CIVIL LIABILITY FOR CRIMINAL CONDUCT

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I. INTRODUCTION

It has long been acknowledged that a civil action for damages may lie where injury has been suffered or loss has been incurred in consequence of the breach of a statute enjoining or prohibiting certain conduct and making its infringement a criminal offence punishable by fine or imprisonment.[1] Two issues have caused dispute: first, the nature of the circumstances in which such an action would be appropriate; and second, the nature of the action which could then be brought. Mr. Justice Dickson of the Supreme Court of Canada recently identified these issues in this way:

> Where 'A' has breached a statutory duty causing injury to 'B', does 'B' have a civil cause of action against 'A'? If so, is 'A's' liability absolute, in the sense that it exists independently of fault, or is 'A' free from liability if the failure to perform the duty is through no fault of his?[2]

In this passage, Dickson J. adverts to the usual instance of the alleged civil liability for breach of a statutory duty: namely, where liability is sought to be imposed as a possible alternative, or substitute, for liability in negligence. In view of certain recent discussions, however, it must be asked whether breach of a statute imposing criminal liability could be used as the basis for liability in situations where common law negligence would never be an appropriate form of liability, for example where the conduct of the defendant was deliberate, wilful and intentional, and not careless or reckless through neglect of his obligations. It is not easy to separate the issues of the possibility of liability for breach of a statutory duty and the juridical nature of any such liability. Sometimes it appears

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[1] J. FLEMING, THE LAW OF TORTS 117-28 (6th ed. 1983); A. LINDEN, CANADIAN TORT LAW ch. 7 (3d ed. 1982); SALMOND & HEUSTON ON THE LAW OF TORTS ch. 10 (18th ed. R. Heuston 1981); WINFIELD & JOLOWICZ ON TORT ch. 8 (11th ed. W. Rogers 1979).

In 1969 the Law Commission (Law Commission Paper 21) made the proposal that statutes creating duties should be presumed to create civil liability for damages resulting from a breach, regardless of the nature of the duty and irrespective of the remedy, if any, for non-fulfilment of the duty, unless some express provision to the contrary were made. This has never been enacted. It is unlikely that it ever will be: *see* J. FLEMING, *id* at 118, note 36.

[2] Saskatchewan Wheat Pool v. Government of Canada, 45 N.R. 425, at 427, 143 D.L.R. (3d) 9, at 10 (1983).

that the courts are using a statute as the source for the obligation, the breach of which *per se* involves the liability that is alleged; in other cases, it seems rather that the statute is being utilized as the source of some legal doctrine, in consequence of which certain conduct is potentially tortious, not in the form of an action on the statute, but in the form of a common law action, whether nominate or innominate, arising from the misconduct that involves a breach of the statute. Chief Justice Laskin in a recent case indicated the problem in these words:

> There is, in my view, a narrow line between founding a civil cause of action directly upon a breach of statute and as arising from the statute itself and founding a civil cause of action at common law by reference to policies reflected in the statute and standards fixed by the statute.[3]

Other recent decisions of the House of Lords and the Supreme Court of Canada have also involved these interrelated questions in one form or another, and raise the vexed issue of what has been termed by earlier commentators as "the effect of penal legislation in the law of tort"[4] or "the juridical nature of the action on the statute".[5] The justification for another examination of this issue,[6] if justification be necessary, is the fact that it has now come before the highest courts in England and Canada in quite novel ways, and the resolution of the particular problems in these cases calls for further critical discussion.

II. A Question of Construction

Since the action for breach of a statutory duty was first accepted in its modern version[7] during the nineteenth century,[8] courts have said that

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[3] Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria, [1981] 2 S.C.R. 181, at 188, 124 D.L.R. (3d) 193, at 199, *rev'g* 27 O.R. (2d) 142, 105 D.L.R. (3d) 707 (C.A.)

[4] Williams, *The Effect of Penal Legislation in the Law of Tort*, 23 Mod. L. Rev. 233 (1960).

[5] Fricke, *The Juridical Nature of the Action upon the Statute*, 76 L.Q.R. 240 (1960).

[6] For earlier discussion, *see* notes 1, 4, 5 *supra*; and *inter alia*, Alexander, *Legislation and the Standard of Care in Negligence*, 42 Can. B. Rev. 243 (1964); Linden, *Tort Liability for Criminal Nonfeasance*, 44 Can. B. Rev. 25 (1966); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 Harv. L. Rev. 453 (1932-33); Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 Colum. L. Rev. 21 (1949); Thayer, *Public Wrong and Private Action*, 27 Harv. L. Rev. 317 (1913-14).

[7] For an older view, that an action in tort could be brought by anyone injured by the breach of a statute, *see* Statute of Westminster II, 1285, 13 Edw. 1, c. 50; Couch v. Steel, 3 El. & Bl. 402, 118 E.R. 1193 (Q.B. 1854); Anon, 6 Mod. 25, 87 E.R. 789 (K.B. 1704); Ashby v. White, 2 Ld. Raym. 938, 92 E.R. 126 (K.B. 1703); Fricke, *supra* note 5, at 240.

[8] Atkinson v. Newcastle and Gateshead Waterworks Co., 2 Ex. D. 441, 46 L.J. Exch. 775 (1877); Gorris v. Scott, L.R. 9 Ex. 125, 43 L.J. Exch. 92 (1874); Doe v. Bridges, 1 B. & Ad. 847, 109 E.R. 1001 (1831).

the availability of such an action depended on the construction of a given statute.[9] Recently[10] Lord Diplock stated that this was decided by the House of Lords in *Cutler v. Wandsworth Stadium Ltd.*[11] That case involved a bookmaker who alleged that he had been deprived of the opportunity to pursue his business at a dog stadium by reason of the defendants' failure to fulfil their statutory obligations to provide him with space on the premises. In concluding that the plaintiff had no such cause of action, the House of Lords made it clear that it was necessary to look at the language, meaning and intent of the statutory provision invoked by the plaintiff. Ultimately, however, the issue was one of construction.

The above approach has not gone unchallenged. It has frequently been said that courts are merely seeking to discover and enforce the intention of the legislature through the interpretation of the statutory language according to the canons of construction.[12] Yet criticism has been voiced that "there just is no such intention apparent in the vast majority" of enactments that come before the courts in this context[13] and courts have been said to be chasing "the will-o'-the-wisp of a non-existent intention".[14] How indeed can this intention be laid bare? *Ex hypothesi* the legislature has not stated that it desires a civil action to lie for a breach of the statute which causes some individual personalized injury, although it would be possible for a statute to do this, as some[15] indeed have.[16] Where a statute confers an express right of action, it creates a private right to be protected from loss or damage caused by the prohibited conduct. Where it does not, then *prima facie* it would appear that the legislature has either not directed its mind towards this question or it has and its failure to make any specific provision for a private right

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[9] Unless of course the statute expressly gives a right of action: *see*, in Canada, the Railway Act, R.S.C. 1970, c. R-2, s. 336; the Highway Traffic Act, R.S.O. 1980, c. 198, s. 166; The Liquor Licence Act, R.S.O. 1980, c. 244, s. 53; in England, the Consumer Safety Act 1978, c. 38, s. 6; The Health and Safety at Work etc. Act 1974, c. 37, s. 47; The Mines and Quarries Act 1954, 2 & 3 Eliz. 2, c. 70, s. 157; in Australia, the Mines Act, 1955, LAWS AUSTL. CAP. TERR., s. 411; in New Zealand, the Mining Act, 1926, REPR. STAT. N.Z.; the Coal Mines Act, 1925, REPR. STAT. N.Z.

[10] Lonrho Ltd. v. Shell Petroleum Co., [1982] A.C. 173, at 183, [1981] 2 All E.R. 456, at 460 (H.L. 1981).

[11] [1949] A.C. 398, [1949] 1 All E.R. 544.

[12] Cunningham v. Moore, [1973] 1 O.R. 357, 31 D.L.R. (3d) 149 (H.C. 1972); *Re* MacIsaac, 25 D.L.R. (3d) 610 (B.C. Small Cl. Ct. 1971); *contra* the view that it is a matter of judicial policy rather than the meaning of an instrument: O'Connor v. S.P. Bray Ltd., 56 C.L.R. 464, at 477-78 (H.C. Aust. 1937).

[13] Wright, *The English Law of Torts: A Criticism*, 11 U. TORONTO L.J. 84 (1955-56), quoted in A. LINDEN, *supra* note 1, at 181.

[14] F. HARPER & F. JAMES, THE LAW OF TORTS 995 (1956). *See* J. FLEMING, *supra* note 1, at 118, who speaks of a "barefaced fiction".

[15] *See*, *e.g.*, the statutes referred to in note 9 *supra*.

[16] This was pointed out by Lord Diplock in Gouriet v. Union of Post Office Workers, [1978] A.C. 435, at 499-500, [1977] 3 All E.R. 70, at 98-99 (H.L. 1977).

or a private action could, and should, be taken to mean that it intended to exclude any such possibility.[17]

The above conclusion would have been not only feasible in the nineteenth century, but possibly even logical and justified on principle. *Expressio unius est exclusio alterius*.[18] Where a statute stipulated that certain conduct, whether act or omission, was a criminal offence punishable by fine or imprisonment, but did not confer a private right of civil action on persons injuriously affected by such conduct, the courts ought to have concluded that no such action could be brought, unless there was also some common law misconduct involved. In that case, the appropriate common law action and remedy would be available to the injured party. Had the courts adopted a blanket rule such as this, much agony might have been avoided over the past century or more. They did not. One possible reason is that they deduced that statutes which did not positively prohibit civil action might be interpreted in a manner which permitted such action. Whether a given statute did so was a purely technical question of statutory construction. Another reason was the existence of valid policy grounds for allowing an injured party to pursue a remedy in damages, even though the legislature had already provided for the penalization of the offender under the criminal law.[19] However, in the nineteenth century, unlike today, it was not regarded as permissible or advisable for a court to acknowledge that its decision rested on policy considerations and not on precedent or logic. Hence, the courts felt the need to justify decisions in this regard upon the more clearly acceptable and doctrinally justifiable basis of statutory construction. It then became necessary, in case after case, to look for and expound some general principles of statutory construction that would substantiate the particular decision being made by the court and would function as a satisfactory precedent while operating as a means for distinguishing those statutes which courts were prepared to regard as conferring a right of civil action from those which they were not. As a result of this *ex post facto* rationalization, the courts evolved some ground rules of statutory construction.

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[17] *See* J. FLEMING, *supra* note 1, at 118.

