- the *Manual Handling Operations Regulations 1992* r 4 required manual handling to be eliminated if possible, and if not possible the risks arising from it to be reduced to the lowest level reasonably practicable.

provisions and concluded that in general “foreseeability” was not relevant to a decision as to whether a workplace was “safe”⁶⁸. On r 7 Hale LJ adopted the reasoning of Lord Nimmo Smith in the Scottish decisions of *Bilton v Fastnet Highlands Ltd* 1998 SLT 1323 and *Williams v Farne Salmon & Trout Ltd* 1998 SLT 1329 where it was held that the duty was an absolute one, not qualified by foreseeability.

In an interesting comment Hale LJ pointed out that the difference between an ordinary negligence action and a statutory duty action was to be expected.⁶⁹ Here the exposure to the hazard could have been completely prevented by not requiring the plaintiff to use latex gloves. The hospital had the onus of proving that this was not reasonably practicable, and they could not - as it was clearly not too expensive or difficult. Even if a defence could have been mounted here (and in the court’s view it could not), the duty to “adequately control” remained and had not been carried out.

The policy reason for this approach to the legislation is that the legislature intended employers to be active in discovering possible sources of danger to their employees. Hale LJ comments that employers have duties to actively seek out possible risks and take precautions, and if they do not then it is not unfair that they should be obliged to compensate employees who suffer as a result.⁷⁰

The comment on this decision by Niazi Fetto and Anastasia Karseras, “Personal Injury Update”⁷¹ is fairly negative, and suggests the decision imposes a high burden on employers. “Employers across the country must now actively investigate what ‘hazardous substances’ are used by their employees, and assess the risks associated with the use of such substances with recourse to all available research”. With respect, it is hard to see this as a negative outcome of the decision!⁷²

Another case involving a duty of the “risk management” sort was *McCook v Lobo et al* [2002] EWCA Civ 1760.⁷³ Mr McCook was employed by Headley, who was a contractor engaged by Lobo (the owner of certain premises) to convert the premises as a business for London Seafood. McCook was injured in falling off a ladder that was not properly secured. Liability was clearly established against the employer Headley, but he was uninsured and without assets. The common law claim against Lobo was rejected- as an occupier Lobo had discharged his duty when he engaged a reputable contractor. Was there a statutory liability? Claims were made under the *Construction (Health, Safety and Welfare) Regulations 1996* (UK) and the *Construction (Design and Management) Regulations 1994* (UK).

The 1996 Regulations impose obligations on someone who “controls the way in which construction work is carried out”, under r 4(2). But the Court held that general control as occupier did not establish sufficient control over the work to create liability- see Judge LJ at [16]-[17]. The 1994 regulations however, under r 10, impose a duty on a “client” (which Lobo clearly was) to ensure that construction does not start “unless a health and safety plan... has been prepared”. There is a general exclusion of civil liability under the 1994 Regulations (see r 21) but r 10 is one of the exceptions to this exclusion, so is clearly actionable.⁷⁴

Accepting that r 10 had been breached here (no safety plan was prepared before construction started), other questions still arose. One was whether the power to lay down a safety plan gave the client “control” for the purposes of the 1996 Regulations; this submission was sensibly rejected - [21]. The more important question then arose as to whether the breach of r 10 was in the circumstances a cause of the accident or not. The Court

⁶⁸ See for example *Larner v British Steel plc* [1993] ICR 551, interpreting s 29(1) of the *Factories Act 1961*- referred to in *Dugmore* at para [16].

⁶⁹ *Dugmore*, above, at [24].

⁷⁰ Above, at para [27].

⁷¹ (2003) 153.7063 *New Law Jnl* 53.

⁷² *Dugmore* was followed in the later decision in *Naylor v Volex Group Plc* [2003] EWCA Civ 222. The Court of Appeal there (Simon Brown, Buxton & Carnwath LJ) held that the regulation in question did not require that the risk be foreseeable; rather it required active steps to be taken by the employer to examine possible risks.

⁷³ The Case Comment in (2003) *Jnl of Personal Injury Law* (Jan) C31-33 simply summarises the decision.

⁷⁴ Interestingly, HSE CD177 (see n 75 above) at para 20 notes that this “civil liability exclusion” is one of those to be reviewed following the repeal of the general exclusion under former r 22 of the MHSWR 1999.

held that it was not; safety plans of this sort were not “required to deal expressly with obvious and elementary safety precautions” such as the need to secure a ladder- [24].

