THIS DOES NOT DEAL WITH 1995 CASES INCLUDED IN 2ND SUPP

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Statute Law

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Introductory note

For the convenience of readers this section of the Review conforms to the Code set out in the second edition of the author's textbook *Statutory Interpretation* as modified by the Second Supplement (Cumulative) to that edition. A reference to the relevant section of the Code is given after each heading in the notes below, where the book itself is referred to as 'Code' and the Second Supplement as '2nd Supp'.

Part I

General

Mandatory and directory requirements (Code s 10)

Voting (p 33)

A person who has been declared to be successful in an election held under statutory authority is presumed to be entitled, by virtue of principles of natural justice applying without specific statutory mention, to be heard on any later move to unseat him. (As to these principles see Code s 341.) This means that an enactment requiring such a person to be served with notice of any such proceeding must be treated as mandatory: ***Absolom v Gillett*** [1995] 2 All ER 661 (election of local government candidate).

The tort of breach of statutory duty (Code s 14)

In the important case of *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353, which came too late for mention in the 2nd Supp, the House of Lords carried out a wide-ranging review of the tort of breach of statutory duty. As a result it has been thought advisable to carry out a complete rewriting of Code s 14. This will be found in Part II below.

Courts and other adjudicating authorities (Code s 19)

Nature of a court (pp 62-63)

In *Peach Grey & Co (a firm) v Sommers* [1995] 2 All ER 513 it was held that an industrial tribunal exercises the judicial power of the state, and is therefore to be regarded as a court (see the analysis by Rose LJ at pp 519-520 of the characteristics of a court).

Adjudicating authorities with original jurisdiction (Code s 22)

Crown Court (pp 75-76)

For further authority confirming that decisions of the Crown Court are not usually subject to judicial review see *R v Chester Crown Court, ex p Cheshire County Council* (1995) *Times* 23 October. This decided that if the Supreme Court Act 1981 s 29(3) had intended to render subject to judicial review decisions where the Crown Court purported to exercise jurisdiction which it did not possess that subsection would have said so.

See also, as to the rule that decisions of the Crown Court regarding trial on indictment are not subject to judicial review, the note on *R v Crown Court at Maidstone, ex p Hollstein* [1995] 3 All ER 503, *R v Crown Court at Maidstone, ex p Clark* [1995] 3 All ER 513 and *R v Crown Court at Leeds, ex p Hussain* [1995] 3 All ER 527 at p 000 below, related to Code s 319.

Tribunals (pp 76-77)

In *Peach Grey & Co (a firm) v Sommers* [1995] 2 All ER 513 it was held that an industrial tribunal is a species of inferior court.

Adjudicating authorities with appellate jurisdiction (Code s 23)

Magistrates' courts (p 78)

An appeal may lie to a magistrates' court from the decision of a local authority, as under the Children Act 1989 s 77(6) (refusal to register a person as a child-minder). On such an appeal the magistrates' court must exercise its own judgment: see *Sutton London Borough Council v Davis* [1995] 1 All ER 53.

Judicial review (Code s 24)

Where other remedy available (pp 87-88)

Where the alternative statutory remedy is an appeal to a Minister it is likely not to preclude judicial review where 'the issue is entirely one in law in a developing field which is peculiarly appropriate for decision by the courts rather than by [a Minister]', per Dillon LJ in ***R v Devon County Council, ex p Baker*** [1995] 1 All ER 73 at 87. Simon Brown LJ added (at 92)-

> 'Where ministers have default powers, application to them will generally be the better remedy ... The minister brings his department's expertise to bear upon the problem. He has the means to conduct an appropriate factual inquiry ... Where ... what is required is the authoritative resolution of a legal issue ... I would regard judicial review as the more convenient alternative remedy'.

Locus standi (p 88)

The question of locus standi in judicial review turns on the requirement in the Supreme Court Act 1981 s 31(3), and in RSC Ord 53, r 3(7), that the applicant must have 'a sufficient interest' in the matter to which the application relates. The authorities were reviewed in ***R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd*** [1995] 1 All ER 611, where it was held that a pressure group called the World Development Movement had sufficient interest in the financing of the Pergau dam in Malaysia to give it standing.

Executive agencies ancillary to adjudicating authorities (Code s 25)

The Charging Orders Act 1979 enables the court to impose a charge on property for securing the payment of money due under a court judgment or order. Such a charging order is a form of execution: ***Parr v Smith*** [1995] 2 All ER 1031 at 1038-1039. Legislation places certain restrictions on the right of execution (see eg the Legal Aid Act 1988 s 17(3), restricting the right of execution in respect of a debtor's dwelling house etc).

Definition of an Act (Code s 27)

An Act which, under statutory powers, has been modified and then set out as modified in a subordinate instrument is not less an Act. Regarding the Drug Trafficking Offences Act 1986 as set out in modified form in the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990 (SI 1990/1199) Sch 3, Pill LJ said in ***Re S-L*** [1995] 4 All ER 159 at 161: 'It is common ground that [Sch 3] can be read as a statute and construed accordingly'.

Overriding effect of an Act (Code s 32)

Ecclesiastical law cannot be 'repugnant, contrariant or derogatory' to the laws and statutes of the realm: ***Re St Edmund's Churchyard, Gateshead*** [1995] 4 All ER 103 at 108-109.

Nature of a prerogative instrument (Code s 48)

Statutory curtailment of the prerogative (p 149)

In *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 All ER 244 the House of Lords considered the composite decision whereby the Home Secretary determined that he would make no commencement order bringing into force Part VII of the Criminal Justice Act 1988. He so determined with the object of enabling a new scheme made under the prerogative, the Criminal Injuries Compensation Tariff Scheme, to operate instead of those provisions. The House held that this was an unlawful use of the prerogative. If Part VII had been brought into force it 'would have subsumed the prerogative, under the principle of *A-G v De Keyser's Royal Hotel Ltd* [1920] AC 508' (per Lord Keith at 247). Even though in actual fact it had not been brought into force 'the existence of such legislation basically affects the mode in which such prerogative powers can be lawfully exercised' (per Lord Browne-Wilkinson at 255). The fact that Parliament, in the Appropriation Act 1994, had voted the funds necessary to implement the scheme made under the prerogative did not cure its invalidity (per Lord Browne-Wilkinson at 256).

Interpretation of a prerogative instrument (Code s 49)

Add to the authorities for the statement that judicial review lies in respect of a prerogative instrument: *R v Criminal Injuries Compensation Board, ex p P* [1995] 1 All ER 870; *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 All ER 244.

Duty to exercise delegated legislative powers (Code s 57)

Where power is given to impose restrictions by delegated legislation, the power should be exercised rather than imposing the restrictions by indirect means: see *Sutton London Borough Council v Davis* [1995] 1 All ER 53 (power to prohibit registration of child-minder who refused to undertake not to smack children whom she minded).

Commencement on date specified by government order (Code s 74)

In *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 All ER 244 the House of Lords held that the composite decision whereby the Home Secretary determined that he would make no commencement order bringing into force Part VII of the Criminal Justice Act 1988 so as to enable a new scheme made under the prerogative, the Criminal Injuries Compensation Tariff Scheme, to operate instead of those provisions was an unlawful use of the prerogative. The House held that while there was no duty on the Home Secretary arising under s 171 (commencement) of the 1988 Act to bring Part VII into force at any particular time, the section did require him to consider from time to time whether it had yet become appropriate to bring it into force, and that accordingly his statement that it would not in fact be brought into

force was unlawful.