[18] Toronto-St. Catherines Transp. Ltd. v. Toronto, [1954] S.C.R. 61, [1954] 1 D.L.R. 721 (1977) (Kerwin J.) which deals with the effect of imposing civil liability for breach of one provision of a statute as regards breaches of other provisions of the same statute; however, the principle would seem to be the same: Commerford v. Board of School Comm'rs, [1950] 2 D.L.R. 207 (N.S.S.C.) (Ilsley J.).

[19] *See* A. LINDEN, *supra* note 1, at 188-94.

III. THE RULES OF CONSTRUCTION

The case law from 1874, if not before, through to 1981[20] is full of attempts by judges to lay down some general principles of construction. There have been references to the aim and purpose of the statute, for example, to the mischief which it was designed to deal with and prevent;[21] to the gravity of the penalty imposed for a breach in relation to the potential consequences of such breach;[22] to the precise language of the statute, for example its necessary and reasonable implications;[23] and to the generality or particularity of the class of persons for whose protection the statutory provision was intended.[24] These, and perhaps other criteria, have been suggested as relevant. However, as recently as 1954 in *Solomons v. Gertzenstein Ltd.*,[25] Lord Justice Somervell admitted that attempts to lay down a principle upon which some distinction between statutes could be made had been unsuccessful. In the same case,[26] Lord Justice Romer agreed that it was difficult to reconcile all the reported decisions. He thought, however, that there was at least one criterion accepted as a guide to the legislature's intention, namely whether the statutory duty was imposed for the general welfare on the one hand, or in the interests of individuals or of a defined or definable class of the public on the other.

The latest attempt to put the construction doctrine on a principled, rational basis is that of Lord Diplock in the *Lonrho* case[27] where His Lordship formulated a general principle: if a statute creates an obligation and enforces its performance in a specified manner, normally by making its infringement an offence punishable by imprisonment or fine, the performance of the obligation cannot be enforced in any other manner. This general principle, however, was subject to two exceptions: (1) where the legislation can be understood as imposing an obligation or prohibition "for the benefit or protection of a particular class of individuals";[28] and (2) where a statute "creates a public right . . . and a particular member of the public suffers . . . 'particular, direct and

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[20] *E.g.*, Gorris v. Scott, *supra* note 8 (1874); Groves v. Lord Wimborne, [1898] 2 Q.B. 402, [1895-99] All E.R. 147 (C.A.); Solomons v. Gertzenstein Ltd., [1954] 2 Q.B. 243, [1954] 2 All E.R. 625 (C.A.); *Cutler*, *supra* note 11 (1954); *Lonrho Ltd.*, *supra* note 10 (1981).

[21] *See* J. FLEMING, *supra* note 1, at 119-22; Fricke, *supra* note 5, at 257.

[22] *Cutler*, *supra* note 11; *O'Connor*, *supra* note 12.

[23] Monk v. Warbey, [1935] 1 K.B. 75, [1934] All E.R. Rep. 373 (C.A. 1934).

[24] Phillips v. Britannia Hygienic Laundry Co., [1923] 2 K.B. 832, [1923] All E.R. Rep. 127 (C.A.).

[25] *Supra* note 20, at 253, [1954] 2 All E.R. at 629.

[26] *Id.* at 264, [1954] 2 All E.R. at 636.

[27] *Supra* note 10, at 185-86, [1981] 2 All E.R. at 461-62.

[28] *Id.* at 185, [1981] 2 All E.R. at 461, referring to the Factories Acts and similar legislation.

substantial' damage 'other and different from that which was common to all the rest of the public' ''.[29]

This exposition involves an attempt by a very distinguished judge to achieve in this area of the law of tort what was once stated to be the proper function of the courts:

> The rules applied to the decision of individual controversies cannot simply be isolated exercises of judicial wisdom. They must be brought into, and maintained in, some systematic interrelationship; they must display some coherent internal structure.[30]

Lord Diplock was endeavouring to provide just such a ''coherent internal structure'' in an area where other distinguished and experienced judges had acknowledged the difficulty, if not the intractability, of doing so.[31] The question is whether Lord Diplock's exposition can be considered valid, in the sense that it provides a genuine framework of principles, or whether it is merely a valiant attempt to rationalize the courts' granting of remedies in situations where a remedy was thought justified or necessary, even though the conduct of the defendant was properly covered by the criminal provisions of the relevant statute.

Before considering this, however, reference should be made to some remarks of Chief Justice Laskin in the novel case of *Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria*.[32] This involved the Ontario Human Rights Code, under which certain types of discrimination were prohibited. The plaintiff, who alleged that she had been discriminated against in respect of employment, brought an action for damages. She claimed that the statute permitted a civil action, irrespective of the ''administrative'' consequences of an alleged discrimination as provided under the Code. Her statement of claim was struck out at first instance. This decision was reversed by the Ontario Court of Appeal, which held that such a cause of action was maintainable.[33] The Supreme Court of Canada, however, disagreed. In discussing the issue of an action for breach of statutory duty, Chief Justice Laskin, speaking for the Court,[34] mentioned that cases of this kind had arisen in the field of negligence; the legislation was viewed as ''establishing standards of behaviour, and deviation, unless excused, amount[ed] to a species of strict liability''.[35] The case before the Court was one of alleged strict liability, since on the facts pleaded by the

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[29] *Id.*, citing Brett J. in Benjamin v. Storr, L.R. 9 C.P. 400, 43 L.J.C.P. 162 (1874).

[30] L. FULLER, ANATOMY OF THE LAW 134 (1971).

[31] *See* Alexander, *supra* note 6, at 275; Fricke, *supra* note 5, at 241; Williams, *supra* note 4, at 233.

[32] *Supra* note 3 (S.C.C.).

[33] *Id.* (C.A.).

[34] *Supra* note 3, at 188, 124 D.L.R. (3d) at 199.

[35] *Compare* A. LINDEN, *supra* note 1, at 192-93.

plaintiff, there could be no suggestion of negligence. He then went on to say:

> A line of English cases dealing with statutory duties to employees respecting factory and mine safety illustrates judicial enforcement by civil action for damages, although the legislative prescription is enforcement by penal proceedings. . . . The same approach has been taken in this country [Canada] in respect of statutory duties imposed under railway legislation. . . . Such cases, and others like them have arisen, however, under legislation which . . . does not prescribe a regulatory enforcement authority, although there may be a regulatory authority to prescribe standards enforceable by penal sanction.[36]

His Lordship seems to suggest that civil liability for breach of a statutory duty is possible, if not exclusively so then at least generally so, where the statute does not provide for its self-enforcement in some form. This statement is similar to the general principle enunciated by Lord Diplock in the *Lonrho*[37] case. It may be suggested, at least as far as England is concerned, that the only major exception to the general principle stated by Lord Diplock, and seemingly endorsed by Laskin C.J.C. in the above passage, is to be found in legislation dealing with the safety, health and welfare of employees.[38] This raises serious questions with regard to Lord Diplock's exposition.

IV. CRITIQUE OF THE RULES

Lord Diplock's formulation of the rules of construction is superficially attractive and plausible. Seemingly, it creates the kind of "coherent internal structure", the necessity for which was noted above. On closer examination, however, it may not be entirely acceptable.

On analysis, the validity of His Lordship's formulation depends upon the acceptance that certain statutes, either by implication or as a matter of judicial construction, create "rights" in favour of certain classes of individuals, or the public at large. Where an obligation was thought to be for the benefit of a particular class of individuals, the first exception to Lord Diplock's rule,[39] it was possible to infer a right to

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[36] *Supra* note 3, at 188-89, 124 D.L.R. (3d) at 199.

[37] *Supra* note 10.

[38] *See* SALMOND & HEUSTON, *supra* note 1, at 231-36. There are cases arising from legislation dealing with safety on the highway, although in England these are few and far between. *Compare* Monk v. Warbey, *supra* note 23 *with* Phillips v. Britannia Hygienic Laundry Co., *supra* note 24. In Canada the situation may be different *vis-à-vis* highway traffic legislation and legislation dealing with product safety. *See* A. LINDEN, *supra* note 1, at 212-41. Other cases deal with legislation regulating dangerous activities: *id.* at 241-44. It may be said, therefore, that Canadian case law has reached further in this respect than that of England.

[39] *See* text accompanying note 28 *supra*.

enforce that obligation[40] by civil action.[41] Where the right was a public one, falling within Lord Diplock's second exception,[42] the right to sue for compensation[43] arose only where the plaintiff could point to personal damage caused by the infringement of the general public right. This latter exception is very much akin to the requirements that must be met before a private individual can sue in respect of a "public" nuisance. Indeed, it might be argued that Lord Diplock's second exception is an illustration not of liability for breach of statutory duty at all but rather of liability for public nuisance.[44] The cases cited by Lord Diplock in support of his propositions[45] are cases of nuisance, and more especially nuisance on or to the highway which has always been a peculiar area of the law of torts.[46] For this reason it is suggested that the second exception does not throw light upon the broader question of the extent to which breaches of a criminal statute can give rise to civil actions for damages. This would leave Lord Diplock's first exception as the only true, or apparently true, qualification of the more basic proposition.

What must now be considered is whether the first exception is a true exception based upon the consideration of the statute in issue, in other words the real intention of the legislature; or whether it is a false one, in the sense that it does not stem logically from the basic proposition, but rather has been grafted on to it by courts anxious to allow a civil action in certain circumstances, though not in others. It is suggested that the latter explanation is more accurate. In truth, the alleged exception does not encompass situations in any way different from those which fall within the basic proposition. In other words, whenever a statute makes it a criminal offence to fail to perform or to contravene an obligation which the Act creates and provides for the prosecution of that offence, the intention of the legislature is always to impose the obligation or prohibition in question for the benefit of a particular class of individuals. The class may be limited in scope; it may be much more comprehensive;

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[40] Jurisprudentially speaking, this may involve a tremendous "leap" in reasoning, the nature and validity of which could entail more detailed discussion of the controversial concept of "rights" in the law. *Cf.*, *e.g.*, Robinson, Coval & Smith, *The Logic of Rights*, 33 U. TORONTO L.J. 267 (1983).

[41] Perhaps the right is more accurately stated as the right to claim compensation for breach of the duty. This is an example of a "secondary obligation" arising from a primary one, to use language employed by Lord Diplock in a very different context: Photo Production Ltd. v. Securicor Transp. Ltd., [1980] A.C. 827, at 849, [1980] 1 All E.R. 556, at 566-67 (H.L.).

[42] *See* text accompanying note 29 *supra*.

[43] Or, to use Lord Diplock's language in *Photo Production*, *supra* note 41, the secondary obligation to compensate.