With respect, this may not be correct. It could be strongly argued this is precisely what these plans *are* supposed to deal with- providing a “checklist” of matters which might seem obvious to experts but might be omitted in the rush of getting a job done. As Latham LJ commented in relation to similar provisions in *Sherlock v Chester City Council* [2004] EWCA Civ 210 at [25]:

The purpose of a risk assessment in a case such as this is to ensure that what may appear to be obvious is in truth obvious, in the sense that both parties have appreciated the risk. I say both parties, because it also provides the opportunity for an employer to ensure that he has taken appropriate steps to protect his employee.

There seems no indication in *McCook* that the court was taken to other such plans from within the industry, so that a comparison could be made with what other plans included. And even if the plan did not deal with the placement of ladders precisely, it might have set out risk assessment procedures that would have ensured that the safety of the ladder should have been checked by somebody. It is suggested that a more careful evaluation needs to be made by the courts in the future as to the likely contents of a risk management plan, and the effect it may have had on the way risks are handled in the workplace.

Griffiths v Vauxhall Motors Ltd [2003] EWCA Civ 412 also provides an interesting discussion of risk management issues. Mr Griffiths was injured by the “kickback” of a tool used to tighten a bolt while assembling a car. Evidence was presented that the machine had no apparent fault based on the manufacturer's specifications, but did occasionally kick back in this way. He sought damages on the basis of a breach of statutory duty under regulations 4 & 5 of the *Provision and Use of Work Equipment Regulations 1992* [PUWER] (in relation to the tool). However, he also brought what amounted to a negligence claim in which the breach was alleged to be a failure to conduct a “risk assessment” in accordance with r 3 of the *Management of Health and Safety at Work Regulations 1992* [MHSWR 1992].

This second claim could not, at the time Mr Griffith's accident occurred, technically be a claim for breach of statutory duty, as r 15 of the MHSWR 1992 specifically excluded civil liability for breach of a number of specific regulations, including r 3.

A brief digression on the current actionability of the “risk management” provisions of the MHSWR seems in order. The MHSWR 1992 were repealed and replaced by the *Management of Health and Safety at Work Regulations 1999* [MHSWR 1999]. Regulation 3 (the risk assessment requirement) of the MHSWR 1992 was repeated in r 3 of the MHSWR 1999. The exclusion of civil liability for a breach of this regulation was also repeated in the MHSWR 1999 when first enacted, in r 22.

Importantly, however, r 22 was repealed and replaced with effect from 27 October 2003, so that a breach of statutory claim for a breach of r 3 is now possible.⁷⁵ The *Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003*⁷⁶ have removed the former wide exemption, and r 22 now assumes⁷⁷ that all the provisions of the 1999 regulations may be the basis for a civil action against an employer, **except** only in relation to persons who are not employees.

Restriction of civil liability for breach of statutory duty

⁷⁵ Indeed, it seems likely that claims of this sort can now be filed where the injury occurred up to three years prior to the claim, even if the injury occurred prior to 27 October 2003, and possibly even a longer time ago than three years if the injury was a “latent” one- *Limitation Act* 1980 (UK) s 11. See the advice about the effect of the amendment to the regulations offered in the Health and Safety Executive Consultative Document (CD177) *Consultative proposals to amend the Management of Health and Safety at Work Regulations 1999 and the Fire Precautions (Workplace) Regulations 1997* (December 2001), which lay behind the amendments, at para 15(iii).

⁷⁶ SI 2003/2457.

⁷⁷ When read in conjunction with s 47(2) of the *HSW Act* 1974, which as noted above sets up a *prima facie* rule that breaches of the regulations are actionable.

22. Breach of a duty imposed on an employer by these Regulations shall not confer a right of action in any civil proceedings insofar as that duty applies for the protection of persons not in his employment.

This change to the regulations was made, as the relevant HSE consultation document reveals, as a response to complaints from the European Commission that the UK was in breach of its obligations under the health and safety “Framework Directive” (89/391/EEC) to allow action to be taken by employees in relation to all breaches of the directive.⁷⁸

As Howes⁷⁹ points out, the implications of the amendment are fairly wide-reaching, as the 1999 regulations contain a number of broadly worded obligations relating to risk assessment, preventative measures to be applied, planning of safety measures, health surveillance, and provision of information and training, etc.⁸⁰ She cites the *Griffiths* case as an example of the sort of case where risk management issues can now be raised as a direct statutory breach.⁸¹

To return to that case: at first instance the Recorder refused to find a breach of the PUWER as expert evidence was accepted that the tool was safe. On appeal the Court of Appeal (Clarke LJ delivered the main judgement; Judge & Aldous LJJ concurring generally) held that this decision of the Recorder could not be overturned. His Lordship agreed with the worker's submission that the “suitability” of a piece of equipment could not solely be judged on the basis of the manufacturer's specifications, which had weighed heavily with the Recorder- see [28]- but in the end held that the Recorder had taken other matters into account and his judgement on this point had not been shown to be erroneous. He commented that rr 4 & 5 of PUWER were mainly concerned with “the physical condition of the equipment” and not so much with the training or instruction given to operators, which is dealt with in rr 8 & 9- [29]. Judge LJ in a brief concurring judgement also noted that equipment is not “unsuitable” under PUWER “when injury results from inadequate control of or mishandling of the equipment”- see [47].