Generalia specialibus non derogant (Code s 88)

The wording of Code s 88 was relied on by the Court of Appeal in ***R v Secretary of State for the Home Department, ex p Hickey (No 1)*** [1995] 1 All ER 479 at 487.

Uniform meaning throughout area of extent (Code s 104)

Comity between British courts (pp 228-229)

The Union with Scotland Act 1706 art XIX prevents a court in England and Wales from reviewing or altering the act or sentence of a Scottish court or stopping the execution of the same. It was held in ***R v Commissioner of Police of the Metropolis, ex p Bennett*** [1995] 3 All ER 248 that this applied to the execution in England of a Scottish warrant having effect there by virtue of the Indictable Offences Act 1848 s 15 and the Criminal Law Act 1977 s 38, since there was no implication limiting 'execution' to execution in Scotland.

Application of Act to foreign persons etc: general principles (Code s 128)

The principle of comity (pp 255-256)

In ***R v Governor of Belmarsh Prison, ex p Martin*** [1995] 2 All ER 548 it was held that the Interception of Communications Act 1985 s 1, which makes it an offence for a person intentionally to intercept certain types of communication, although worded without reference to any territorial restriction, did not create an offence triable in the United Kingdom in respect of an act committed outside the United Kingdom by a non-resident.

Application of Act to foreigners and foreign matters within the territory (Code s 129)

Privileges and immunities (pp 261-262)

In footnote 4 on p 261, as substituted by 2nd Supp p B30, add a reference to ***Kuwait Airways Corp v Iraqi Airways Co*** [1995] 3 All ER 694.

Selective comminution (Code s 139)

Use of italics

In Code s 139(2) the following should be inserted after the first sentence: 'Alternatively, the relevant components may be highlighted by use of a typographical device such as italics'. Judges are increasingly making use of italics to highlight the relevant parts of an enactment: see eg ***R v Secretary of State for the Home Department, ex p Hickey (No 2), per*** Simon Brown LJ at 494.

The legal thrust (Code s 144 as amended by 2nd Supp pp B32-B33)

Cause of action

1. A right to apply for a declaration is a 'cause of action': ***Newport Association Football Club Ltd v Football Association of Wales Ltd*** [1995] 2 All ER 87 at 93.

2. Where a cause of action arises under common law its legal viability may be unclear, perhaps because the law is in a state of transition: see *E (a minor) v Dorset CC* [1994] 3 WLR 853 *per* Bingham MR at 865.

3. The fact that more than one type of damage arises from a particular wrongful act does not mean that there is more than one cause of action. In *Walkin v South Manchester Health Authority* [1995] 4 All ER 132 the Court of Appeal considered whether the negligent failure effectively to sterilize a woman, resulting both in the personal 'injury' involved in pregnancy and the economic loss in rearing the resulting child gave rise to two different causes of action, only the former being caught by the Limitation Act 1980 s 11(1) (which lays down a three year limitation period for claims for personal injury). *Held* There was only one cause of action, namely the unwanted pregnancy, which arose at the moment of conception.

When strained construction needed (Code s 158)

Where the safety of children is involved the courts are very ready to give a strained construction. In *Re H and others (minors) (prohibited steps order)* [1995] 4 All ER 110 at 113 Butler-Sloss LJ accepted a dictum in *Nottinghamshire CC v P* [1993] 3 All ER 815, [1994] Fam 18 that a 'contact order' may be an order that there shall be *no* contact. This is a highly strained construction, for the Children Act 1989 s 8(1) defines a contact order as 'an order requiring [the relevant person] to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other'. This is a far cry from an order doing just the opposite, namely *forbidding* contact. In *Nottinghamshire CC v P* [1993] 3 All ER 815 at 824 Sir Stephen Brown P justified his ruling merely by saying that it was 'the sensible and appropriate construction', that an order that there shall be no contact 'falls within the general concept of contact', and that common sense required it. This was a strong decision in view of the coercive nature of such an order.

Weighing the interpretative factors: nature of the operation (Code s 186)

Although an interpretative factor is relevant in arriving at the legal meaning of an enactment, it may be right to attach no weight to it. Cf *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 2 All ER 636, per Lord Hoffmann at 661.

Statutory definitions (Code s 199)

Failure to keep to the definition (p 417)

In *R v Lynsey* [1995] 3 All ER 654 at 658 Henry LJ set out this paragraph of the Code and acted in accordance with it. See also the notes on that case at p 000 below, related to Code s 373.

The Interpretation Act 1978 (Code s 200)

The term 'person' (pp 422-423)

That a foetus is not in law a 'person' was accepted by the Court of Appeal in ***R v Newham London Borough Council, ex p Dada*** [1995] 2 All ER 522. However, though correct on that point, the decision is questionable as not having taken into account a necessary inference affecting the legal meaning of the relevant enactment, the Housing Act 1985 s 75. This states that accommodation let by the housing authority is to be treated as available for the applicant's occupation only if it is available for occupation both by the applicant and by any other person who might reasonably be expected to reside with the applicant. At the relevant time the applicant was eight months pregnant. The crucial point, not examined by the court, is whether the reference to a person who might reasonably be expected to reside with the applicant is limited to an expectation concerning only the moment of commencement of the tenancy (when it would exclude the foetus) or includes a reasonable period into the tenancy (when it would embrace the time after the expected birth). It is submitted that having regard to the purpose of the enactment the latter is the correct reading. A suitable interstitial articulation (see Code s 177) would be secured by adding at the end words such as 'during the whole or a substantial part of a reasonable period beginning with the commencement of the tenancy'. Such words are, it seems, to be taken as implied by the legislature.

Skeleton arguments (Code s 206)

Skeleton arguments are required to be submitted before the hearing by Practice Notes [1995] 1 All ER 385 and 586 and 3 All ER 847 and 850.

Consolidation Acts (Code s 211)

Straight consolidation (p 443)

Add to footnote 2-

For another example see *Associated Newspapers Ltd v Wilson* [1995] 2 All ER 100.

Use of committee reports leading up to Bill (Code s 216)

In referring to a committee report for the purpose of ascertaining the legal meaning of an enactment, care must be taken to ensure that the version the report refers to was not altered before enactment. In *Commission for the New Towns v Cooper (GB) Ltd* [1995] 2 All ER 929, Stuart-Smith LJ (at 952) said it was unfortunate that the fourth edition of ***Halsbury's Statutes***, in reproducing the Law of Property (Miscellaneous Provisions) Act 1989 s 2, had incorporated in its notes to that section para 4.15 of the Law Commission's report on the proposed Bill for that Act. Section 2 as enacted differed in a material respect from the version of it in the proposed Bill, and this rendered the note misleading. It had apparently misled the Court of Appeal in an earlier case (unreported).

Use of Hansard (Code s 217 as substituted by 2nd Supp pp B43-B56)

For a Practice Note relating to the citation of Hansard reports see [1995] 1 All ER 234.

In *Richardson v Pitt-Stanley* [1995] 1 All ER 460 the Court of Appeal regarded it as significant that opposing counsel had not resisted the citing of Hansard. Similarly in *Building Societies Commission v Halifax Building Society* [1995] 3 All ER 193 Chadwick J (at 209) relied on the fact that passages from Hansard were put before him 'without objection', as did Jacob J in *Denny \v Yeldon* [1995] 3 All ER 624 at 632. It is submitted that whether or not it is proper to cite Hansard on a particular point is a matter for the court's decision, and that the consent or otherwise of opposing counsel is irrelevant.