[44] *Compare* the idea of statutory nuisance propounded by Thayer, *supra* note 6, at 327 *with* A. LINDEN, *supra* note 1, at 186-87.

[45] Benjamin v. Storr, *supra* note 29; Boyce v. Paddington Borough Council, [1903] 1 Ch. 109, 72 L.J. Ch. 28 (1902).

[46] SALMOND & HEUSTON, *supra* note 1, at 80-85; WINFIELD & JOLOWICZ, *supra* note 1, at 388-97.

it may even embrace the entire public. But the aim of the legislation is to afford the protection contained within the requirements of the statute. The true issue that arises in cases involving a breach of statutory duty is whether the statute in question expressly or by implication denies the possibility of some alternate or additional remedy, namely an action for damages. If it does, then logically there should be no exceptions. If it does not, then logically the possibility of an action for damages has not been outlawed. The issue then becomes whether it is consistent with the general aims and policies of the statute in question, and the general aims, purposes and doctrines of the common law, to allow a civil action in such circumstances. Put another way, Lord Diplock's exposition is flawed in that it suggests that the law is based upon some logical principles giving rise to defined distinctions between those statutes which do and those which do not allow a court to recognize a civil action, when in truth there are no such principles. Courts have allowed an action or denied it, as the case may be, not by reason of any intelligible, well-constructed rules of statutory interpretation, but on the basis of what they considered to be the most acceptable, desirable solution to the problem. In the course of time, and by operation of the doctrine of precedent, it became inevitable that certain situations justified a civil cause of action while others did not.[47] There were good policy reasons for allowing an injured workman to bring a civil action and for not forcing him to rely on common law negligence with all its attendant difficulties of proof. During the nineteenth century, in England, the courts strained to allow injured workmen to bring actions for their injuries; hence the decision by the House of Lords with regard to the maxim *volenti non fit injuria*[48] and the courts' desperate efforts to restrict the operation of the "common employment" rule where it was not outlawed by statute, until eventually it was completely abrogated.[49] The courts also attempted to control the potentially harmful effects of the doctrine of contributory negligence until it too was done away with by more modern legislation.[50] In making a civil action for breach of statutory duty available, judges aided the English workman in the days before Parliament enacted legislation that would have a similar effect.

The legacy of this judicial activity, it is suggested, has been that while there have been major instances of civil liability for breach of statutory duty in both England and Canada, the courts have expressed the theory that these were not the only potential instances of such liability,

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[47] *Cf.* the developments that have occurred in respect of implied terms in contract. *See* Liverpool City Council v. Irwin, [1977] A.C. 239, [1976] 2 All E.R. 39; Shell U.K. Ltd. v. Lostock Garage Ltd., [1977] 1 All E.R. 481, [1976] 1 W.L.R. 1187 (C.A.); Wettern Electric Ltd. v. Welsh Dev. Agency, [1983] 2 All E.R. 629, [1983] 2 W.L.R. 897 (Q.B.).

[48] Smith v. Baker & Sons, [1891] A.C. 325, [1891-94] All E.R. Rep. 69.

[49] *Cf.* FLEMING, *supra* note 1, at 487-88; WINFIELD & JOLOWICZ, *supra* note 1, at 169-71.

[50] SALMOND & HEUSTON, *supra* note 1, at 479-95; A. LINDEN, *supra* note 1, at 463-76.

while in practice they adopted a more restricted approach. While suggesting that the possibility of these actions was limitless, depending as it did upon "fundamental" and "accepted" principles of statutory construction, the courts' actual decisions have been very different. Their frequent denial of the possibility of civil actions betrayed their opposition to enlarging the meaning of legislation where the legislature had not clearly indicated such an intention. The bias was against civil liability. Only exceptionally would it be allowed.

Recent decisions in Canada and in England support this contention. They reveal that in two ways the courts are opposed to the recognition of an action founded upon breach of a statutory duty. Only if they are compelled by the inherent logic of the statutory language, or a clear manifestation of legislative intent to the contrary, will they reach the conclusion that such an action will lie.

The first way in which courts betray their opposition is in finding that a given statute creates a new form of liability and provides for what must presumably be the only consequences of such liability. The second way is by deciding that, unless the statute says expressly otherwise, a breach of the statutory obligation is not of itself a wrongful act, except in the manner indicated by the statute; it does not involve *per se* the commission of a *tortious* act. Tortious conduct, involving as a consequence liability in tort, must be evidenced in some other way. Although these appear to be, and will be discussed as two distinct lines of attack, it might be suggested that they are in fact only two ways of looking at exactly the same issue, namely, whether it is possible to discover a common law form of liability in tort in a statute creating criminal or *quasi*-criminal behaviour and liability. The answer would seem to be that by and large it is not. The conclusion which this dictates is that there is no necessary connection between criminal behaviour and liability in tort.

V. Negating a Cause of Action

A. *Exclusivity*

In some respects the most successful judicial technique for denying civil liability for breach of a statutory duty is the use of what might be termed "the exclusivity test". The statute in question may well impose obligations on individuals, classes of individuals, or the public at large. It may stipulate that breaches of such obligations are wrongful and set out penalties, possibly specifying how these are to be exacted. This may involve the creation of an elaborate mechanism to deal with allegations of statutory violations, the imposition of statutory penalties or other methods of enforcement such as the punishment of the violator. Even in the absence of such machinery and where the statute envisages the invocation of the regular judicial system for its enforcement or for the

imposition of penalties, its form and language may clearly indicate the legislature's intention to regulate or control the effects of the provisions by making the statutory means of enforcement the only available ones. In other words, the consequences of a breach must be held to be within the exclusive jurisdiction of the criminal courts, or such other special body, if any, which the statute may stipulate for this task.

An excellent illustration of the exclusivity approach is provided by the *Bhadauria*[51] case. The plaintiff, a highly educated woman of East Indian origin with a Ph.D. in mathematics, a valid provincial teaching certificate, and several years' teaching experience alleged that she was refused employment by Seneca College in violation of the Ontario Human Rights Code.[52] She claimed damages for breach of the statutory duty not to discriminate, for deprivation of the opportunity to teach at the defendant college and to earn a teaching salary, as well as damages for mental distress, frustration, loss of self-esteem and dignity, and loss of time in repeatedly applying for the advertised positions. The various stages of litigation were concerned with whether her statement of claim disclosed a valid cause of action. At no time were her allegations of fact admitted or established by evidence. As a result, the case proceeded on the footing that her factual allegations were substantiated, or capable of being substantiated. The only issue therefore was whether it was possible for her to sue in respect of her various injuries and losses.

The plaintiff was successful in the Ontario Court of Appeal. The members of the Court were of the view that there was a common law tort of discrimination, in respect of which the plaintiff would have a valid claim and a right to damages, if she could prove the alleged facts. Therefore, it was not necessary for the Court to consider the possibility of a suit arising from a statutory breach.[53] It might be added, however, that the provisions of the statute were treated as relevant to the common law claim in that their tenor indicated that "the interests of persons of different ethnic origins are entitled to the protection of the law".[54] The preamble to the statute evidenced the public policy of Ontario respecting fundamental human rights.[55] The plaintiff had a right not to be discriminated against because of her ethnic origin. She alleged that she had been injured in the exercise of that right. Therefore, relying on the principle stated in the old case of *Ashby v. White*,[56] if she could prove her allegations, the common law must afford her a remedy. The statute did nothing to impede the appropriate development of the common law in

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[51] *Supra* note 3. For the different situation in England, *see* the Sex Discrimination Act 1975, c. 65, sub. 66(1); the Race Relations Act 1976, c. 74, sub. 57(1); SALMOND & HEUSTON, *supra* note 1, at 230.

[52] R.S.O. 1980, c. 340.

[53] *Supra* note 3, at 150, 105 D.L.R. (3d) at 715 (C.A.).

[54] *Id.* at 149, 105 D.L.R. (3d) at 715.

[55] *Id.* at 149-50, 105 D.L.R. (3d) at 715.

[56] *Supra* note 7.

this important area. The fundamental human right not to be discriminated against, while recognized by the statute, was not created by it.

With respect to the issue now under examination, the only truly relevant statement made by the Ontario Court of Appeal was that the statute did not "contain any expression of legislative intent to exclude the common law remedy".[57] Wilson J.A., as she then was, thought the reverse because the appointment of a board of inquiry to look into a complaint was not a matter of right but rather one of ministerial discretion.[58] In effect, the learned justice applied the "exclusivity" test in reverse. The absence of an obligatory solution invited the conclusion that the statute accepted whatever common law remedy might exist outside the purview of the statute.

The approach of the Supreme Court of Canada was very different. In effect, the Court held that the statute was exclusive in its regulation of the field of discrimination. It was a comprehensive Code in its administrative and adjudicative features, which excluded both a civil action based directly upon a breach of the statute and a common law action based on an invocation of the underlying public policy. In the words of Chief Justice Laskin: "The Code itself has laid out the procedures for vindication of that public policy, procedures which the plaintiff respondent did not see fit to use."[59] Whatever may be thought of the notion of a common law right not to be discriminated against, and the idea that discrimination, where unjustified, especially if in violation of a statute designed to cope with it in its various forms, can be the basis of liability in tort, the Supreme Court here decided that this particular anti-discrimination statute had pre-empted the field; it excluded any other form of procedure or remedy in the event of an alleged breach. Even if a breach were to involve a wrong at common law, a possibility which the Supreme Court did not consider and perhaps by implication denied, the statute did not permit an action for damages at common law.

The Supreme Court stressed the comprehensiveness of the Code.[60] Ministerial discretion to appoint a board of inquiry, which the Court of Appeal thought was strongly indicative of the statute's insufficient comprehensiveness, was not regarded by the Supreme Court as supporting the contention that the Human Rights Code itself contemplated a civil cause of action, by way of election of remedy or otherwise. The ministerial discretion was simply an element in the statutory scheme.[61] Furthermore, the Supreme Court thought that the attitude of the Court of Appeal necessarily involved the creation of a new

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[57] *Supra* note 3, at 150, 105 D.L.R. (3d) at 715.

[58] *Id.*

[59] *Id.* at 195, 124 D.L.R. (3d) at 203 (S.C.C.).

[60] The comprehensiveness of the Code was obvious from its substantive and enforcement provisions. These are set out in detail in the judgment, *id.* at 184-88, 124 D.L.R. (3d) at 196-98.