This part of the judgement may turn on a failure of the plaintiff to plead a breach of the regulations concerning instructions and training. Despite comments about not knowing what caused the “kickback” the court seems to have accepted that if workers had been told in using the machine to grasp it firmly that the accident could have been avoided.⁸²

The second and more important issue for present purposes was the alternative claim (made in negligence for reasons noted above) that there was a breach of r 3 of the MHSWR in not conducting a proper “risk assessment” and communicating the results of that to the workers. This claim was upheld by the Recorder, and also by the Court of Appeal. The Recorder held that if the risk assessment had been carried out, and the results (eg the advice to “hang on tightly”) properly communicated, then the advice would probably have been followed and the accident not occurred- see [36].

This is an important part of the judgement, especially now that a breach of the duty to conduct a risk assessment under r 3 of the MHSW Regs 1999 is directly actionable. The judgement of the Court of Appeal here well describes the logic of an action that might be

⁷⁸ See the HSE CD177 (above, n 75) at para 3.

⁷⁹ Victoria Howes, ‘New civil action against employers’ (2003) 153(7106) *New Law Journal* 1794.

⁸⁰ All these matters are dealt with in NSW under the *Occupational Health and Safety Regulation* 2001.

⁸¹ Note that in the recent House of Lords decision in *Fyfe v Wincanton* [2004] UKHL 31, at [68], Baroness Hale says that “There is no civil liability for breach of the general obligation to assess risks: see the Management Regulations, reg 22.” Her Ladyship seems to be referring to the former reg 22, rather than the current; in the context of the case, where the events occurred on 19 December 1999, the former exclusion of liability was in force.

⁸² There is an interesting contrast here with the decision in NSW of the Industrial Relations Commission in Court Session in *WorkCover Authority of New South Wales (Inspector Mulder) v Arbor Products International (Australia) Pty Ltd* [2001] NSWIRComm 50. There it was held that machinery was not inherently “safe” if it was foreseeably able in the ordinary course of use to be used unsafely, despite the manufacturer's instructions to the contrary. That was a decision in the criminal jurisdiction rather than the civil, but does illustrate a different approach to the interpretation of legislation requiring equipment to be the “safe”.

based on a failure to conduct an adequate risk assessment. Similar logic could be used in an action based on chapter 2 of the *OHS Regulation* 2001 in NSW.⁸³

The recent amendment to the MHSWR 1999 allowing breaches of the risk management provisions to be civilly actionable raises a number of questions for the future.

Howes' article makes a number of interesting points.⁸⁴ She suggests that since many of the obligations under the 1999 regulations are "general obligations" rather than specific, then "only some regulations can be invoked by the claimant". This may not be entirely accurate. The issue, it seems, is not the generality or specificity of the obligations concerned, but whether the obligation is imposed for the benefit of the claimant. Of course there may come a point where the language is so vague that a court cannot decide whether the obligation has been breached. For example, in NSW there is a statutory provision in the *OHS Act* 2000 s 14(c) requiring that the views of employees "be valued". It is hard to see what sort of meaningful standard a court could apply here.⁸⁵ But many of the broad obligations in the UK MHSWR 1999, while onerous, are certainly not meaningless.

Howes notes that under r 14 of the MHSWR 1999 obligations are imposed on employees, rather than employers. Regulation 14 provides:

Employees' duties

14. - (1) Every employee shall use any machinery, equipment, dangerous substance, transport equipment, means of production or safety device provided to him by his employer in accordance both with any training in the use of the equipment concerned which has been received by him and the instructions respecting that use which have been provided to him by the said employer in compliance with the requirements and prohibitions imposed upon that employer by or under the relevant statutory provisions.

She suggests that where there is an injury to an employee resulting from a breach of this regulation by another employee (eg failure to use machinery in accordance with instructions), there might be an action against the employee at fault by the injured fellow employee.⁸⁶ The suggestion does not seem very likely in practice given the limited financial resources that employees are likely to have to meet such claims. But there are a number of interesting issues here.

One is whether there been any claims against fellow employees under previous such legislation. This writer at least is not aware of any. This is certainly one area where (assuming that different regulations within the MHSWR might be treated differently) it might be questioned whether Parliament could have had the intention to allow such actions (or, to be more accurate, the intention to allow regulations to be made allowing such actions.) On the other hand, s 47(2) of the *HSW Act* 1974 (quoted previously) is quite clear that breaches of the regulations "shall be" actionable, and so may be thought to have removed the need to consider this issue.

