



Précis Paper:

Associate Professor Neil Foster on the tort of breach of statutory duty with Ian Benson, special counsel

This is one of Neil's pet subjects and he claims the profession should better understand the rights that flow from breaches of statutory duty.

Discussion Includes

- What is the source of the tort of breach of statutory duty and what are the elements?
- How do the courts approach the task of ascertaining the attention of Parliament?
- What does it mean to say that the damage must fall within the intended scope of the statute?
- What type of statutes allow for the existence of the tort, and which do not?
- What issues may arise under the *Uniform Workplace Legislation*?
- How might the tort of breach of statutory duty have an advantage over the tort of negligence?

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1. In this edition of BTV, Mr Neil Foster (Associate Professor) and Mr Ian Benson (Solicitor) present on the common law tort of statutory duty.

The Tort of Statutory Duty

2. Mr Foster discusses the history of the tort of statutory duty in the common law and discusses when an individual may bring an action under this tort. It is apparent from *Stuart v Kirkland-Veenstra* [2009] HCA 15 that the tort of statutory duty is a separate tort to the tort of negligence. Mr Foster notes that there are some statutes that explicitly provide a civil remedy for a breach of statute such as: Part 9.4B of the *Corporations Act 2001* (Cth) and ss 18, 236 of the *Australian Consumer Law* (Schedule 2, *Competition and Consumer Act 2010* (Cth)). However, where the statute does not make explicit provision, the tort of statutory duty is used when the courts, in interpreting the legislation, come to the view that Parliament intended there be a civil remedy.
3. As such, the right to damages comes from both the common law and the legislation in that the source of the right is from statute, and the common law courts will enforce it. Where Parliament has given a right to an individual (statutory right), the tort action for breach of statutory duty provides a remedy for damages when that statutory right has been breached (*Sovar v Henry Lane Pty Ltd* [1967] HCA 31).
4. Mr Foster discusses the different types of statutory rights that are commonly protected by the tort of statutory duty. Most prominently, workplace health and safety legislation has been interpreted as being actionable under this tort (*Groves v Lord Wimborne* [1898] 2 Q.B. 402).

The Six Elements of the Tort of Statutory Duty

5. The courts must first make a ruling as to whether there is a parliamentary intention to allow a civil remedy in relation to the particular breach by using the usual rules of statutory interpretation. Mr Foster notes that this includes primarily looking at the words used in the legislation, any background material, the purpose of the legislation, whether the statute already provides some form of civil remedy and the findings of previous courts. In *O'Connor v S P Bray Limited* [1937] HCA 18, it was found that if the common law protects a class of individuals and a statute makes more explicit provision for protection, the courts will often find that the statute is intended to be civilly actionable. Legislation intended for the benefit of the general community will probably not

give rise to a private civil action and this is the case with social welfare and Australian postal legislation.