[61] *Id.* at 188, 124 D.L.R. (3d) at 198.

economic tort, founded on a statute enacted outside a fully recognized area of common law duty. Using breach of a statutory duty to substantiate liability in negligence, through adopting the statutory standards as those of the reasonable man, was quite different from creating a duty to confer an economic benefit on those with whom the party obliged had no connection, solely on the basis of a statute which itself provided comprehensively for remedies for its breach.[62] It is suggested that Laskin C.J.C. was referring to the idea that the statute necessarily involved the imposition of some novel duty upon those within its scope, in favour of those for whose benefit it was passed, so that any breach resulted in the usual consequences of a breach of duty, namely, liability in tort for damages.

Upon examining the peculiar facts of this case, it may be seen that two issues were interwoven: first, the question of the "exclusivity" or "comprehensiveness" of the statute; and secondly, the question of the creation of some new obligation the violation of which could potentially involve civil liability. As indicated earlier, it is not always easy to disentangle these issues. Theoretically, the negation of one does not necessarily involve the negation of the other. However, to conclude that a statute does not permit or recognize an independent liability outside that which it imposes might invite the conclusion that the statute does not create some distinct form of obligation or potential liability, and *vice versa*.

The so-called "exclusivity rule" was given great emphasis by Lord Diplock in the *Lonrho* case.[63] Indeed, the main discussion concerned the two alleged exceptions to that rule and whether they formed any basis upon which the plaintiffs might sue. One of the issues was whether a civil cause of action could arise from the defendant's alleged intentional and knowing violation of the Southern Rhodesia Act, 1965[64] and the Southern Rhodesia (Petroleum) Order,[65] which was the "sanctions" order passed under the provisions of the Act. This legislation prohibited the supply of petroleum products to what was then Southern Rhodesia. Lonrho claimed, *inter alia*, that by acting in violation of this legislation the defendants, Shell and B.P., had caused foreseeable loss to the claimants, Lonrho.[66]

For the purposes here under discussion, the relevant question for the House of Lords was whether violations of this legislation could, as a matter of law, involve the defendants in civil liability, apart from any

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[62] *Id.* at 189, 124 D.L.R. (3d) at 199-200.

[63] *Supra* note 10.

[64] U.K. 1965, c. 76.

[65] S.I. 1965/2140, *replaced by* Southern Rhodesia (United Nations Sanctions) (No. 2) Order 1968, S.I. 1968/1020.

[66] In the present context, it is not necessary to consider the claim based upon the tort of conspiracy although it too depended upon the alleged violation of the legislation for its foundation. This claim also failed, *supra* note 10, at 188-89, [1981] 2 All E.R. at 463-64.

possible criminal liability. This the House denied. The legislation fell decisively under the "exclusivity" rule; neither of the exceptions set out by Lord Diplock applied in the circumstances. In one sense, therefore, this decision so far as it concerns this aspect of the case, is not particularly noteworthy; it may be just another example of the interpretation of a statute in such a way as to negate the possibility of a civil action for its breach. The real interest in the case, it is suggested, lies first of all in Lord Diplock's analysis of what might be called the theory of civil liability for breach of a criminal statute; secondly, in his discussion of the case of *Ex parte Island Records Ltd.*;[67] and thirdly, in his treatment of the claimant's argument that, quite apart from the possibility of founding a civil action upon breach of a criminal statute, there was a recently developed and broad principle that criminal activity, in the sense of statutory breach to which penal consequences attached, might under certain conditions necessarily involve civil liability in tort. This latter point and, to some extent, the Court's discussion of the *Island Records* case, more closely appertains to the consideration of what will later be termed "the principle of neutrality". In the present context the feature of the *Lonrho* case which merits consideration is the way in which the issue of "exclusivity" was approached.

The validity of Lord Diplock's analysis has already been questioned. His statement of the "general rule", what is referred to here as the "exclusivity rule", is unobjectionable. However, his two exceptions are less acceptable. In this respect it is instructive to compare what Lord Diplock said in the *Lonrho* case with the attitude of the Court of Appeal in *Island Records*, a case criticized by His Lordship. It concerned an application for an *Anton Piller* order[68] against defendants who had allegedly infringed provisions of the Dramatic and Musical Performers' Protection Act, 1958.[69] A majority of the Court of Appeal, Lord Denning M.R. and Lord Justice Waller, granted the order, although their grounds for doing so differed.[70] Their arguments in this regard[71] have a bearing on the issue of the principle of neutrality, which will be discussed later. For the moment, it is their approach to the argument that the statute could be used as the basis for civil relief which is relevant.

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[67] [1978] 1 Ch. 122, [1978] 3 All E.R. 824 (C.A.).

[68] Anton Piller KG v. Mfg. Processes Ltd., [1976] Ch. 55, [1976] 1 All E.R. 779 (C.A. 1975). On such orders *see* Staines, *Protection of Intellectual Property Rights: Anton Piller Orders*, 46 MOD. L. REV. 274 (1983).

[69] 6 & 7 Eliz. 2, c. 44 (*as amended by* U.K. 1963, c. 53 and U.K. 1972, c. 32).

[70] It appears, however, that Lord Diplock took the view that Their Lordships were *ad idem* as to the grounds: Lonrho Ltd. v. Shell Petroleum Co., *supra* note 10, at 187, [1981] 2 All E.R. at 463.

[71] Lord Denning found the Court's jurisdiction to grant the order in the common law principle, stemming from the notion that rights must be protected, *supra* note 67, at 135-37, [1978] 3 All E.R. at 829-30. Waller L.J. found the basis in equity, *id.* at 142-45, [1978] 3 All E.R. at 835-37.

The criminal acts in question involved the "bootlegging" of performances without the performers' consent for which the statute imposed a relatively small penalty. Hence, the plaintiffs argued that it was reasonable and proper to interpret the statute in such a way as to permit civil relief where a breach inflicted harm upon them. The circumstances were complicated by the fact that both the performers themselves and the record companies for which they performed were seeking the order. This, as was noted by Lord Diplock in both the *Lonrho* case,[72] and in subsequent decisions involving similar allegations of infringement of the statute,[73] caused a problem. Was the statute designed to protect or benefit performers, or could it also be construed as extending its protection and benefits to record companies? Having regard to Lord Diplock's first exception to the general rule, that is the exclusivity rule, this might have been and perhaps later became a vital point.

In the *Lonrho* case, Lord Diplock suggested that the *Island Records* decision could have been justified upon "entirely orthodox reasons",[74] namely that the Act was passed for the protection of a particular class of persons, that is dramatic and musical performers. It should be noted that these "orthodox" reasons are in fact those given by Lord Diplock in the *Lonrho* case. As previously indicated, it is questionable whether Lord Diplock's approach is truly orthodox, if "orthodox" implies that the approach and the reasons are generally accepted as correct and operative. The orthodoxy of which Lord Diplock spoke in the *Lonrho* case, it is respectfully suggested, is Lord Diplock's orthodoxy, not necessarily orthodoxy in any universal sense. Certainly Lord Justice Shaw, who dissented in *Island Records*, did not consider that the 1958 Act created a duty defined for the benefit of a particular class. It simply provided for the punishment of certain conduct in relation to dramatic or musical works.[75] Lord Justice Waller took a similar view.[76] Thus, both these judges clearly were of the opinion that the granting of the order could not be substantiated on what Lord Diplock later called "orthodox reasons", namely, his first exception to the general, or exclusivity, rule. On the contrary, Waller L.J. stressed the fact that the 1958 statute provided only one remedy for a breach, a criminal remedy, in contrast to the Copyright Act, 1956, which allowed for both criminal and civil law remedies.[77]

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[72] *Supra* note 10, at 187, [1981] 2 All E.R. at 462-63.

[73] R.C.A. Corp. v. Pollard, [1982] 2 All E.R. 468, [1982] 1 W.L.R. 979 (Ch.), *rev'd* [1983] Ch. 135, [1982] 3 All E.R. 771 (C.A. 1982); Warner Bros. Records Inc. v. Parr, [1982] 2 All E.R. 455, [1982] 1 W.L.R. 993 (Ch. 1981) where Jeffs Q.C. thought that the 1963 amendment to the Dramatic and Musical Performers' Act, 1958 had extended the Act's protection to record companies. *See id.* at 460, [1982] 1 W.L.R. at 997.

[74] *Supra* note 10, at 187, [1981] 2 All E.R. at 462.

[75] *Supra* note 67, at 139, [1978] 3 All E.R. at 832.

[76] *Id.* at 142, [1978] 3 All E.R. at 834-35.

[77] *Id.* at 142, [1978] 3 All E.R. at 835.

The judgment of Lord Denning on this point is even more interesting, when viewed in the light of Lord Diplock's subsequent discussion and exposition of the law in *Lonrho*. Lord Denning considered whether the claim to the order could be based upon the doctrine that penal legislation can sometimes be the foundation of a civil action, and concluded that the state of the law and the cases left the courts with "a guesswork puzzle".[78] The dividing line between the *pro*-cases and the *contra*-cases was so blurred and ill-defined "that [one] might as well toss a coin to decide it".[79] Or, as the present writer would prefer to say, the correct way to decide any individual case really has nothing to do with logic or principle, but is merely a matter of preference based upon the particular judge's view of the applicable or desirable policy. Lord Denning declined to indulge in such a game of chance. Thus, he would not decide the case on the basis of the doctrine of statutory causes of action. From what Lord Denning said, and the similar language of Waller L.J., who denied that an action could be brought for a simple statutory breach,[80] it would seem that Lord Diplock was incorrect in suggesting that the *Island Records* decision could have been justified or supported by the application of "entirely orthodox reasons". The truth, as it so happens, was quite the contrary.