Although doubtful whether the criteria for the citing of Hansard were satisfied, the court in *Richardson v Pitt-Stanley* [1995] 1 All ER 460 appeared to act on a statement by the sponsor of the relevant Bill, Lord Pargiter, that it was not intended to affect employee-employer relationships. The Bill became on enactment the Employers' Lability (Compulsory Insurance) Act 1969.

In *Berkovits v Grinberg (Attorney General intervening)* [1995] 2 All ER 681, where the question arose whether any change in the law had been intended by the changed wording of the Family Law Act 1986 s 46(3), the court relied (at 691) on the fact that Hansard reports of ministers' speeches on the Bill for the Act did not mention that any such change was intended.

In *Denny v Yeldon* [1995] 3 All ER 624 the court rather curiously allowed recourse to the Minister's statement in Parliament on the intended ambit of a regulation-making power even though the point at issue concerned not the ambit of the power (which was not doubtful, and not in dispute) but the meaning of a regulation made under the power.

In *Hassall v Secretary of State for Social Security* [1995] 3 All ER 909 the Court of Appeal allowed recourse to Hansard on the ground that on one possible construction the enactment might result in an absurdity, namely that Parliament intended to create an injustice. The court held that as correctly construed it did not do so, and was not ambiguous. Nevertheless they took comfort from the fact that nothing in the Hansard report cast doubt on the view as to the legislative intention that the court had already formed.

Special restriction on Parliamentary materials (the exclusionary rule) (Code s 220 as substituted by 2nd Supp pp B58-B89)

Residuary right to admit Parliamentary materials (p B89)

In *Building Societies Commission v Halifax Building Society* [1995] 3 All ER 193 Chadwick J (at 209) allowed reference to Hansard on the ground that it had been referred to in an earlier case on the same point, and was therefore relevant to a full understanding of the judgment in that case.

In *Nottinghamshire CC v P* [1993] 3 All ER 815 at 823 Sir Stephen Brown P allowed reference to a Hansard report showing how a new clause was proposed to be added to the Bill for the

Children Act 1989 but rejected. There was no attempt to relate this to the conditions laid down in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. Indeed that case was not mentioned.

Use of international treaties (Code s 221)

Distinction between proceedings in personam and in rem

An Act implementing a treaty so as to apply to foreign legal systems may need to be construed in a way which accommodates alien features of those systems. In *Re S-L* [1995] 4 All ER 159 this point arose in connection with the fact that a relevant New York court order operated against certain funds in rem whereas proceedings in rem are, except with respect to ships, alien to English law. Following *The Deichland* [1990] 1 QB 361, where it was held that the owners of a vessel could be regarded as persons who were 'sued' in proceedings against the vessel in rem, because they were the persons against whom the proceedings were directed in fact, the Court of Appeal applied a purposive construction of the Drug Trafficking Offences Act 1986 as set out in modified form in the Drug Trafficking Offences Act 1986 (Designated Countries and Territories) Order 1990 (SI 1990/1199) Sch 3. The wording of the Act is directed solely to proceedings in personam on the English model. Nevertheless the court held that the order in rem made in the New York proceedings, where the defendants were the funds in question rather than their owners, qualified as an 'external confiscation order' under section 1 of the 1986 Act even though that section contemplated that the defendant would be a person. It held that the objection to this reading was purely formal, and the purpose of the Act and treaty should not be defeated by procedural distinctions between proceedings in personam and in rem.

Use of delegated legislation made under Act (Code s 233)

In *Re NRG Victory Reinsurance Ltd* [1995] 1 All ER 533 at 535 Lindsay J said: 'Whilst it may be inappropriate to construe an Act by reference to the secondary legislation made under it, it is at least a comfort that the draftsman of the regulations appears to have had in mind the same construction as that to which, looking only at the Act and the ordinary meaning of words, I would arrive.'

Sidenote (Code s 256)

For the text of footnote 5 on Code p 513 substitute: *'Stephens v Cuckfield RDC* [1960] 2 QB 373 at p 383 (emphasis added). The dictum was applied in *Tudor Grange Holdings Ltd v Citibank NA* [1992] Ch 53 at 66 and *DPP v Johnson* [1995] 4 All ER 53 at 56.'

Law should serve the public interest (Code s 264)

Interest reipublicae res judicatus non rescindi (p 543)

The maxim that it is in the public interest for court orders, once made, to remain operative rather than being casually overthrown for insubstantial reasons applies in relation to the inherent jurisdiction of the court. When, as is usually the case, the order is made under statutory powers, the relevant enactment may well lay down circumstances in which the order can be rescinded. In the absence of this, the court has an inherent jurisdiction to rescind its order where justice demands, for example where the order was obtained unfairly. This will be exercised sparingly where, as with a decree absolute of divorce or an adoption order, the order affects status: see ***Re B (adoption order: jurisdiction to set aside)*** [1995] 3 All ER 333.

Interest reipublicae ut sit finis litium (pp 543-544)

In *Hewitson v Hewitson* [1995] 1 All ER 472 at 477 Butler-Sloss LJ said of an attempt to obtain an order under the Matrimonial and Family Proceedings Act 1984 Pt III following a comprehensive divorce settlement in a California court-

> 'There has to be finality and an end to litigation ... the umbrella of the dissolved marriage which covers the post-divorce period cannot remain open forever. Upon the making and implementing of a clean break order between spouses with no children, that umbrella has to be shut. Thereafter, the relationship which may develop between former spouses is to be dealt with under [general] civil law.'

Statutory interference with human life or health (Code s 272)

Personal autonomy (2nd Supp, pp B96-B97)

The right of an adult of sound mind to exercise self-determination overrides the interest of the state in keeping him alive, so if as a prisoner he insists on a hunger strike the prison authorities, doctors etc have no right or duty to interfere by force-feeding or otherwise: *Secretary of State for the Home Department v Robb* [1995] 1 All ER 677.

Statutory interference with rights of legal process (Code s 281)

Access to courts (p 591)

In the absence of statutory restriction, it is for the court to determine which persons it will hear on any application: see *Ex p Crook* [1995] 1 All ER 537 (right of local authority to make representations to court regarding order under Children and Young Persons Act 1933 s 39).

Law reports (p 592)

By virtue of Practice Note [1995] 3 All ER 256, the following directions apply in the Court of Appeal. (They are of persuasive authority in other courts.) If a case is reported in the official Law Reports published by the Incorporated Council of Law Reporting for England and Wales, that report should be cited. 'These are the most authoritative reports; they contain a summary of argument; and they are the most readily available.' If the case is not (or not yet) reported in the

official Law Reports, but is reported in the Weekly Law Reports or the All England Law Reports, that report should be cited. If a case is not reported in any of these reports, a report in any of the authoritative specialist series of reports may be cited. The Practice Note recognises that occasions arise when one report is fuller than another, or when there are discrepancies between reports. Here the practice just outlined need not be followed. The Practice Note allows for the citation of unreported judgments, and does not reproduce the restrictions on these which were laid down by the House of Lords in *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192 and widely criticised (see Code p 592).