Since an action under r 14 would be against an employee, the limits imposed by the new version of r 22 would not be present (see the opening words of r 22: "Breach of a duty imposed on an *employer* by these Regulations ..."). Hence if such actions were possible then it is quite possible that employees would face actions from contractors or members of the public injured by the employee's failure to use (eg) machinery in accordance with training or instructions. Thus an employee would be subject to actions that could not be taken against the employer. This might be another reason for supposing that there would not be an intention to allow such civil actions under r 14.

⁸³ Unlike the previous situation in the UK, in NSW the provisions of the *OHS Regulation* 2001 have been civilly actionable under s 32(2) of the *OHS Act* 2000 since their enactment. Another UK case where risk assessment issues were raised, although again at the time not technically actionable, was *Sherlock v Chester City Council* [2004] EWCA Civ 210.

⁸⁴ See n 79 above.

⁸⁵ It should be noted, however, that as s 14 is located within Part 2 of the Act, there is in any event no civil action in relation to breach, by virtue of s 32(1) of the Act.

⁸⁶ The point was also made in HSE CD177, above n 75, at para 15(ii).

On the other hand, the possible availability of such an action would raise the issue of the doctrine of vicarious liability, and the difficult question of whether it is the master's tort or the servant's tort that creates liability. If an employer *is* vicariously liable for the servant's tort, then a breach of statutory duty by an employee will create liability in the employer if the other requirements for vicarious liability are satisfied (ie the employee was acting in the course of employment). In Australia it seems clear that in the current state of authority, at common law an employer will not be vicariously liable for a breach of a statutory duty imposed on an employee⁸⁷; but the opposite position seems have been assumed for many years in the UK⁸⁸. It would be an interesting irony if such an action were allowed, as the amendment to r 22 in 2003 was clearly designed not to apply in relation to non-employees. But on established legal principle there seems no good reason why it should not be allowed. In short, where a contractor or a member of the public is injured by the failure of an employee to comply with MHSWR 1999, r 14, then it seems at least possible that they can sue the employer as vicariously liable for the employee's breach.⁸⁹

6. The risk management model and the future of the civil action in Australia

What is the likely future of actions for breach of statutory risk management provisions in Australia, then? How will the Australian courts approach the question of actionability in relation to these provisions?

We have already seen that it cannot be assumed that every statute that concerns workplace safety will be read as implying a civil right of action, nor that even where some provisions imply such a right, all others will. Despite the decision of the Queensland Court of Appeal in *Schiliro*⁹⁰ holding that the general employer/employee duty provision of the *Workplace Health and Safety Act 1995* (Qld) implies a civil action, a series of other Queensland decisions have treated other sections of that Act differently.

In *Heil v Suncoast Fitness* [2000] 2 Qd R 23 the plaintiff was walking with a group led by an employee of a fitness centre when struck and injured by a passing cyclist. He sued

⁸⁷ In *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 the High Court held that an employer could not be vicariously liable for a breach of statutory duty committed by an employee, when the duty was imposed by the statute directly on the employee rather than on the employer.

⁸⁸ It is usually stated in the textbooks that the House of Lords has declined to clarify this point. Certainly in *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656 Lord Pearce seems to specifically leave the point open at 688G-689A. But the comments of their Lordships elsewhere in the decision are really explicable on no other grounds, and often come very close to being directly on point. So at one point Lord Hodgson says: "unless the company has some defence of its own it must accept vicarious liability for the participation of James in the accident" (680D). Lord Pearce's comment at 687E states that an employer may be "vicariously in breach of [a] statutory duty" which is not in terms binding on the employer directly. Nevertheless, out of deference to the High Court decision in *Darling Island Stevedoring*, his Lordship on the next page says that it is "not necessary to decide the point" and "I prefer to reserve the matter for future consideration". With respect, this very much has the feel of a paragraph added at the last minute when his Lordship had discovered the High Court judgment. There seems no doubt from the rest of the judgment that the House believed an employer vicariously liable in the circumstances. Apart from Lord Pearce's concluding words the rest of the judgment must stand for the proposition that a master can be vicariously liable for a breach of a statutory duty imposed directly on an employee. This is contrary to the High Court's decision in *Darling Island Stevedoring*, although it is not contrary to the policy implemented by the NSW Parliament to overturn that decision (see the *Law Reform (Vicarious Liability) Act 1983* (NSW), s 7, which now provides that an employer *is* vicariously liable for breach of a statutory duty imposed on an employee where the employee is acting in the course of the employment, or where the breach is incidental to the carrying on of the employer's business) It may even be queried (given the lack of support for the "master's tort" theory today) whether the current High Court would uphold its own prior decision on the point. Clerk and Lindsell, 'Breach of Statutory Duty (ch 11)' in *Clerk & Lindsell on Torts* (18th ed, 2000) 248 take the same view, effectively, of the English law.