In the *Lonrho* case,[81] Lord Diplock drew a distinction between the performers on the one hand and the record companies on the other. As regards the former, Lord Diplock said that the 1958 Act was passed for the protection of a particular class of individuals, namely dramatic and musical performers. He left open whether it was also passed for the protection of record companies so as to permit them to apply for civil relief. It is indeed curious that in *Island Records* not one of the three judges, including the dissenter, considered that the Act was passed to benefit or protect any particular class, and more especially, the performers. Was Lord Diplock implying that the decision on this point by the Court of Appeal was incorrect? That was not the view that Lord Diplock said was adopted by the trial judge in the later case of *Warner Bros. Records Inc. v. Parr*.[82] However, at first instance, in *R.C.A. Corp. v. Pollard*,[83] Vinelott J. disagreed. In his view, the decision of the Court of Appeal that the Act in these cases did not create a right to bring a civil action so far as performers were concerned, must be taken to have been overruled by the House of Lords in *Lonrho*. These later cases involved claims by record companies, not performers; hence it was possible for the trial judges to hold that record companies had no rights of action, even though they differed in their interpretation of Lord Diplock's remarks on

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[78] *Id.* at 134-35, [1978] 3 All E.R. at 828-29.
[79] *Id.* at 135, [1978] 3 All E.R. at 829.
[80] *Id.* at 142, [1978] 3 All E.R. at 835.
[81] *Supra* note 10, at 187, [1981] 2 All E.R. at 462-63.
[82] *Supra* note 73, at 466, [1982] 1 W.L.R. at 998.
[83] *Supra* note 73, at 475-76, [1982] 1 W.L.R. at 987-88 (Ch.).

the *Island Records* case. When the *R.C.A.* case went to the Court of Appeal, however, the opinion of Vinelott J. in this regard was overruled. The Court of Appeal[84] held that record companies were not given any civil rights of action under the relevant legislation. But it also made it clear that nor were performers. This was the effect of the judgments in the *Island Records* case, and nothing said by Lord Diplock in the *Lonrho* case was meant, or could be understood, to alter that decision. This is plainest in the judgment of Lord Justice Oliver,[85] although it would also seem to be implicit in the remarks of Lords Justices Lawton and Slade.[86] Lord Justice Oliver stated that the critical remarks of Lord Diplock in the *Lonrho* case, with respect to the approach taken by the Court of Appeal in the *Island Records* case, were made *apropos* something else, namely the proposition that where there is a breach of a statute enacted for the protection of a class to which the plaintiff belongs and he can show that he is specially damaged, he may bring proceedings to enforce, not his own civil right of action, but the public duty which has not been observed.[87] As will become more evident later, it is debatable whether the remarks of Lord Diplock were directed towards this point. But it is clear that Lord Diplock was not purporting to disturb the validity of the decisions in *Island Records*, namely that the 1958 statute did not confer a right upon performers to bring civil proceedings. In view of this, it is hardly surprising that the Court of Appeal in the *R.C.A.* case took the view that the same was true *a fortiori* of record companies.

The above discussion reveals the confusion and uncertainty in this area of the law. Lord Diplock's *dicta* in *Lonrho* regarding *Island Records* are obfuscating and misleading and have already produced conflicting opinions in later cases. It is suggested that His Lordship has injected ideas that may give a false impression of order and principle, while in reality they conceal the lack of clarity, logic and reason that characterizes the issue of civil liability for breaches of a statute which creates criminal responsibility for its infringement. The proper approach should be one dictated or legitimized by what has been termed in this article "the exclusivity rule". Shaw L.J., in his dissenting judgment in *Island Records*, expressed this sentiment very well: "It is not . . . a proper function of the courts indirectly to stiffen the sinews of a criminal statute."[88] The courts by and large seem to have taken the view that, where the statute does provide for such "exclusivity", it would be inappropriate to allow an aggrieved plaintiff to pursue his own civil remedy.

This approach seems perfectly sound and acceptable. Indeed one can go further. To the limited extent that courts in England and elsewhere in

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[84] *Supra* note 73 (C.A.).
[85] *Id.* at 150-51, [1982] 3 All E.R. at 779-80.
[86] *Id.* at 147-48, 157, [1982] 3 All E.R. at 777-78, 784.
[87] *Id.* at 150, [1982] 3 All E.R. at 780.
[88] *Supra* note 67, at 141, [1978] 3 All E.R. at 824.

the common law world have allowed civil actions based on statutory breach, whether on the exceptional grounds suggested by Lord Diplock or on others, they have gone beyond what is the "proper function of the courts".[89] They have exercised a jurisdiction which they never had. As indicated, this possibly resulted from a desire to allow injured workmen to bring actions against their employers at a time when there was no scheme of industrial injury insurance. The common law had to be developed in such a way as to give minimal security or relief to those engaged in dangerous work. Similarly, the attitude of the courts to statutes concerning safety on the roads may have resulted from the desire to protect those who could be injuriously affected by the failure to observe proper standards of safety at a time when there was no adequate alternative system for compensating victims. With the evolution of statutory schemes providing such protection, the rationale for allowing an action for breach of statutory duty perhaps disappeared.

The above argument is reinforced by cases which have discussed the possibility of construing a statute as creating some form of tortious liability in itself, without proof of any other kind of tortious behaviour. This involves the second method of denying the possibility of civil liability for breach of a statute. In contrast to "the exclusivity test", this may be termed "the principle of neutrality".

B. *Neutrality*

The principle of neutrality means that the statute does not set out a standard of conduct against which the tortious character of the defendant's conduct can be measured. The commission of a prohibited act, or the failure to perform a required one, may involve criminal liability, but it does not of itself constitute any form of tortious behaviour. With respect to the latter, the statute does not lay down any conditions under which such liability can be imposed. If this were the proper method of interpretation, it might be more open to argument that the statute justified or permitted the imposition of civil liability for a breach; failure to fulfil the statutory requirements, if resulting in damage or loss to the plaintiff, would *per se* provide the juridical, as well as the factual, basis for a successful action. Such, indeed, was one approach where the action for breach of a statutory duty was perceived as a variant of the tort of negligence.[90] A recent decision of the Supreme Court of Canada[91] however, suggests that such an approach is no longer tenable in Canada. As a result, actions for breach of statutory duty are arguably less

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[89] *Id.*

[90] Lochgelly Iron & Coal Co. v. M'Mullan, [1934] A.C. 1, [1933] All E.R. Rep. 1018 (H.L. Sc. 1933); O'Connor v. S.P. Bray Ltd., *supra* note 12.

[91] Saskatchewan Wheat Pool v. The Queen, [1981] 2 F.C. 212, 117 D.L.R. (3d) 70 (App. D. 1980).

acceptable, at least where the defendant acted without any intention of causing harm or injury to the plaintiff. The courts in Canada, therefore, if not yet in England, have produced another, perhaps more significant and effective control on the possibility of civil liability stemming from the breach of a criminal statute.

Before considering this development, however, it is necessary to discuss the problem of wilful or intentional conduct, allegedly engaged in for the purpose of inflicting harm upon a party and made a criminal offence by statute. If the factor of intention or wilfulness were to render the offender more susceptible to a civil action, it might be possible to argue that some criminal statutes, more in fact than previously was the case, can be used to create or found civil liability. The judgments in some recent English and Canadian cases indicate that the courts are not willing to go to such lengths; they will not allow a civil cause of action to be based upon the deliberate violation of a statutory provision imposing criminal sanctions for its infringement. This development, when combined with the position taken in Canada regarding the so-called tort of statutory negligence, reveals the courts' increasing reluctance in this regard. Indeed, it may be concluded that the heyday of civil liability founded upon breaches of criminal statutes has passed. Where this leaves the law is a matter to which later reference will be made.

1. *Intentional Misconduct*

In three recent cases,[92] plaintiffs have alleged deliberate violations of certain statutes, as a result of which they suffered foreseeable harm. On the basis of these allegations, they claimed to be able to sue in tort for the loss or damage. In each instance, the plaintiffs failed to convince the court that the defendants' misconduct justified the kind of liability that was being invoked. Those results, and the reasoning that produced them, lead to the conclusion that at the present time the common law will not recognize as a wrong harm caused by the intentional, unjustifiable and inexcusable breach of a statute imposing criminal liability for its infringement. In other words, the attempt to finesse or outflank the exclusivity rule cannot succeed in the absence of explicit statutory language. Criminal statutes are neutral as far as civil liability for their breach is concerned, where intentional breaches are alleged.

The discussion in these judgments really emanates from *dicta* of the High Court of Australia in the earlier case of *Beaudesert Shire Council v. Smith*,[93] which held that an action for damages upon the case could be

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[92] Dunlop v. Woollahra Mun. Council, [1981] 1 All E.R. 1202, [1981] 2 W.L.R. 693 (P.C.) (N.S.W.); Lonrho Ltd. v. Shell Petroleum Co., *supra* note 10; and Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregates, 47 N.R. 191, 145 D.L.R. (3d) 385 (S.C.C. 1983).

[93] 120 C.L.R. 145, 40 A.L.J.R. 211 (H.C. 1966). This case was considered by Lord Diplock in *Lonrho*.

brought by a person who had suffered harm or loss as the inevitable consequence of the unlawful, intentional and positive acts of another.[94] The question directly raised in the *Lonrho*[95] case, and considered without finality in *Dunlop v. Woollahra Municipal Council*,[96] was whether this principle was valid, and if so, whether it could justify maintaining a civil cause of action in tort for damage resulting from the breach of a criminal statute.

Such a principle might well justify an action for damages where a breach has been committed intentionally, with a view to harming a plaintiff, whether or not that breach could be said to allow a civil action on either of the grounds set out by Lord Diplock in the *Lonrho* case, namely, on the basis that the statute recognized public rights and gave a remedy for special, particular damage resulting from an infringement of such rights. There would then be no need to indulge in the kind of games to which Lord Denning referred in *Island Records*. The idea behind the *Beaudesert* principle seems to be that the intentional infliction of harm by acts which cannot be justified in law, since they are *ex hypothesi* illegal or unlawful involving as they do a breach of statute, is itself actionable in tort, though possibly excusable if some valid ground can be shown. This notion has often been mooted in the English courts and may be said to be a source of the American idea of "the *prima facie* tort".[97] However, it has never gained sufficient support to become a valid operative principle of the law of torts despite strenuous efforts in its behalf.[98] *Dicta* in Canadian cases,[99] if not actual decisions, may disclose a certain enthusiasm for such a broad principle. However, no case in England or Canada clearly establishes that the *Beaudesert* principle represents the present state of the common law. Even in Australia, where as the Privy Council noted in *Dunlop*,[100] this principle was first enunciated, it has not been accepted. Specifically, where a statute neither expressly nor by

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[94] *Id.* at 156, 40 A.L.J.R. at 215.

[95] *Supra* note 10.

[96] *Supra* note 92.

[97] *See* Hale, *Prima Facie Torts, Combination, and Non-Feasance*, 46 COLUM. L. REV. 196 (1946); Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503 (1952); Frokosch, *An Analysis of the "Prima Facie Tort" Cause of Action*, 42 CORNELL L.Q. 465 (1957); Brown, *The Rise and Threatened Demise of the Prima Facie Tort Principle*, 54 N.W.U.L. REV. 563 (1959).

[98] *See, e.g.*, cases where Lord Denning attempted to prod the law in this direction: Daily Mirror Newspapers Ltd. v. Gardner, [1968] 2 Q.B. 762, [1968] 2 All E.R. 163 (C.A.); Torquay Hotel Ltd. v. Cousins, [1969] 2 Ch. 106, [1969] 1 All E.R. 522 (C.A.); Acrow (Automation) Ltd. v. Rex Chainbelt Inc., [1971] 3 All E.R. 1175, [1971] 1 W.L.R. 1676 (C.A.); *cf.* Nagle v. Feilden, [1966] 2 Q.B. 633, [1966] 1 All E.R. 689 (C.A.).