Presumption that literal meaning to be followed (Code s 285)

Time factors (p 601)

Expressions relating to time are to be construed with common sense, and a strictly literal meaning will not be applied unless this is required by the purpose of the enactment. Thus in *Attorney General's Reference (No 2 of 1994)* [1995] 2 All ER 1000 it was held that the requirement relating to sampling in the Water Act 1989 s 148(1) to notify the occupier 'on taking the sample' and to divide the sample 'then and there' were not to be strictly construed, particularly since surprise might be necessary to prevent the occupier from disconnecting a source of pollution. So 'on' did not mean 'before', and 'there and then' meant at or proximate to the site where the sample was taken and on the occasion of taking it.

Presumption that rectifying construction to be given (Code s 287)

Garbled text (pp 609-611)

The court supplied the word 'of', omitted from the Overseas Development and Co-operation Act 1980 s 1(1): see *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611.

Avoiding a futile or pointless result (Code s 316)

See the note on *R v Crown Court at Maidstone, ex p Hollstein* [1995] 3 All ER 503, *R v Crown Court at Maidstone, ex p Clark* [1995] 3 All ER 513 and *R v Crown Court at Leeds, ex p Hussain* [1995] 3 All ER 527 at p 000 below, related to Code s 319.

Presumption that evasion of Act not allowed (Code s 319)

In *R v Crown Court at Maidstone, ex p Hollstein* [1995] 3 All ER 503 the custody limits laid down by the Prosecution of Offences (Custody Time Limits) Regulations 1987, SI 1987/299, were attempted to be evaded by a factitious arraignment which the Crown Court judge admitted (at 505) was 'cheating'. *Held* Since the arraignment was a sham serving no purpose other than to foil the plain spirit of the legislation, the decision remanding the accused in custody would be

quashed. McCowan LJ said (at 511)-

> 'I do not consider it permissible for a Crown Court, whether of its own motion or at the request of the prosecution, artificially to create an arraignment situation with the deliberate intention of denying the defendant the fruit of the failure by the prosecution to obey the custody time limits.'

See also *R v Crown Court at Leeds, ex p Hussain* [1995] 3 All ER 527 where, on similar facts, Leggatt LJ (at 532) described such a device as 'pointless' in relation to the true purpose of arraignment which in a third similar case, *R v Crown Court at Maidstone, ex p Clark* [1995] 3 All ER 513, was defined by Glidewell LJ (at 519) as 'reading the counts in an indictment to a defendant or defendants and asking them to plead to those counts'.

Construction hindering legal proceedings (Code s 325)

An enactment giving the court power to require the giving of security for costs, such as the Companies Act 1985 s 726(1), calls for a balancing exercise: see *Kerry Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534, where the Court of Appeal, faced with the allegation that an order for security for costs, if made against the plaintiff, would stifle the claim and kill the action, set out the relevant considerations.

Presumption that ancillary rules of law intended to apply (Code s 327)

Independent change in ancillary rule (p 732)

The House of Lords decision in *C v Director of Public Prosecutions*, mentioned in 2nd Supp pp B106-B107, is now reported at [1995] 2 All ER 43. The cited dictum of Lord Lowry is at page 64 of that report.

Presumed application of constitutional law rules (Code s 328)

Parens patriae doctrine (pp 732-733)

The application of the *parens patriae* doctrine is restricted by the Children Act 1989 s 100: see *Devon County Council v S* [1995] 1 All ER 243 (doctrine invoked to protect child against sexual molestation).

Law regulating decision making (Code s 329)

The public law decision-making rules may apply to a decision which is composite in nature. See eg *R v Secretary of State for the Home Department, ex p Fire Brigades Union* [1995] 2 All ER 244, where the House of Lords held that the composite decision whereby the Home Secretary determined that he would make no commencement order bringing into force Part VII of the

Criminal Justice Act 1988 so as to enable a new scheme made under the prorogative, the Criminal Injuries Compensation Tariff Scheme, to operate instead of those provisions was unlawful (the term 'composite decision' was used by Lord Browne-Wilkinson at 256).

Legality (p 738)

Where the decision-maker is a public corporation it lacks the comprehensive power possessed by natural persons to regulate the use of its property in any lawful way it sees fit: see eg ***R v Somerset County Council, ex p Fewings*** [1995] 3 All ER 20, following ***Calder and Hebble Navigation Co v Pilling*** (1845) 14 M & W 76 at 88 (right of local authority purely on moral grounds to prohibit stag hunting on land acquired under Local Government Act 1972 s 120(1)(b) for 'the benefit, improvement or development of their area').

Procedural propriety (pp 739-741)

In ***R v Devon County Council, ex p Baker*** [1995] 1 All ER 73 at 85 Dillon LJ cited approvingly a passage from Deane J in the Australian case of ***Haoucher v Minister of State for Immigration and Ethnic Affairs*** (1990) 93 ALR 51 at 52 suggesting that the phrase 'reasonable expectation' was preferable to 'legitimate expectation' since 'the word "legitimate" is prone to carry with it a suggestion of entitlement to the substance of the expectation whereas the true entitlement is to the observance of procedural fairness before the substance of the expectation is denied'. The former case decided that the 'permanent' inhabitants of a residential home were entitled to be collectively consulted before it was closed by the local authority.

Fairness requires that the decision-maker should disclose to a person entitled to make representations before the decision is made any relevant information: see ***R v Secretary of State for the Home Department, ex p Hickey (No 2)*** (disclosure of further evidence where reference under Criminal Appeal Act 1968 s 17 contemplated).

Presumed application of rules of tort law (Code s 333)

Nuisance (p 752)

For footnote 8 substitute: '***Gillingham BC v Medway (Chatham) Dock Co Ltd*** [1993] QB 343 (planning permission to operate commercial port held to change character of neighbourhood). In ***Wheeler v J J Saunders Ltd*** [1995] 2 All ER 697 (planning permission to operate pig farm did not change character of neighbourhood) the Court of Appeal doubted whether a grant of planning permission could ever rightly be held to authorise a nuisance or other tort.'

Presumed application of rules of criminal law (Code s 334)

Criminal law concepts (p 753)

The remarks here should be read in the light of ***R v Lynsey*** [1995] 3 All ER 654, where it was held that 'assault' in the Criminal Justice Act 1988 s 40 included battery. See also the notes on this case at p 000 below, related to Code s 373.

Presumed application of rules of evidence (Code s 335)

Standard of proof (pp 762-763)

Where imprisonment might result, the criminal standard of proof is applicable even though the form of action is a civil one: *Percy v Director of Public Prosecutions* [1995] 3 All ER 124 (binding over to keep the peace), following *Re Bramblevale Ltd* [1970] Ch 128.

Reliance on illegality: *allegans suam turpitudinem non est audiendus* (Code s 340)

Acts sometimes recognise that the rights they bestow are subject to implied exceptions on grounds of illegality etc. This applies for example to copyright. The Copyright Designs and Patents Act 1988 s 171(3) says: 'Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright, on grounds of public interest or otherwise'. Relief for infringement of copyright has thus been refused where the plaintiff was seeking to protect a dishonest or immoral work, or where a breach of national security was involved: see *ZYX Music GmbH v King* [1995] 3 All ER 1 at 10.