⁸⁹ And, in NSW at least, given the *Law Reform (Vicarious Liability) Act 1983* (NSW) s 7, noted above, the same logic would lead to the view that an obligation imposed on an employee under the *OHS Regulation 2001* (NSW) might create vicarious liability in the employer there- see, for example, r 28 or r 204 which requires an employee to notify the employer of certain risks to safety. On the other hand, given the "lighter touch" of s 32(2) of the NSW *OHS Act 2000*, which allows rather than prescribes a civil action, a court might conclude for reasons canvassed above that there was no Parliamentary intention to allow a civil action against the employee in such cases.

⁹⁰ See above; and also *Schulz v Schmauser & Anor* [2000] QCA 17.

the centre in both negligence and breach of statutory duty. The relevant statutory provision was s 10(1) of the *Workplace Health and Safety Act 1989* (Qld):

- (1) An employer who fails to conduct his or her undertaking in such a manner as to ensure that his or her own health and safety and the health and safety of persons not in the employer's employment and members of the public who may be affected are not exposed to risks arising from the conduct of the employer's undertaking, except where it is not practicable for the employer to do so, commits an offence against this Act.

The negligence claim failed, and the Court of Appeal then had to consider the actionability of s 10. The Court (McMurdo P, Pincus J) conceded that the fact that s 9 of the Act had already been held to be actionable⁹¹ counted in favour of the actionability of the adjacent provision. But their Honours were struck by the very wide ambit of the duty imposed by s 10 and other provisions part from s 9. They offered the following reasons for concluding that s 10 did not create a civil action:

- For a duty to be created, the obligation should be “specific”, not “general”⁹²;
- A duty should only be read when there is an obligation in relation to a limited class of the public⁹³ - here the duties “appear to be for the protection of anyone, whether employee or not, whose safety may be put at risk by the activities dealt with by the various sections”;
- The different status of s 9 may be related to the historical availability of actions by employees, and should not be read into the other provisions;
- “[T]he offence [s 10] creates depends on proof of mere exposure to risk; had it been intended to create a right of civil action, one might have expected there to be some reference to prevention of injury or damage”;
- “[Section] 10 is not confined in its operation to the workplace, but applies to the whole undertaking, as is illustrated by the present case. If there were a collision between two vehicles, one being driven in the course of an undertaking caught by s. 10 and one not, it would seem absurd that different tests should be applied, in determining the liability of the two drivers”;
- “[T]here is no reason to think that the general law provides inadequate safeguards, by way of imposition of civil liability, to members of the public put at risk by undertakings or work mentioned in s. 10”.

With respect, some of these reasons are not very convincing. It is by no means unknown for general obligations to be actionable, and indeed the obligation in s 9 of the same Act is quite general. It seems to overstate the case to say that the duties owed under the Act are for the protection of “anyone”- all of them have to do with activities that go on in the workplace, and any injury will result from a connection of some sort with a workplace. And almost all industrial safety laws refer to risk rather than specific injury. Accepting that Mr Heil's claim does not seem very compelling, it would seem to have been more in accord with principle and authority discussed above to have conceded the actionability of s 10 and to have rejected the claim if the evidence showed (as it seemed to) that it was not practicable to have done more to protect the runners from passing cyclists. Instead the court has, for the sake of rejecting this claim, ruled as non-actionable an important provision of the Act which provides protection for contractors and members of the public at a workplace.

Unfortunately the tone was then set for further decisions. *Percy v Central Control Financial Services Pty Ltd* [2001] QCA 226 concerned the liability of contractors under s 23 of the *Workplace Health and Safety Act 1989* (Qld). The plaintiff was a self-employed plumber injured by a fall. He was unable to use s 10 as the basis for an action against the

⁹¹ In *Rogers v Brambles*, above n 29.

⁹² Citing *O'Connor v. S P Bray Limited* (1937) 56 C.L.R. 464 at 477, 478, *John Pfeiffer Pty Ltd v. Canny* (1981) 148 C.L.R. 218 at 243, *Byrne v. Australian Airlines Limited* (1995) 185 C.L.R. 410 at 424.