[99] Gershman v. Manitoba Vegetable Producers' Marketing Bd., [1976] 4 W.W.R. 406, 69 D.L.R. (3d) 114 (Man. C.A.), *aff'g* 65 D.L.R. (3d) 181 (Q.B. 1975); Mintuck v. Valley River Band No. 63A, [1977] 2 W.W.R. 309, 75 D.L.R. (3d) 589 (Man. C.A.).

[100] *Supra* note 92, at 1208, [1981] 2 W.L.R. at 101.

implication provides a civil remedy in damages, breach of a statutory duty has been denied as a possible basis for an action, on the ground that while it is clearly "unlawful", it is not necessarily unlawful within the meaning of the *Beaudesert* principle. However, what is meant by the latter is uncertain. In the Australian case of *Kitano v. The Commonwealth*,[101] it was suggested that the plaintiff would have to show that the "unlawful" act was tortious as well as in contravention of a statute. Certainly, as was said in *Dunlop*, "unlawful" cannot include an act which is merely null and void, without also involving criminal or tortious behaviour.

In the *Lonrho* case[102] Lord Diplock stated that the expression "unlawful" in the *Beaudesert* principle remained unclarified. He did not comment on the state of the law in Australia[103] but refused to extend the principle, even assuming that it existed in a narrow form in English law, beyond the confines of the case law.

It has already been suggested that the case law in this area is in such a state that there is neither rhyme nor reason for holding that some statutes and not others allow civil actions, nor any general principle by which to categorize statutes capable of this construction. At present there are only some limited classes of statutes in respect of which such actions are allowed. Beyond this the general rule is that no such actions are possible. The acceptance of this proposition, which has been urged in this article, would virtually preclude the use of the *Beaudesert* principle to enlarge the range of circumstances in which civil actions will lie for breach of a criminal statute, assuming that this principle is even a part of the common law. In view of its dubious character, courts will be even less likely to use it to extend the situations in which such civil actions may be brought.

If the intentional infliction of damage or loss by some kind of unlawful, and presumably unjustifiable or inexcusable act, were actionable in tort, it might seem logical to recognize as actionable the contravention of a statute imposing criminal sanctions, at any rate where that contravention was deliberate. Since the Privy Council and the House of Lords have now both denied this, the basis for rejecting the possibility of civil liability in such instances is arguably not logic, precedent or principle; it must be the unwillingness of the courts to extend civil liability to cover cases of breach of a statutory duty or obligation. Without saying this in precise terms, the Privy Council, and more

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[101] 129 C.L.R. 151, 47 A.L.J.R. 757 (H.C. 1973); *see also* Hull v. Canterbury Mun. Council, [1974] 1 N.S.W.L.R. 300, 29 L.G.R.A. 29 (S.C.); *see also* Dworkin & Harari, *The Beaudesert Decision — Raising the Ghost of the Action upon the Case*, 40 AUST. L.J. 296 (1967).

[102] *Supra* note 10, at 187-88, [1981] 2 All E.R. at 463.

[103] Now the law in Australia does not necessarily have to be the same as in England: Cassell & Co. v. Broome, [1972] A.C. 1027, [1972] 1 All E.R. 801 (H.L.). The same holds true for Canada, where appeals to the P.C. were abolished in 1949 and the judiciary has taken a more independent stance in recent years.

particularly the House of Lords in the *Lonrho* case, have endorsed the graphic words of Shaw L.J., quoted earlier:[104] there will be no stiffening of the sinews of criminal statutes by reinforcing their sanctions with actions for damages.

While the judgment of the Supreme Court of Canada in *Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregates*[105] is by no means as clear and definite on this point as is the *Lonrho* case, it may nonetheless be suggested that the Supreme Court of Canada has inferentially endorsed the approach of the House of Lords. Certainly Mr. Justice Estey,[106] speaking for the Court, accepted the House of Lords' *dicta* regarding the tort of conspiracy. However, the point about the effect of a breach of a criminal statute is not quite as distinctly made in the Canadian case, since it was said that the breach in question, namely an infringement of the provisions of the Combines Investigation Act,[107] while unlawful, was not directed towards the plaintiff. Therefore, such conduct could not support an allegation of tortious conspiracy.[108] Whether it might have formed the basis for a distinct action based upon breach of the statute is more questionable. The Supreme Court's apparent approval of the House of Lords' attitude towards the claims in the *Lonrho* case might well imply the latter's endorsement of the idea that an injured plaintiff cannot bring an action against a party who has breached a statute creating a criminal offence, even where the resulting injury was intentional. In view of what will be said later with respect to cases involving allegations of negligence founded upon breach of a statute which creates a criminal offence, it seems unlikely that the Supreme Court of Canada would countenance a distinct tort action based upon the deliberate, as opposed to the careless or unintentional, breach of such a statute.

2. *A Possible Alternative*

In the *Island Records* case,[109] Lord Denning M.R. considered an approach which might be thought of as an alternative to the argument that the intentional breach of a criminal statute should give rise to tort liability. If His Lordship's *dicta* were accepted, it might possibly lead an injured or aggrieved plaintiff to base his claim upon an argument that would not founder upon the reef of statutory construction, that is the exclusivity rule.

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[104] *See* note 89 and accompanying text *supra*.
[105] *Supra* note 92.
[106] *Id.* at 200-02, 145 D.L.R. (3d) at 396-97.
[107] R.S.C. 1970, c. C-23, *as amended by* S.C. 1974-75-76, c. 76, ss. 12, 13.
[108] *Supra* note 92, at 201-03, 145 D.L.R. (3d) at 397-99.
[109] *Supra* note 67.

Lord Denning rejected the plaintiffs' argument[110] that the relevant statute could be construed as permitting an action for relief as well as imposing criminal liability, and approached the problem from a different standpoint. His discussion of the possibility of the plaintiffs' bringing a successful claim for an *Anton Piller* order turned on the protection of private rights:

> If a private individual can show that he has a private right which is being interfered with by the criminal act, thus causing or threatening to cause him special damage over and above the generality of the public, then he can come to the court as a private individual and ask that his private right be protected.[111]

For this proposition Lord Denning relied on the *Gouriet* case[112] and *Iveson v. Moore*,[113] an early instance where public nuisance gave rise to a private civil action, in a sense anticipating the reasoning of Lord Diplock in the *Lonrho* case. Lord Denning lumped together a number of disparate decisions, in which rights were protected, as he put it, against different kinds of interference or wrongdoing.[114] His attempt to bring some kind of order to the chaos of legal decisions may be applauded but his analysis is questionable. While he did suggest that unlawful interference, including criminal interference through statutory breach, could give rise to a civil action, it is not quite correct to say, as Lord Diplock did,[115] that Lord Denning was formulating a wider general rule along the lines suggested in *Lonrho*. Lord Denning's wider general principle, it is suggested, was of a different order. It was an attempt to lay down a broadly based rule of unlawful interference, not a broad rule of statutory interpretation to guide courts in determining whether a particular statute permitted a civil action for breach of a provision creating a criminal offence.

It should also be noted that, contrary to Lord Diplock's suggestion in the *Lonrho* case,[116] Lord Justice Waller did not endorse Lord Denning's proposition. Lord Justice Waller preferred to base his decision on the court's equitable jurisdiction to grant an injunction to a person claiming special damage as a result of a crime.[117] Moreover, Shaw L.J. felt that the statute in question did not permit a civil remedy;[118] such a result could not be justified either on the basis of statutory interpretation or on the view that the statute created a private as well as a public right, interference with which entitled a party claiming special damage to bring a civil suit.

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[110] *See* note 67 and accompanying text *supra*.

[111] *Supra* note 67, at 135, [1978] 3 All E.R. at 829.

[112] *Supra* note 16.

[113] (1699), 1 Ld. Raym. 486.

[114] *Supra* note 67, at 136, [1978] 3 All E.R. at 830.

[115] Lonrho Ltd. v. Shell Petroleum Co., *supra* note 10, at 187-88, [1981] 2 All E.R. at 463.

[116] *Id.*

[117] *Supra* note 67, at 142-45, [1978] 3 All E.R. at 835-37.

[118] *Id.* at 139-41, [1978] 3 All E.R. at 833-34.

Decisions subsequent to *Lonrho* and *Island Records* reveal a recognition of Lord Diplock's criticism of the latter case, holding that neither Lord Denning's statement of principle nor his approach to cases of that kind is part of English law,[119] although it would seem that the "equitable jurisdiction" approach of Waller L.J. is still open to debate.[120]

The concern here is not with the possibility of a civil action arising under the Dramatic and Musical Performers' Protection Act, 1958[121] but rather with the validity of the argument that criminal statutes can create or recognize private rights capable of protection through private suits, where breach of the statute constitutes an interference with these rights and inflicts special damage on a party. The interpretation of *Island Records* by Lord Diplock[122] and by the Court of Appeal in a later decision,[123] in which the statute was held not to create any property right capable of protection by civil action, does not appear to have affected the more general proposition[124] that there may be a civil action for breach of a criminal statute where the statute creates public rights. Lord Diplock suggests that a statute creating private rights does not give rise to any civil action unless it specifically states that it does. Yet he appears to approve Lord Denning's intimation in the *Island Records* case that the relevant statute was passed for the protection of private rights and interests, thereby negating any action for breach of a statutory duty. However, Lord Denning was using that argument to show how the plaintiffs could maintain an action based upon interference with their private rights, a possibility which Lord Diplock and the later cases[125] denied. Again, it is suggested, this is symptomatic of the confusion and uncertainty in this area of the law. At the very least, however, Lord Diplock's discussion of this aspect of *Island Records* emphasizes how the courts are loath to accept that the creation of a criminal offence may provide a basis for a civil action, where a statute appears to rely exclusively upon a criminal sanction to enforce compliance with its provisions, even where the protection of private rights is urged as a basis for such jurisdiction. At common law, even if private rights are involved, there will be no civil remedy in the absence of either a recognized tort covering the defendant's conduct or an express statutory provision granting a civil remedy.

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[119] Warner Bros. Records Inc. v. Parr, *supra* note 73, at 466, [1982] 1 W.L.R. at 998; R.C.A. Corp. v. Pollard, *supra* note 73, at 477, [1982] 1 W.L.R. at 989 (Ch.) and *id.* at 778, 780, 785, [1982] 3 W.L.R. at 1016, 1018, 1025 (C.A.).