Contrary intention (pp 774-775)

In *Hughes v Asset Managers plc* [1995] 3 All ER 669 the Court of Appeal considered the Prevention of Fraud (Investments) Act 1958 s 1 (repealed), which made it an offence either to carry on an unlicensed business of dealing in securities or to deal in securities as the unlicensed servant or agent of a person carrying on such a business. *Held* The section did not by implication render void for illegality contracts entered into in contravention of its provisions. The prohibition was not directed against the deals themselves and their principals (who would be penalised if the deals were held void), but against agents carrying out the deals. The statutory purpose was fully met by imposing the severe criminal penalties provided for by section 1(2) and it could not have been the legislative intention to provide any additional sanction of this kind.

Necessity: *necessitas non habet legem* (Code s 347)

Pressure groups

The courts resist the argument that failure to perform a statutory duty is justified by protest action engaged in by pressure groups. In *R v Coventry City Council, ex p Phoenix Aviation* [1995] 3 ALL ER 37 (non-performance of duty to operate air and sea ports because of unlawful action by animal rights protesters) Simon Brown LJ said at 62-

> 'One thread runs consistently throughout all the case law: the recognition that public authorities must beware of surrendering to the dictates of unlawful pressure groups. The implications of such surrender for the rule of law can hardly be exaggerated. Of course, on occasion, a variation or even short-term suspension of services may be justified. As suggested in certain of the authorities, this may be a lawful response. But it is one thing to respond to unlawful threats, quite another to submit to them - the difference, though

> perhaps difficult to define, will generally be easy to recognise. Tempting though it may sometimes be for public authorities to yield too readily to threats of disruption, they must expect the courts to review any such decision with particular rigour - this is not an area where they can be permitted a wide measure of discretion. As when fundamental human rights are in play, the courts will adopt a more interventionist role.'

See further the discussion by Simon Brown LJ of common law authorities at 58-65 (note, as to obstruction caused by industrial action, the discussion of *Meade v London Borough of Haringey* [1979] 1 WLR 637 at 60-61). See further at 65-68 the discussion by Simon Brown LJ of European Community law on this point, culminating in his statement (at 68) that 'we have not the least doubt that the self-same public policy/rule of law considerations which underlie the domestic law governing these cases must equally inform Community law...'.

Agency: *qui facit per alium facit per se* (Code s 351)

Acts of a body corporate

In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 (company held to have knowledge of securities deal carried out for it by one of its senior investment managers) Lord Hoffmann considered the rules for determining whether the act of a company's servant or agent is to be treated as the act of the company for the purpose of the application of an enactment, and in particular the application of the phrase 'directing mind and will' as used by Viscount Haldane LC in *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713. He said that this celebrated phrase had caused some confusion. The first question is what do the company's *primary rules of attribution* provide? These are the rules by which acts are attributed to the company in accordance with the company's constitution, typically its articles of association. There are also *general rules of attribution* applicable as well to natural persons, for example the rules of agency. Often, in relation to a particular enactment, the court will need to fashion a *particular rule of attribution*. Of this Lord Hoffmann said (at 924): 'This is always a matter of interpretation: given that [the enactment] was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was *for this purpose* intended to count as the act of the company?' (last emphasis in original). See also *Re Supply of Ready Mixed Concrete (No 2), Director General of Fair Trading v Pioneer Concrete (UK) Ltd* [1995] 1 All ER 135, [1995] AC 456 (restrictive arrangement made by employee in breach of company's undertaking and unknown to board held to be made by the company).

Interpretation of broad terms (Code s 356)

Pairs of broad terms (2nd Supp p B124-B125)

For the text of footnote 2 in Code p 815 substitute '*R v Jones* [1995] 3 All ER 139'.

Ordinary meaning of words and phrases (Code s 363)

Substance versus form

In Example 363.12C added in 2nd Supp pp B127-B128, for footnote 1G substitute-

> 1G At 521. This was followed in *Re Leyland DAF Ltd* [1994] 4 All ER 300. Both decisions were upheld by the House of Lords in *Powdrill v Watson* [1995] 2 All ER 65.

Omission to act

A reference to the doing of an act will not normally be taken to include an omission to do the act. For this reason enactments frequently state expressly that references to an act include an omission (see eg Employment Protection (Consolidation) Act 1978 s 153(1)). In such a case the drafter is taken to intend that necessary adjustments of language will be made (for a judicial view to the contrary see *Associated Newspapers Ltd v Wilson* [1995] 2 All ER 100, per Lord Bridge at 105-106).

Technical legal terms (Code s 366)

Meaning uncertain (pp 834-835)

The Law of Property (Miscellaneous Provisions) Act 1989 s 2, in providing that a contract for the sale or other disposition of an interest in land can only be made in a signed document (or two or more signed documents) which (or each of which) incorporates *all* the terms which the parties have *already* expressly agreed, includes the phrase 'where contracts are exchanged'. In *Commission for the New Towns v Cooper (GB) Ltd* [1995] 2 All ER 929, Stuart-Smith LJ (at 950) and Evans LJ (at 958) each held that 'exchange of contracts' is not a term of art. The case nevertheless decided that the phrase 'where contracts are exchanged' in s 2 must be given an artificial meaning. The documents referred to as 'contracts' are not such in fact (or law). Only one contract is in question, not a plurality of contracts, and this does not come into being until the exchange is effected. Stuart-Smith LJ said (at 950) that exchange of contracts 'is a well-recognised concept understood both by lawyers and laymen'. What it really means is an exchange of signed documents whose material terms are identical in law if not wording and which has the effect of creating a contract. It is not a term of art in the sense that 'contract' is a term of art, with a clear and definite legal meaning in any context. Nevertheless, as used in s 2 it is undoubtedly a technical legal term.

In *Brooks v Brooks* [1995] 3 All ER 257 at 263 Lord Nicholls defined a term of art in the legal sense as a term 'with one specific and precise meaning'. By contrast, he said, the term 'settlement' is one whose legal meaning depends on the context in which it is being used. It has one definition in the Settled Land Act 1925 s 1 and a much wider definition given by the Income and Corporation Taxes Act 1988 s 670. As used in the Matrimonial Causes Act 1973 s 24(1)(c), which empowers the court to vary any 'ante-nuptial or post-nuptial settlement', it has no definition at all. Lord Nicholls said (at 263) that the use of the archaic expressions 'ante-nuptial' and 'post-nuptial' did not point against construing the term 'settlement' widely here so as to implement the

legislative purpose.

Homonyms (Code s 373)

The word 'assault' may mean a putting in fear only, or it may also include a physical striking (battery). In *R v Lynsey* [1995] 3 All ER 654 the Court of Appeal was faced with the question whether in the Criminal Justice Act 1988 'Parliament could have intended to have used assault and battery as separate terms in s 39 but in s 40 to have used assault to embrace battery'. It was held that it could and did. Henry LJ said (at 658): 'Where the narrow meaning of the phrase "common assault" makes no sense in its context in s 40 and cannot possibly reflect any rational policy, it is entirely permissible ... to prefer the wider meaning'.

Implication where statutory description only partly met (Code s 397)

Where facts substantially correspond (pp 882-883)

As Lord Hanworth MR said in *Earl Ellesmere v Wallace* [1929] 2 Ch 1 at 25 when ruling on when a contract is to be treated as a wagering contract for the purposes of the Gaming Act 1845 s 1, 'the substance of the matter is to be regarded' (cited in *Morgan Grenfell & Co Ltd v Welwyn Hatfield District Council (Islington London Borough Council, third party*) [1995] 1 All ER 1 at 7).