6. The second element requires the plaintiff to fall within a limited class of the public for whose benefit the statutory provision was enacted. This acts as a control mechanism to stop numerous actions. By way of example, in *Phillips v Britannia Hygienic Laundry* [1923] 2 KB 832 it was found that traffic regulations are to benefit the public as a whole and not any class of the public and therefore cannot be used as a basis for a civil action for a breach of statutory duty. If it is possible to define a limited group for whose benefit the statute was enacted, then this will satisfy the second element.
7. The third element requires the damage suffered to fall within the intended scope of the statute. For example, in *Gorris v Scott* (1874) L.R. 9 Exch. 125, sheep were washed overboard from a boat. The purpose of the relevant legislation in this case was to prevent the spread of disease, not for the physical safety of the sheep, and thus it was found that the statute could not be relied on because the harm was not within the scope of the statute. Mr Foster further discusses *Mummary v Irvings Pty Ltd* [1956] HCA 45, where a member of the public walked into a sawmill to buy some timber when wood flew off from an operating lathe and hit them in their eye. The plaintiff attempted to sue based on a provision that required the fencing of dangerous machinery however the High Court found that the purpose of the fencing legislation was to stop people putting their hands into the machine rather than to prevent things being ejected from it. The legislation was not actionable in those circumstances.
8. The fourth element requires the obligation under the statutory scheme to be imposed on the defendant. Mr Foster notes that issues may arise where vicarious liability is involved. At common law, where an obligation is directly imposed on a person, that obligation cannot be sued on under the principles of vicarious liability against the person's employer. In *Darling Island Stevedoring and Lighterage Co Ltd v Long* [1957] HCA 26, there was a statutory obligation on the officer in charge of a ship to secure a hatch. A person was subsequently injured due to the failure to secure a hatch. The injured person wanted to sue the employer, however the Court found that the obligation was directly imposed on the officer concerned and not the company. However, under statute, employers can now be held vicariously liable for breach of statutory duty where the employee was acting in the scope of their employment. The *Law Reform (Vicarious Liability) Act 1983* (NSW) overturns the *Darling Island Stevedoring and Lighterage* decision.
9. The fifth element requires the defendant to have breached the statute. This is discussed in the section below.
10. The sixth element requires the breach to have caused damage of some sort to the plaintiff. Mr Foster notes that the causation requirement is similar to that in the tort of negligence. In *Betts v Whittingslowe* [1945] HCA 31, it was suggested that it may be easier to establish causation in a

situation where a worker has suffered a particular type of harm and there is a statute that was aimed at preventing that harm, since there is almost a presumption of causation.

Tort of Statutory Duty versus Tort of Negligence

11. In a negligence action, the onus will be on the plaintiff to show how the defendant was careless, however in a breach of statutory duty action, the statute imposes a strict liability and the breach is all that is concerned. In *Galashiels Gas Co. Ltd v O'Donnell* [1949] AC 275, the relevant statute required that the lift be in good working order. The worker did not need to show how or why it had failed, just merely that it had failed as the statute imposed a strict liability to have working lifts. As such, the benefit of a breach of statutory duty action is that in some cases, one may be liable when a negligence action may not succeed.

Application of the *Civil Liability Act 2002* (NSW)

12. Part 1A of the *Civil Liability Act 2002* (NSW) adjusts some of the liability rules in that it applies in cases of a failure of reasonable care and statutory breach as a common law tort. Where the statutory provision is a strict liability provision, Part 1A will not apply to an action for breach of statutory duty. However, Part 2 of the *Civil Liability Act 2002* (NSW) deals with damages and pecuniary limits and s 11 notes that the limitations to damages also applies to breach of statutory duty actions.

BIOGRAPHY

Associate Professor Neil Foster

Neil Foster is an Associate Professor in Law at Newcastle Law School, in NSW. His primary research interests include law and religion, property law, torts and workplace health and safety law. He has published leading textbooks in these areas including *Property Law in New South Wales* (2012), *Torts: Cases and Commentary* (2013) and *Workplace Health and Safety Law in Australia* (2012), among others. He has also published more than 25 articles for various Australian and International law journals.

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Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

BIBLIOGRAPHY

Cases

Stuart v Kirkland-Veenstra [2009] HCA 15
Sovar v Henry Lane Pty Ltd [1967] HCA 31
Groves v Lord Wimborne [1898] 2 Q.B. 402
O'Connor v S P Bray Limited [1937] HCA 18
Phillips v Britannia Hygienic Laundry [1923] 2 KB 832
Gorris v Scott (1874) L.R. 9 Exch. 125
Mummery v Irvings Pty Ltd [1956] HCA 45
Darling Island Stevedoring and Lighterage Co Ltd v Long [1957] HCA 26
Betts v Whittingslowe [1945] HCA 31
Galashiels Gas Co. Ltd v O'Donnell [1949] AC 275

Legislation

Competition and Consumer Act 2010 (Cth)
Corporations Act 2001 (Cth)
Law Reform (Vicarious Liability) Act 1983 (NSW)
Civil Liability Act 2002 (NSW)