[120] Different views on this appear to have been expressed by the various members of the Court of Appeal in R.C.A. Corp. v. Pollard, *id.* at 778, 782, 785, [1982] 3 W.L.R. at 1016 (Lawton L.J.), 1021 (Oliver L.J.), and 1025 (Slade L.J.).

[121] 6 & 7 Eliz. 2, c. 44 (*as amended by* U.K. 1963, c. 53 and U.K. 1972, c. 32).

[122] *Supra* note 10, at 187-88, [1981] 2 All E.R. at 462.

[123] R.C.A. Corp. v. Pollard, *supra* note 73.

[124] As stated by Lord Diplock in *Lonrho*.

[125] *Supra* note 119.

3. *Negligence*

Arguably the proposition that civil liability in tort can arise from the breach of a criminal statute derives largely from the body of case law concerned with "statutory negligence".[126] These decisions have led judges and writers to conclude that breach of a statute amounts to negligence *per se*,[127] where the statute can be interpreted, whether on Lord Diplock's analysis or any other, as permitting a civil action. English courts have said that the statute lays down the standard expected of the party upon whom the obligation is placed, such that his failure to observe that standard constitutes some form of "negligence". In other words, it is actionable without proof of negligence in the usual common law sense.[128] Not every breach, it is true, will attract liability in tort. Problems of causation, remoteness or contributory negligence for example, may arise.[129] These, however, relate to other aspects of an action in tort, especially an action based on negligence, whether statutory or common law. They do not affect the matter under consideration. For present purposes the vital issue is the validity of this approach.

This approach has often been debated.[130] However, it is not necessary to rehearse the arguments as to whether the action for breach of a statutory duty is an action for negligence, where the negligence is established *ipso facto* by proving the contents of the statute and the fact of breach, or whether it is a very special action involving absolute, or at least strict liability. Very recently Mr. Justice Dickson of the Supreme Court of Canada indicated that English courts had come down firmly on the side of the special character of the action for breach of a statutory duty.[131] For this His Lordship cited the decision of the House of Lords in *London Passenger Transport Board v. Upson*.[132] Nevertheless, the doctrine has been the subject of much criticism by commentators who have adverted to the inconsistencies, uncertainties, illogic and general undesirability of such an action. Mr. Justice Dickson agreed with the comments of Glanville Williams[133] that the judicial decisions revealed an "irresolute course" and "reflect no credit on our jurisprudence". Mr. Justice Dickson then examined the American approach,[134] which was said to assimilate civil responsibility for statutory breach into the general law of negligence. However, he doubted whether this truly represented

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[126] SALMOND & HEUSTON, *supra* note 1, at 231, citing Lord Wright in Lochgelly Iron and Coal Co. v. M'Mullan, *supra* note 90, at 23, [1933] All E.R. Rep. at 1029-30.

[127] J. FLEMING, *supra* note 1, at 126.

[128] WINFIELD & JOLOWICZ, *supra* note 1, at 165-67.

[129] *Id.* at 160-63; A. LINDEN, *supra* note 1, at 195-202.

[130] *See* authorities referred to in note 6 *supra*; A. LINDEN, *supra* note 1, at 202-12.

[131] Saskatchewan Wheat Pool v. Government of Canada, *supra* note 2, at 432, 143 D.L.R. (3d) at 14.

[132] [1949] A.C. 155, [1949] 1 All E.R. 60 (1948).

[133] *The Effect of Penal Legislation on the Law of Tort*, *supra* note 4.

[134] *Supra* note 2, at 438-41, 143 D.L.R. (3d) at 19-21.

the American approach. There were, he said, "differing views of the effect of this assimilation; at one end of the spectrum, breach of statutory duty may constitute negligence *per se* or, at the other, it may merely be evidence of negligence".[135] The majority view, as evidenced by the language in the *Restatement on Torts*,[136] was that in certain circumstances statutory breach constituted negligence *per se*. The minority view was that breach of a statute was merely evidence of negligence. "There are, however," he said, "varying degrees of negligence. Statutory breach may be considered totally irrelevant, merely relevant, or *prima facie* evidence of negligence having the effect of reversing the onus of proof."[137] His Lordship agreed with the major criticism of the negligence *per se* approach, namely that it meant the inflexible application of the legislature's criminal standard of conduct to a civil case.

> The defendant in a civil case does not benefit from the technical defences or protection offered by the criminal law; the civil consequences may easily outweigh any penal consequences attaching to the breach of statute; and finally the purposes served by the imposition of criminal as opposed to civil liability are radically different. The compensatory aspect of tort liability has won out over the deterrent and punitive aspect; the perceptible evolution in the use of civil liability as a mechanism of loss shifting to that of loss distribution has only accentuated this change.[138]

The problem facing the Court in *Saskatchewan Wheat Pool*[139] was whether the Canadian approach was, or should be, the negligence *per se* approach or the modified American one that breach of statute was not necessarily negligent or actionable unless there was independent evidence of the failure to observe the standards of the common law. Earlier Canadian authority, including a case in the Supreme Court of Canada,[140] had left the matter open.

The facts of *Saskatchewan Wheat Pool* are as follows. The Canada Grain Act[141] prohibited delivery of insect-infested grain. The Wheat Pool, at the request of the Canadian Wheat Board, collected grain from agents of the Board in Saskatchewan and shipped it to Thunder Bay, on Lake Superior, for delivery to the Board for export or for shipment further east within Canada. The Board was an agent of the Federal Crown, authorized by the Canadian Wheat Board Act to buy, sell and market wheat, oats and barley grown in Western Canada. A shipment of

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[135] *Id.* at 438, 143 D.L.R. (3d) at 19.

[136] RESTATEMENT OF THE LAW OF TORTS, 2nd (app. vol. 1) (A.L.I. 1966), para. 288-B.

[137] *Supra* note 2, at 441, 143 D.L.R. (3d) at 20.

[138] *Id.* at 441, 143 D.L.R. (3d) at 21.

[139] *Id.*

[140] Sterling Trusts Corp. v. Postma, [1965] S.C.R. 324, 48 D.L.R. (2d) 423 (1964); *see also* Queensway Tank Lines Ltd. v. Moise, [1970] 1 O.R. 535, 9 D.L.R. 30 (C.A. 1969); A. LINDEN, *supra* note 1, at 209.

[141] S.C. 1970-71-72, c. 7, para. 86(*c*).

grain loaded at Thunder Bay was infested with rusty grain beetle larvae. However routine inspection at the port did not reveal this. Indeed, the exact cause of the infestation was not, and could not be, known. No claim was made by the Wheat Board against the Wheat Pool for costs incurred in testing the cargo while *en route*, in unloading and reloading of the grain to facilitate fumigation of the ship and in diverting the ship to Kingston during this process. The Board based its claim for damages upon the breach of the statutory provision prohibiting the delivery of infested grain out of a grain elevator. There could be no doubt that the Pool had breached this statutory obligation. However, there was no evidence that this breach was due to the negligence of the Pool, its agents or servants. Hence, a critical issue arose as to whether the mere breach of a statute creating criminal liability could, without more, sustain a civil action.

At trial, the Board was successful. A judge of the Federal Court of Canada held that the statute imposed an absolute duty, breach of which could give rise to a civil action for damages.[142] The Federal Court of Appeal unanimously reversed this decision, taking a different view of the intent and object of the Canada Grain Act.[143] The Board's appeal to the Supreme Court of Canada was dismissed. The unanimous judgment of the Court was delivered by Mr. Justice Dickson who endeavoured to state the Canadian position. His Lordship rejected the idea that breach of a statutory provision was "prima facie evidence of negligence", on the ground that this could be misinterpreted as "prima facie liable".[144] Instead, he thought that the intellectually acceptable approach was to use a statutory breach as evidence of negligence rather than as a nominate tort in itself. This avoided the "fictitious hunt for legislative intent to create a civil cause of action".[145] Moreover, it was consonant with other developments in the law, notably the way statutes have explicitly and directly created civil rights of action to compensate individuals, the diminishing role of tort liability in compensation and the allocation of loss through the rise of other modes of achieving such ends, and the eclipse of nominate torts of negligence, "the closest the common law has come to a general theory of civil responsibility".[146] Dickson J. stressed the importance of fault as a ground for imposing liability, an interesting viewpoint in the face of the attitude of many modern writers that tort law should not be dominated by the concept of fault. In his words:

> One of the main reasons for shifting a loss to a defendant is that he has been at fault, that he has done some act which should be discouraged. There is then

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[142] The Queen v. Saskatchewan Wheat Pool, [1980] 1 F.C. 407, 104 D.L.R. (3d) 392 (1979).

[143] Saskatchewan Wheat Pool v. The Queen, *supra* note 91.

[144] *Supra* note 2, at 442, 143 D.L.R. (3d) at 21.

[145] *Id.*

[146] *Id.* at 443, 143 D.L.R. (3d) at 23.

> good reason for taking money from the defendant as well as a reason for giving it to the plaintiff who has suffered from the fault of the defendant.[147]

This suggests shades of deterrence, as well as guilt, as bases for tort liability! Where a statute imposed criminal liability without fault, and provided for a penalty "on a strictly admonitory basis", there was "little justification to add civil liability when such liability would tend to produce liability without fault".[148]

In view of judicial attempts to reduce the absoluteness of so-called torts of strict liability, such as nuisance and liability under *Rylands v. Fletcher*,[149] it is hardly surprising that a court should try to limit further the reach of such "strictness". Liability without fault is a medieval principle which has fallen into strong disfavour over the past few decades. "The tendency of the law of recent time", said Dickson J.,[150] "is to ameliorate the rigours of absolute rules and absolute duty in the sense indicated, as contrary to natural justice."[151] For these reasons, the Court was adverse to the recognition in Canada of a nominate tort of statutory breach and concluded as follows:

> 1. Civil consequences of breach of statute should be subsumed in the law of negligence.
> 2. The notion of a nominate tort of statutory breach, giving a right to recovery merely on proof of breach and damages, should be rejected, as should the view that unexcused breach constitutes negligence *per se* giving rise to absolute liability.
> 3. Proof of statutory breach, causative of damages, may be evidence of negligence.
> 4. The statutory formulation of the duty may afford a specific, and useful, standard of reasonable conduct.[152]

This decision is of the utmost importance. First of all, it exemplifies the independence of the Canadian judiciary in relation to the common law. Indeed, in this instance, it was the Canadian Supreme Court which hearkened to, adopted and acted upon the criticisms voiced in England of the English courts' approach to this problem. Second, it states categorically that in Canada there is no tort of statutory negligence or breach of statutory duty. Such a tort is not justified on principle or policy. Third, it rejected the notion that criminal statutes can impose civil liability, in the absence of any specific provision to that effect.