Part II

The tort of breach of statutory duty

Code s 14 revised as required by the 1995 Bedfordshire Case

THIS VERSION IS IN TEXT FILE OF BOOK AS 14b

(1) The remedies, if any, available for a breach of statutory duty depend on the legislative intention. This may be that there shall be a special remedy laid down either by the enactment creating the duty or a related enactment, or that a general remedy shall apply, or both. An applicable special or general remedy may be criminal or civil. The legislative intention may be that there shall be no legal remedy.

Civil law remedies

(2) Subject to any contrary legislative intention, the breach may give rise in civil law to a general public law remedy, or a general private law remedy, or both.

(3) In public law, the breach may be remediable by judicial review.

(4) In private law, the breach may constitute the tort of breach of statutory duty ('the breach tort') or the tort of negligence, or some other general remedy may apply.

The breach tort

(5) The breach tort may arise either because the defendant is the principal tortfeasor or because, under general principles governing vicarious liability, the defendant is vicariously responsible for tortious acts committed by employees or agents.

(6) The sanctions available for the breach tort in damages or otherwise arise at common law, and are the same as for tort generally.

(7) Where no relevant enactment specifies that the breach shall constitute the breach tort, the considerations set out in subsections (8) to (15) below may affect the question of whether by implication the breach is intended to constitute that tort.

Questions concerning the breach tort

(8) Does the law provide a sufficient remedy by other means? If so, the breach tort is unlikely to arise.

(9) Is the plaintiff within the class of persons intended to benefit from the duty? If not, the breach tort does not arise.

(10) Is damage suffered by the plaintiff of a kind for which the law awards damages? If not, the breach tort does not arise in respect of that damage.

(11) Is damage suffered by the plaintiff of a kind to which the duty is directed? If not, the breach tort does not arise in respect of that damage. If the answer is yes, the breach tort is more likely to arise if the plaintiff is an individual who has suffered physical injury from the breach.

(12) Does breach of the duty require a certain state of mind, for example deliberate intention, recklessness or carelessness? If so was the defendant (or where relevant the defendant's employee or agent) in that state of mind? If not, the breach tort does not arise.

(13) Does the question whether a breach of the duty was committed depend on the exercise of some person's discretion or judgment? If so, it is likely that only a public law remedy was intended, since the decision was what the law calls subjective.

(14) Is the duty one of a general administrative or regulatory nature imposed on a public authority? If so, the breach tort is unlikely to arise.

(15) If the duty is imposed on a public authority, does it concern the formulation of policy or the carrying out of an operational function? In the former case the breach tort is unlikely to arise. In the latter case it is likely to arise.

Other common law remedies

(16) It may constitute the tort of negligence if a person purporting to perform a statutory requirement, or exercise a statutory authority, contravenes a duty of care arising otherwise than under the statute (that is at common law). Similarly with other torts such as nuisance. The reason is that the power or authority is taken not to extend to malfeasance or misfeasance in its purported exercise which is actionable apart from the statute. In other words the statute provides no defence.

COMMENT

Subsection (1)

General It is of the essence of a legal command that there shall be a sanction for disobedience to it (see Code p 40). However this is not necessarily so. If it thinks fit, Parliament has power to issue legislative commands without attaching sanctions. Nevertheless there is a presumption that a legislative command does carry a sanction, in accordance with the maxim *ubi jus ibi remedium*, where there is a right there is a remedy. See *Ashby v White* (1703) 2 Ld Raym 938 (remedy given by the court where returning officer wrongfully refused to accept plaintiff's vote at an election). Cf *Tozer v Child* (1857) 26 LJQB 151 (returning officers held to be quasi-judges, so that no action lay). Thus Coke said that 'whensoever an act of parliament doth generally prohibit any thing' the party grieved shall have his action 'for his private reliefe' (2 Inst 163). See also *Monk v Warbey* [1935] 1 KB 75, *per* Greer LJ at 81.

> *Example 14.1* Section 3(4) of the Housing (Homeless Persons) Act 1977 requires local authorities to ensure that accommodation is made available for the homeless. No sanction for breach of this duty is laid down by the Act. In *Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626 the plaintiff brought an action for damages in respect of breach of this duty. *Held* The action was well-founded. Roskill LJ said (at 643): 'where the statute imposes a duty on a public authority or on anyone else for the benefit of a specified category of persons, but prescribes no special remedy for breach of duty, it can normally be assumed that a civil action for damages will lie.' (But see, in qualification of this dictum, subsections (13) to (15) of this section and the notes thereon below.)

However the correct construction may be that the enactment is *not* intended to confer an actionable right, and in that case there is no civil remedy. Consideration of consequences plays a large part in this field (as to consequential construction see Code s 286).

Sanctions for disobedience to a statute may be criminal or civil, or both (as to criminal sanctions see Code s 13). Here it has to be remembered that the objects of criminal and civil law are different. In very broad terms, the criminal law exists to punish wrongdoing, remove dangerous criminals from circulation, and deter potential wrongdoers from offending; while the main object of civil law is to compensate the victim. Parliament may intend to visit breaches with both types of sanction, or one or other of them alone (see *Wilson v Merry* (1868) LR 1 HL(Sc) 326, *per* Lord Chelmsford at 341). If there is clearly no criminal sanction, the inference is stronger that a civil

sanction is intended.

Avoiding the difficulty The difficulty which frequently arises of determining whether a remedy for breach of statutory duty is intended, and if so which one, prompted Lord du Parcq to say *in Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 410-

> 'To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be ... I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned.'

Relatively few Acts have contained provisions on the lines suggested by Lord du Parcq. For examples where the Act expressly states that no civil remedy lies for breach, see Representation of the People Act 1949 ss 50(2) and 51(2); Radioactive Substances Act 1960 s 19(5)(a); Water Resources Act 1963 s 135(8); Medicines Act 1968 s 133(2); Consumer Credit Act 1974 s 170(1); Sex Discrimination Act 1975 s 62; Safety of Sports Grounds Act 1975 s 13; Guard Dogs Act 1975 s 51(2)(a); Race Relations Act 1976 s 53. For examples where the enactment states expressly that breach of the duty constitutes a tort see Mineral Workings (Offshore Installations) Act 1871 s 11; Resale Prices Act 1976, s. 25 (2), (3); Building Act 1984 s 38; Consumer Protection Act 1987 s. 41(1). Cf. Fatal Accidents Act 1976, s. 1 (1), which confers a right of action in damages for breach of duty without stating that it is a tort. Citing Lord du Parcq's suggestion in *M (a minor) v Newham London Borough Council* [1994] 2 WLR 554 at 579, Staughton LJ said that a reason why it is not more commonly acted on could be that it might be politically embarrassing to say expressly that a public authority was not to be liable for failing to perform its statutory duty even though that was the intention.

In 1969 the Law Commissions recommended the enactment of a general provision to the effect that breach of a statutory provision is intended to be actionable as a tort unless the contrary is expressly stated (*The Interpretation of Statutes* (1969) LAW COM No 21, SCOT LAW COM No 11, para 38 and App A). This has not been acted on (see Bennion, 'Another Reverse for the Law Commissions' Interpretation Bill' (1981) 131 NLJ 840).

Subsection (2)

Modern English law on the right of action, if any, for breach of a statutory duty distinguishes between remedies in public law and private law (for the nature of this distinction see Code pp 85-87). As Lord Browne-Wilkinson put it in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 363-

> 'It is important to distinguish such actions to recover damages, based on a

private law cause of action, from actions in public law to enforce the due performance of statutory duties, now brought by way of judicial review. The breach of a public law right by itself gives right to no claim for damages. A claim for damages must be based on a private law cause of action.'