⁹³ Citing *Phillips v. Britannia Hygienic Laundry Co. Ltd* [1923] 2 K.B. 832 at 840, *Byrne v. Australian Airlines Limited* (above) at 424.

owner of the site, due to the decision in *Heil*. Instead he relied on the provisions of s 23(a) and (c) in an action against the “principal contractor”:

23. In respect of a project on which he or she is engaged, a principal contractor who -
 (a) fails to ensure, except where it is not practicable for the principal contractor to do so, that every employer and every employee engaged in an occupation at a workplace complies with or, as the case may be, does not contravene the provisions of this Act; or ...
 (c) fails to provide such other safeguards and take such other safety measures as are prescribed;
 commits an offence against this Act.

The claim is curious in that it is not apparent from the judgement how the contractor was said to have breached the provisions; the plaintiff does not seem to have fallen into the category of either “employer” or “employee”, and none of the safety measures listed by the court (appearing in r 12 of the regulations made under the Act) appear to have been relevant to the plaintiff’s injury. Be that as it may, the Court of Appeal took the opportunity to say that in their view the provisions did not create civil liability. Davies JA, with whom the other members of the Court agreed, said:

[16] For different reasons therefore neither of these provisions, in my opinion, confers a private right of action. Para(a) does not because it is not a provision which on its face imposes any primary liability but imposes a secondary vicarious liability for the acts or omissions of another. And para(c) does not because, though it confers a primary liability, it is one which cannot be said to be for the benefit of any specific class. For those reasons, in my opinion the learned primary judge erred in concluding that, by s23(a) and s23(c) the legislature intended to add an action for breach of statutory duty to the common law duty of care for the safety of employees.

This decision was reached despite there being clear statutory precursors to the provisions, in the *Construction Safety Act* 1971 (Qld), s20(a), s20(b)(ii), s21(b)(ii) and s22(b), which had been held to create civil liability in *Sherras v Van der Maat & Ors* [1989] 1 Qd R 114. But the width of the obligation in the 1989 Act (applying to members of the public as well as employees), and the unusual “vicarious” nature of s 23(a), were held to be reasons for finding against civil actionability.

In another limiting decision, *O’Brien v T F Woollam & Son Pty Ltd* [2001] QSC 217 it was held that sections 30 and 31 of the *Workplace Health and Safety Act* 1995 (which replaced the 1989 Act dealt with in the above decisions) were not actionable.

In many ways this decision is simply an application of *Percy*, as some of the provisions here were simply renumbered versions of s 23 of the 1989 Act which had already been ruled to be non-actionable. Phillipides J noted that one criterion for determining actionability was whether the particular provision replaced one that “historically” had been held to be actionable.⁹⁴

Noting that s 30 of the 1995 Act (dealing with the duties of persons “in control” of a workplace) was the equivalent of s 11 of the 1989 Act, and that s 11 had been held at first instance in *Percy* not to be actionable, he ruled that s 30 was not actionable. Other considerations which led to this view were that the duty was owed to a group wider than employees (“persons coming onto the workplace to work” - with respect, surely not too wide a proportion of the public!), and that the duties were expressed in broad rather than specific terms.

In relation to s 31, imposing obligations on principal contractors, his Honour’s reasons for finding that this provision did not create civil liability were effectively the same reasons as offered by the Court of Appeal in *Percy*. That is, the obligations were to a wide group of people rather than a “specific class”, and the obligations to see that others obeyed the law were inappropriate for a civil liability.

⁹⁴ Citing the judgement of Atkinson J at first instance in *Percy* at [2000] QSC 129 at [24].

None of the Queensland decisions discussed so far dealt specifically with “risk management” provisions.

In *O'Reilly v Henson t/a Cavalier Foods* [2002] QDC 70 we do, however, have a decision which to some extent illustrates the nature of a breach of statutory duty case involving risk management considerations. As noted above, s 28 of the *Workplace Health and Safety Act 1995* (Qld) has been held a number of times to be a source of civil liability. The section provides:

28 Obligations of employers

(1) An employer has an obligation to ensure the workplace health and safety of each of the employer's workers in the conduct of the employer's business or undertaking.

The 1995 Act combines aspects of the standard post-Robens “general duties” legislation, with aspects of the risk management model. It does so particularly in s 29B(a), where it refers to the fact that an obligation under s 28 includes “(a) identifying hazards, assessing risks that may result because of the hazards, deciding on control measures to prevent, or minimise the level of, the risks, implementing control measures and monitoring and reviewing the effectiveness of the measures.”

Under s 26 of the Act, an employer is obliged to follow any advisory standards relating to the area, unless able to show that what they did provides the same protection. There is also a general defence provision, s 37, allowing proof that a relevant “code of practice” has been followed.

In *O'Reilly* the worker tripped over an uneven section of grass while carrying some boxes to be stacked in a truck. In considering the statutory duty claim based on s 28, Samios DCJ considered the provisions of the “Code of Practice for Manual Handling” issued under the Act. The Code itself was an example of the “risk management” process, requiring the employer to conduct “Risk Identification” and “Risk Assessment”, followed by “Risk Control”.⁹⁵ After weighing up the evidence of the various experts, Samios DCJ concluded that the area in question was little used, there had been no evidence of previous problems, and that a proper “risk identification” process could have concluded that there was no need to go on to any further “assessment” of risks.