This last comment connects the *Saskatchewan Wheat Board* case with the remarks of Laskin C.J. in the *Bhadauria* case[153] with respect to the "comprehensiveness" of the statute, or the "exclusivity rule" as it

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[147] *Id.*

[148] *Id.* at 443-44, 143 D.L.R. (3d) at 23.

[149] L.R. 3 H.L. 330, 37 L.J. Exch. 161 (1868).

[150] *Supra* note 2, at 444, 143 D.L.R. (3d) at 23.

[151] This is a strange, very individual usage of the expression "natural justice". *But see* J. FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

[152] *Supra* note 2, at 446, 143 D.L.R. (3d) at 25.

[153] *Supra* note 3, at 188, 124 D.L.R. (3d) at 198.

has been termed herein. Dickson J. did not put it quite that way, preferring to base his reasoning upon the inutility of adding civil to criminal liability unless the statute required it, rather than upon any logical principles. However, although his argument may have differed in nature, its general purpose was the same: criminal statutes do not need, nor do they justify the addition of civil liability to achieve their purpose or to give them their true worth or value.

The second of the above three comments on the *Saskatchewan Wheat Board* case is highly relevant to the point under consideration in this part of this discussion, namely, the "neutrality" of criminal legislation. Statutes which create duties and impose criminal sanctions for their non-fulfillment or breach do not invite or involve the conclusion that such non-fulfillment or breach constitutes the kind of tortious behaviour on the strength of which any individual who suffers or incurs damage or loss can bring an action for negligence. Thus the situation with respect to allegedly negligent behaviour has been equated with the situation with respect to deliberate or intentional conduct, designed to cause harm.

This decision by the Supreme Court appears to be convincing and justifiable. However, it must be viewed against its decision rendered four years previously in *Re National Capital Commission and Pugliese*.[154] The issue in that case was not negligence but nuisance. The plaintiffs complained that the defendants had constructed a collection sewer on their land, the effect of which was a substantial reduction in the ground water level beneath the plaintiffs' land. As a result, the plaintiffs' land was damaged by reason of subsidence. In the Court of Appeal of Ontario[155] the defendants were held liable in nuisance, for reasons which are not material. They were also liable in negligence, assuming that the plaintiffs could establish the appropriate facts at trial. However, the argument that they were also liable for statutory breach failed. The Court held that the Ontario Water Resources Act[156] did not confer a right to bring a civil suit. The Supreme Court of Canada thought otherwise.

Mr. Justice Pigeon, speaking for the Court, said that the "result of any enactment is always a matter of the proper construction of the statute":[157]

> [The section involved[158]] makes it apparent that this provision is not only in the public interest but also in the private interest of all land-owners who are liable to suffer damage from excessive pumping. Furthermore the section is really not an enactment creating a statutory duty, it is a restriction on whatever right a land-owner previously enjoyed as such to abstract the water

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[154] [1979] 2 S.C.R. 104, 97 D.L.R. (3d) 631.

[155] Pugliese v. Nat'l Capital Comm'n, 17 O.R. (2d) 129, 79 D.L.R. (3d) 592 (1977).

[156] R.S.O. 1970, c. 332.

[157] *Supra* note 154, at 114, 97 D.L.R. (3d) at 638.

[158] R.S.O. 1970, c. 332, s. 37.

> under his land which percolates in undefined channels. Whenever such abstraction causes damage to other lands, it prima facie comes within the definition of a nuisance. . . .[159]

Later, dealing with the problem "from the standpoint of the law of negligence", the learned judge stated that in his view it was clear "that this statute is not concerned only with the public interest but also with the protection of private interests".[160] His conclusion on this point is substantiated by reference to the decision in *Cutler v. Wandsworth Stadium Ltd.*,[161] to which reference was made earlier in this article.

The interest of this case for present purposes is the Supreme Court's statements regarding liability for breach of statute. It seems that two bases for liability existed. First of all, the statute did not create a criminal offence with a concomitant civil liability in nuisance for breach of a statutory duty. It limited a land-owner's right to do certain things, making activity in excess of those limits a nuisance. This is hardly the same as giving a civil right of action for breach of a criminal statute which creates duties and fixes penalties for their breach. Second, to the extent to which the plaintiffs' cause of action lay in negligence, the Court held that the breach of the statute did involve a civil suit. The statute had to be construed in this way because it was designed to protect private as well as public interests. In other words, the Court adopted the traditional test of civil liability in these situations. It might be argued therefore that, where nuisance is concerned, the statute is relevant for its definition of lawful and unlawful activity; there is no need to consider statutory breach as grounds for a civil suit. Second, the proper test to apply, certainly where negligence is in issue, is the one confirmed in the *Cutler*[162] case and further analyzed by Lord Diplock in *Lonrho*.[163] It would therefore seem that the statute is extremely relevant to liability whether in nuisance or negligence, and breach of the statute may well be a cause of action in itself without proof of anything more.

The above line of reasoning seems to reveal a conflict between the *Pugliese* case and the later decision in *Saskatchewan Wheat Board*. Is there in fact a conflict? Can the decisions and reasons be reconciled? Are the cases distinguishable? Is there a different rule for nuisance than for negligence? If not, which decision truly represents the law in Canada?

The *Saskatchewan Wheat Board* case was followed by the Federal Court of Appeal in *Baird v. The Queen in Right of Ontario*.[164] The plaintiff had sued the Crown for damages resulting from alleged breaches of the Trust Companies Act.[165] The statement of claim had been struck

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[159] *Supra* note 154, at 115, 97 D.L.R. (3d) at 638-39.
[160] *Id.* at 115-16, 97 D.L.R. (3d) at 639.
[161] *Supra* note 11.
[162] *Id.*
[163] *Supra* note 10.
[164] 48 N.R. 276, 148 D.L.R. (3d) 1 (1983).
[165] R.S.C. 1970, c. T-16.

out as not disclosing a reasonable cause of action. The plaintiff's appeal was allowed and he was permitted to proceed. The chief reasons for this were given by Mr. Justice LeDain who said that the judgment in *Saskatchewan Wheat Board* indicated the following:

> [T]he question whether there is to be civil liability for breach of statutory duty is to be determined, in so far as it necessarily remains a question of policy, not by conjectures as to legislative intention but by the application, in a public law context, of the common law principles governing liability for negligence. The liability is not to be regarded as created by statute, where there is no express provision for it.[166]

As LeDain J. pointed out,[167] his own approach in an earlier case[168] appears to have been rejected by the Supreme Court in favour of the view that there is no nominate tort of statutory negligence. The judgment, at the very least, recognizes the effect of the *Saskatchewan Wheat Board* case with respect to negligence. It leaves open the question of its applicability to nuisance or other tortious behaviour. Thus the questions raised above still remain to be answered.

VI. Conclusion

In the preceding pages there has been an attempt to show how certain recent decisions have called into question the idea that tortious liability can somehow be founded upon statutory breach if the conduct involved is not tortious independent of the statute. Whether the behaviour is alleged to be deliberate and intentionally harmful or merely careless and irresponsible, the attitude of the courts has been the same. The trend is against allowing statutes to supply the criteria of wilful or negligent wrongdoing.

The two questions posed by Dickson J. in *Saskatchewan Wheat Board*,[169] quoted in the introductory paragraph of this article, may now be re-examined. The way those questions have been answered in the cases discussed above indicates a fresh approach to the issue of civil liability for criminal conduct. As to the first issue, the possibility of a civil action arising from statutory breach is increasingly less likely. On principle, it has been argued, it should not occur at all in the absence of a positive direction from the legislature. In view of the recent developments in the law of tort and modern thought regarding tortious responsibility, this argument makes sense, particularly in the context of Mr. Justice Dickson's judgment in *Saskatchewan Wheat Board*.

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[166] *Supra* note 164, at 282-83, 148 D.L.R. (3d) at 9.

[167] *Id.* at 281, 148 D.L.R. (3d) at 8.

[168] Canadian Pacific Air Lines, Ltd. v. The Queen, [1979] 1 F.C. 39, 87 D.L.R. (3d) 511 (1978).

[169] *Supra* note 2, at 427, 143 D.L.R. (3d) at 9-10.

On the second issue, whether such civil liability, assuming it exists, should be absolute or whether it should be negated by proof of lack of fault, the trend is against absolute liability. Again this makes good sense and is a desirable development. To permit an independent action for breach of a statutory duty or provision would create a proliferation in causes of action in tort at a time when the courts appear to be trying to limit these and to rationalize the law of torts so as to produce some general principles of liability and appropriate defences. Moreover, the approach taken towards older notions of strict liability would indicate, as Dickson J. suggested in his innovative judgment, that it is hardly in keeping with a modern law of torts to impose liability in the absence of some kind of fault, whether that fault takes the form of negligence, the more usual instance in modern times, or wilful, deliberate wrongdoing.

Arguably, decisions such as *Saskatchewan Wheat Board*, which reject the notion of an independent tort of absolute liability for statutory breach, may further limit the possibility of civil actions for breach of statute to the extent that they are still conceivable. In Canada, as a result of *Saskatchewan Wheat Board*, breach of the provisions of a criminal statute may provide evidence that negligence has occurred, shifting the evidential, but not the ultimate, burden of proof to the defendant. Thus, a statute's only relevance in a civil action for damages may be with respect to questions of proof or evidence, adjectival issues, and not with respect to whether as a matter of law an action may be brought, which is an issue of substantive law.

The foregoing comments are founded upon the correctness and ultimate acceptance of the *Saskatchewan Wheat Board* case in which the Supreme Court tried to eradicate from the Canadian law of tort the difficulties, anomalies, uncertainties and quibbles that have plagued English courts for a long time and continue to do so on any reading of Lord Diplock's judgment in the *Lonrho* case. In *Pugliese*, on the other hand, the Supreme Court appears to have adopted what is now the classical English approach. If Dickson J. is correct, there is a trend against the notion that breach of a criminal statute can give rise to a civil action and against the view that once such a breach has occurred, the civil liability of the offender is absolute. These developments may be healthy and desirable if the movement towards "fault" in tort liability is favoured. Adoption of the Dickson approach, in contrast to that embraced by Pigeon J., would probably lead to greater rationalization of the law of torts, in terms of general principles of liability and defences, rather than to the accretion of disparate and contradicting causes of action. It would also free the law in Canada from some of the disfiguring barnacles that have clung to the hull of the English tort law.