The fact that the statute renders breach of the duty a criminal offence, or expressly states it to be 'unlawful', has been held to strengthen the argument for an implied remedy in private law.

> *Example 14.2* *Rickless v United Artists Corp* [1988] QB 40 concerned the Dramatic and Musical Performers' Protection Act 1958 s 2, which renders it a criminal offence to make a cinematograph film by use of a dramatic performance without the consent of the performer, but does not refer to any civil remedy. The Court of Appeal held that since the Act was stated to be for the protection of performers a civil remedy was to be inferred. It was assisted in reaching this conclusion by the fact that the Performers' Protection Act 1963, which extended the protection given by the 1958 act to other types of performer, was stated to have the purpose of enabling effect to be given to the 1961 International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (Cmnd 2425), and the Convention requires a civil remedy to be made available. The court reached this result notwi thstanding the ruling by Sir Nicholas Browne-Wilkinson V-C (at 51) that 'it is easier to spell out a civil right if Parliament has expressly stated the act is generally unlawful rather than merely classified it as a criminal offence'.

Here it is relevant to note that the former practice by which parliamentary drafters usually declared proscribed acts to be 'unlawful' has largely been abandoned in favour of declaring them merely to be 'an offence'. Indeed it is common in modern times for the drafter to refrain even from this, and merely state that if a person does a specified act he shall be liable to a specified penalty. Nevertheless in *Richardson v Pitt-Stanley* [1995] 1 All ER 460 the Court of Appeal supported the view that a difference is to be drawn according to whether the enactment states that the conduct in question is 'unlawful'. The case is also authority for saying that where a large fine may imposed for breach of the criminal sanction this lessens the likelihood that an offender was also intended to be subject to an award of heavy damages in a civil action for the same default.

Subsection (3)

As to remedies for breach of statutory duty by way of judicial review, in succession to the prerogative writs of mandamus, certiorari and prohibition, see C ode ss 24 (nature of the remedy) and 329 (rules governing decision making).

Subsection (4)

The tort of breach of statutory duty The common law treats actionable breach of statutory duty as a species of tort: *Thornton v Kirklees Metropolitan Borough Cou ncil*

[1979] QB 626 at 642. (For the implied importation by statutes of the general rules of tort law see Code s 339.) Parliament also has recognised such a breach to be a tort: see the definition of 'fault' in the Law Reform (Contributory Negligence) Act 1945 s 4; *AB Marintrans v Comet Shipping Co Ltd* [1985] 1 WLR 1270; *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852. The Limitation Act 1980 s 11(1) speaks of 'any action for damages for negligence, nuisance or breach of duty': see also Sex Discrimination Act 1975 s 66(1). Judicial reference is sometimes made to a 'statutory tort': see eg *Ministry of Defence v Cannock* [1995] 2 All ER 449. It follows that statutory references to 'tort' include breach of statutory duty (see *American Express Co v British Airways Board* [1983] 1 WLR 701).

The tort of negligence The common law rules governing the tort of negligence sometimes apply in the context of a statutory duty. This is dealt with elsewhere (see subsection (16) of this section and note thereon below).

Some other general remedy An example of a general remedy otherwise than in tort is the action for recovery of a debt owed under an enactment.

> *Example 14.3* Under the statute 11 & 12 Vict c 14 (1848) money had accrued due to a retired police constable. An application being made to attach this sum as a debt, it was objected that the sum was not truly a debt and so could not be attached. *Held* It must be treated as a debt, since otherwise the intention of Parliament would not be fulfilled. Lord Coleridge CJ said in *Booth v Traill* (1883) 12 QBD 8 at 10-
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> > 'It appears to me to be nonetheless a debt because no particular mode of enforcing the payment is given by the statute. When there is a statutory obligation to pay money, and no other remedy is expressly given, there would be a remedy by action.'

Another example is the remedy for misfeasance in a public office, where the office is created by statute. Lord Browne-Wilkinson said in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 363-364 that one of the categories of private law claims for breach of statutory duty is 'misfeasance in public office, ie the failure to exercise, or the exercise of, statutory powers either with the intention to injure the plaintiff or in the knowledge that the conduct is unlawful'.

Subsection (5)

Where a tort is committed by a person in the course of his or her employment by another person the employer will be vicariously liable, regardless of whether the actual tortfeasor is also liable. If for example a doctor employed by a health authority treats a patient carelessly, this may be actionable against the authority either as a breach of a duty of care owed by the authority to the patient (direct liability), or because the authority, though owing no relevant duty of care to the patient is nevertheless responsible for the act of its employee in breaching a duty of care owed by the employee to the patient (vicarious liability). In the former case the liability arises

because the authority is itself acting, even though it acts through its employee (the only way a body corporate can act). In the latter case the authority is not acting, but is nevertheless vicariously liable for the act of its employee (see *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353, *per* Lord Browne-Wilkinson at 372). It is established that doctors and other persons having special skills, such as social workers, usually owe a direct duty to the patient or client arising irrespective of contract (ibid at 383). Nevertheless on its facts the case may be one where the duty of the professional person is owed to his or her employer rather than to the patient or client (ibid).

In many cases where no claim can be made for reasons such as are set out in subsections (13) to (15) it will be possible for the plaintiff to succeed on a claim for vicarious liability (ibid at 391-392). It is important to identify this right of action correctly. '... failure to allege and identify the separate duty of care said to be owed by the servant or agent of the defendant is not a mere pleading technicality. Unless and until the basis on which the servants are alleged to be under a separate individual duty of care is identified it is impossible to assess whether, in law, such duty of care can exist' (ibid at 399).

Subsection (6)

General As authority for the statement that the remedies available for the tort of breach of statutory duty are the same as for tort generally see *Building and Civil Engineering Holidays Scheme Management Ltd v Post Office* [1966] 1 QB 247 (see also Code p 68). Since the High Court and county courts possess the old equity jurisdiction, the remedies this provided are available for breach of statutory duty. As Farwell J stated in *Stevens v Chown* [1901] 1 Ch 894 at 904-

> ' ... there was nothing to prevent the Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating the right provided a remedy which it enacted should be the only remedy, subject only to this, that the right was such a right as the [Court of Chancery] under its original jurisdiction would take cognisance of.'. Cf *A-G v Sharp* [1931] 1 Ch 121 (As to equitable remedies for breach of statutory duty see further Code s 330).

Relator actions A person or body entitled to restrain apprehended breaches of statutory duty may apply to the Attorney General for that official to bring a relator action against the person bound. Here the Attorney acts in pursuance of his constitutional function as guardian of the public interest (see *Brookes v DPP of Jamaica* [1994] 1 AC 568 at 579). Once the Attorney's consent to the action has been obtained, the actual conduct of the proceedings is in the hands of the relator, who is responsible for the costs: Administration of Justice (Miscellaneous Provisions) Act 1933 s 7. The question of giving consent is solely for the Attorney, and the court cannot intervene: *London County Council v A-G* [1902] AC 165.

An action may be brought by the Attorney General at the relation of a local authority to

enforce a byelaw of that authority: *A-G v Ashbourne Recreation Ground Co* [1903] 1 Ch 101. Where an enactment is persistently flouted by a person, regardless of frequent convictions, a relator action may be brought.