His Honour essentially concluded that the risk was, in more familiar common law terms, not reasonably foreseeable. In the risk management parlance, the degree of risk was not sufficient to warrant further preventative action. The Code was complied with and hence s 26(3) and s 37(1)(b) of the Act were satisfied.⁹⁶ The case provides an interesting example of how a court responds to risk assessment issues.

What we find in the Queensland cases, then, is a recognition that the “central” duty of an employer to employee will give rise to civil liability (although of course subject to the defences allowed by the legislation). But other duties, owed to members of the public or the employees of contractors, have been treated differently. It is difficult to agree with some of these fine distinctions; insofar as a part of statutory interpretation is the overall context of a provision, it seems to make little sense to conclude that one group of protected persons can take a civil action while another group cannot.

A willingness to distinguish between the actionability of different provisions of the same legislation, however, may also be seen in a recent NSW decision.

In the NSW Court of Appeal in *McDonald (t/as B E McDonald Transport) v Girkaid Pty Ltd* [2004] NSWCA 297, it was claimed by the defendant that the obligations imposed by regs 18(e), 19(e) and 19(g) of the *Dangerous Goods Regulation 1978* were too “general” in nature to be civilly actionable. The obligations in two of these provisions, regs 18(e) and 19(e), were framed in terms of taking “all practicable steps” to deal with fire hazards, and taking “all practicable precautions”. The Court of Appeal (McColl JA, with whom Beazley JA and Young CJ in Eq agreed) ruled that in light of the fact that the High Court of Australia

⁹⁵ See the summary by an expert witness at paras [22]-[24], and the judge at [78].

⁹⁶ See para [81].

in *Slivak v Lurgi (Australia) Pty Ltd* [2001] HCA 6; (2001) 205 CLR 304 had accepted as actionable a provision of South Australian legislation that required something to be “ensured so far as is reasonably practicable”, that such the regulations were not too vague. However, the terms of reg 19(g), which simply stated that an occupier must not “do any act in or on the premises that may cause fire”, were found to be not actionable because they “prescribed the end but not the means”- at para [177].

With respect, it is hard to see how this approach can be reconciled with the large number of earlier decisions holding that legislation that requires, for example, that machinery be “in good repair”, imposes an actionable duty. Cases such as *Galashiels Gas Co Ltd v O'Donnell* [1949] AC 275 have said that where there is clear evidence that machinery is not in good repair because it has failed, there is no obligation on the employee to show the cause of the lack of good repair. It is not a question of vagueness- a breach of reg 19(g) could clearly be shown to have occurred if a fire had broken out! Nevertheless, the Court of Appeal ruled against actionability in this case on the grounds that the provision “does not identify any specific precaution or measure which the occupier is to take”.

7. Conclusions and Prospects

Finally, what do these decisions of courts in the UK and Australia suggest about the future of the action for breach of statutory duty in cases of workplace injury or death?

We have seen that the consensus that seems to have been accepted for many years, that the civil action for breach of statutory duty is usually available in industrial safety cases, is to some extent breaking down. The comments of some members of the Australian High Court in *Slivak v Lurgi* seem to hint that the Court might be willing in the future to reconsider the availability of the action even in this previously unchallenged “heartland” territory. The decision of the UK Court of Appeal in *Todd v Adams* may suggest an increased willingness on the part of the UK judiciary to rethink the availability of the action in these cases.⁹⁷ The line of decisions in the Supreme Court of Queensland may suggest the same. Courts might, for example, seize upon the differences between the “traditional” safety legislation and the new risk management models as a means of distinguishing earlier cases.

But it is suggested that this trend is unjustified. The reasons offered for moving away from this historically accepted position are not very convincing- see, for example, the critique of *Todd* offered in the later Court of Appeal decision in *Zemniak*. From a historical perspective the action for breach of statutory duty may have developed at a time when other actions, especially the action in negligence, were not available. The artificial common law doctrines constraining the application of the tort of negligence in this area (such as common employment, and contributory negligence in its old form) have mostly been removed over the years. But there seems to be no need to abolish a separate tort action that may be of benefit to a large number of plaintiffs, simply in the name of an academic desire to “rationalise” the area of compensation law. And indeed, in an age when Parliaments seem bent on removing the more usual common law rights of litigants for the benefit of insurance companies, it would seem to be fair that the common law courts retain some possibility of extending rights to injured workers through this ancient and respected action. The action for breach of statutory duty, while sometimes difficult for theorists to “pin down”, shows signs recently that it is still fulfilling its historic function of allowing the courts to ensure that citizens are not denied compensation when injured by those who choose to ignore a Parliamentary directive.⁹⁸

⁹⁷ See also the comments of M Sellar, “European Regulations and the Risk of Burden” (2004) 26 *Scots Law Times* 161-165, who notes that with the decision of the House of Lords in *Fyfe* and that of the Court of Appeal in *Hammond v Commissioner of Police of the Metropolis* [2004] EWCA Civ 830, there seems to be in England at least a “rowing back from burdening employers and their insurers with liability to compensate injured employees” (at 165).

⁹⁸ See, for example, the recent decisions of the UK Court of Appeal in *Roe v Sheffield City Council and ors* [2003] 2 WLR 848, [2003] EWCA Civ 1 (Council liable for breach of a statute regulating the laying of tram-rails when a road-user’s accident was caused by the breach); the Privy Council in *Kirveke Management and Consulting Services Ltd v Attorney-General of Trinidad and Tobago* [2002] 1 WLR 2792, [2002] UKPC 43 (where the Government

To take an example from NSW: following the “tort reforms” of 2001-2002, the *Civil Liability Act 2002* introduced a number of complex restrictions on the right of injured plaintiffs to seek common law damages. One area where these restrictions seem particularly Draconian is where a plaintiff may be injured when participating in a “dangerous recreational activity”. Part 1A, Division 5 of the Act erects a number of “immunities” from suit enjoyed by defendants, including under s 5L the following:

5L No liability for harm suffered from obvious risks of dangerous recreational activities

(1) A person (the defendant) is not liable in negligence for harm suffered by another person (the plaintiff) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

Without going into detail, it seems likely that this broad-reaching provision would allow someone who runs a “dangerous recreational activity” like “bungy-jumping” to reason thus: the risk of ropes failing if they are not properly maintained is “obvious”; hence if a client dies because I fail to maintain the ropes properly I cannot be sued because of s 5L. But it is interesting to observe that the immunity is given in terms of “negligence”. It is possible (although this may not have been the intention of the drafters of the legislation) that s 5L would not apply to an action for breach of statutory duty, especially if the standard erected by the statute did not depend on “foreseeability” or “practicability” (when in some general sense the action might be argued to be based on “negligence”). This at least is suggested by Villa in his commentary on the legislation.⁹⁹ In that case the operator might then be sued for breach of the duty under, for example, reg 15 of the *Occupational Health and Safety Regulation 2001*, which requires that where “personal protective equipment” is needed to control a risk (which would seem to cover proper ropes and harnesses, etc) then the employer¹⁰⁰ must ensure that “(d) the equipment is properly maintained and is repaired or replaced as frequently as is necessary to control the risk”. In situations like these the action for breach of statutory duty still seems to have an important role to play.

The possibility that courts may be moving away from a presumption of a right of action in industrial cases is complicated by the move to the new models of legislation. The courts will be asked to decide whether a breach of risk management principles is actionable, and whether if so it can be causally linked to injury or death in the workplace. The preferable answer to both questions is, yes. In today’s workplace it is simply not acceptable for an employer, when confronted with an injury to an employee that he or she could not personally have foreseen, to “plead ignorance”. The current legislation requires an employer to think ahead, to investigate the possibility of injury, and to take appropriate safeguards. While these regulations are sometimes couched in jargon-ridden language (and hence will perhaps alienate some members of the judiciary for this reason alone), these measures are, to be frank, not rocket science. They are simply an articulation of what a modern employer should be doing- considering what might bring harm to the people who generate profits for his or her business, and as a matter of common decency doing what he or she can to prevent this harm. If injury or death eventuates, then the continued application of the tort of breach of statutory duty will provide an avenue of compensation for the injured worker or their family, and an incentive for the employer to do better in the future. Viewed from this perspective the action represents what it always has, the common law courts seeking to make sure that individuals who are harmed by those who seek to make profit while ignoring the law, are given a voice in the legal system.

had been ignoring a Parliamentary directive to pay interest on funds deposited in court by litigants), and of the House of Lords in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] 1 WLR 1763 (where a prisoner held under anti-terrorism laws was denied access to legal advice contrary to regulations, and the majority of the House held that a civil action was available for breach of the regulations, although by a different majority that the prisoner in this case had not suffered appropriate damage).

⁹⁹ See D Villa, *Annotated Civil Liability Act 2002 (NSW)* (Pymont: Lawbook Co, 2004), para [1A.5L.010] at 79.

¹⁰⁰ Which term in this Chapter of the *OHS Regulation 2001* includes, by virtue of reg 3(1), “self-employed persons”.