> *Example 14.4* In contravention of the Manchester Police Regulation Act 1844 s 102, Mr and Mrs Harris each operated a flower stall which projected on to a footway near the entrance to a public cemetery. The penalty laid down by the Act was limited to a small fine, which was regarded by the defendants as a business expense. During a period of two years Mr Harris was convicted 74 times under s 102, and Mrs Harris 34 times. Finally, on the relation of the Town Clerk, a relator action was brought for an injunction, which was granted: *A-G v Harris* [1961] 1 QB 74. Sellers LJ said (at 86): 'It cannot, in my opinion, be anything other than a public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law.' Pearce LJ referred (at 92) to 'the community's general right to have the laws obeyed'. See also J Ll G Edwards, *The Law Officers of the Crown*, pp 286-295.

Local authorities now have a specific statutory power to bring civil proceedings in such cases: see Local Government Act 1972 s 222; *Runnymede Borough Council v Ball* [1986] 1 WLR 353.

Subsection (8)

'Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner': *Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847, *per* Lord Tenterden CJ at 859. See also *Stevens v Evans* (1761) 2 Burr 1152 at 1157; *Stevens v Jeacocke* (1848) 11 QB 731 at 741; *Wake v Mayor of Sheffield* (1884) 12 QBD 145; *R v County Court Judge of Essex* (1887) 18 QBD 704 at 707; *Clegg Parkinson & Co v Earby Gas Co* [1896] 1 QB 592 at 595; *Wilkinson v Barking Corpn* [1948] 1 KB 721 at 724; *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173 at 185; *Wentworth v Wiltshire County Council* [1993] QB 654.

> *Example 14. 5* In *Melton Medes Ltd v Securities and Investments Board* [1995] 3 All ER 880 the question arose whether the Financial Services Act 1986 s 179 (prohibition of disclosure of restricted information) provides by implication a remedy in tort for breach of its requirements. *Held* No such implication arose because ample protection already existed under the law of confidence: see *Marcel v Comr of Police of the Metropolis* [1992] Ch 225.

This 'general rule' is stronger in these days of precision drafting, where the drafter may be expected to insert a remedy if one is truly intended (for precision drafting see Code s 141). As to when the 'general rule' does not apply see *Waghorn v Collison* (1922) 91 LJKB 735 at 736 and 738. The likelihood that Parliament intended breach of the statute to amount to the tort of breach of statutory duty is lessened where some other adequate civil remedy is available (see eg *Scally v Southern Health and Social Services Board* [1992] 1 AC 294 (no remedy in damages for breach of right to information where the

information could be obtained by applying to a tribunal). This may be provided under another statute (*Square v Model Farm Dairies (Bournemouth) Ltd* [1939] 2 KB 365) or at common law (*Phillips v Britannia Hygienic Laundry Co* [1923] 2 KB 832 at 842).

A statutory duty does not extinguish a corresponding common law duty, unless the contrary intention appears: *Glossop v Heston Local Board* (1879) 12 Ch D 102 at 110-111; *East Suffolk Catchment Board v Kent* [1941] AC 74 at 89; *Read v Croydon Corpn* [1938] 4 All ER 654; *Barnes v Irwell Valley Water Board* [1939] 1 KB 21. Sometimes the Act imposing the duty expressly states that other causes of action are not affected. This was done for example by the Water Resources Act 1963 s 135(8) (see *Cargill v Gotts* [1981] 1 WLR 441) and the Control of Pollution Act 1974 s 105(2) (see *Budden v British Petroleum Ltd* (1980) 130 NLJ 603). See also (1981) 131 NLJ 1026. Where in one provision a statute both lays down a new right or duty and links it with a tailor-made special remedy there provided, the implication is strong that no other remedy is intended to be available.

> *Example 14.6* An Act empowered harbour undertakers to remove any sunken ship from the harbour and recover the expenses of doing so from the ship's owner in a magistrates' court. In *Barraclough v Brown* [1897] AC 615 undertakers applied for a declaration of their right to recover damages in respect of such expenses. *Held* The only remedy available was the one laid down by the Act, namely an order of a magistrates' court. Lord Herschell LC said (at 620) that the appellant could not claim to recover by virtue of the statute and yet insist on doing so by means other than those prescribed by the statute. Lord Watson said (at 622)-
>
> > 'The right and remedy are given *uno flatu*, and the one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has therefore by plain implication enacted that no other court has any authority to entertain or decide these matters.'

Craies treats this as an ouster of jurisdiction (*Statute Law* 7th edn, 1971, p 247); but in fact it was a novel judicial procedure as to which no High Court jurisdiction was ever conferred.

Where a particular sanction is specifically provided for by the enactment laying down the duty the *expressio unius* principle suggests that no other sanction (whether civil or criminal) was intended: *Atkinson v Newcastle & Gateshead Waterworks Co* (1877) 2 Ex D 441; *Phillips v Britannia Hygienic Laundry Co* [1923] 2 KB 832 at 841; *Witham Outfall Board v Boston Corpn* (1926) 136 LT 756; *Monk v Warbey* [1935] 1 KB 75 at 84; *Thomas v National Union of Mineworkers (South Wales Area)* [1986] Ch 20. In *Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626 at 643 Roskill LJ said that 'where an Act imposes a duty on a public authority and provides an administrative remedy by way of complaint to the Minister or to some other body, that almost

invariably excludes the right of action in the courts'. As to the *expressio unius* principle see Code ss 390-395.

Subsection (9)

To be entitled to recover in tort, the plaintiff must be a member of the class Parliament intended to relieve when creating the duty. The plaintiff may have suffered damage of the kind contemplated by the statute, yet still not be one of the intended beneficiaries. As Maugham LJ said in *Monk v Warbey* [1935] 1 KB 75 at 85, an action for breach of statutory duty must be brought 'by a person pointed out on a fair construction of the Act as being one whom the Legislature desired to protect'.

> *Example 14.7* In *Buxton v North-Eastern Railway Co* (1868) LR 3 QB 549 a bullock got through a gap in a fence on to the railway line. This caused a train accident, in which the plaintiff was injured. He sued for breach of the duty imposed by the Railways Clauses Consolidation Act 1845 s 68. The section begins with the following introductory words: 'The company shall make and at all times thereafter maintain the following works *for the accommodation of the owners and occupiers of lands adjoining the railway* ...'[Emphasis added.] The relevant provision of s 68 refers to the erection of fences 'for separating the land taken for the use of the railway from the adjoining land not taken, and protecting ... the cattle of the owners or occupiers thereof from straying thereout'. *Held* The plaintiff could not recover, since s 68 was intended only for the protection of owners and occupiers.

See also *Square v Model Farm Dairies (Bournemouth) Ltd* [1939] 2 KB 365 (Food and Drugs (Adulteration) Act 1928 s 2 enacted for benefit of purchasers only, and not those to whom they passed on food they had purchased); *Ex p Island Records Ltd* [1978] Ch 122 (Performers' Protection Acts 1958 to 1972 enacted for benefit of performers only, and not recording companies; cf *RCA Corpn v Pollard* [1983] Ch 135); *Peabody Donation Fund Governors v Parkinson (Sir Lindsay) and Co* [1984] 3 WLR 953 (drainage requirements imposed to safeguard occupiers of buildings, not developers).

> *Example 14.8* In *West Wiltshire District Council v Garland* [1993] Ch 409 (affd [1995] 2 All ER 17) the question arose whether an action lay against district auditors at the suit of (a) the local authority or (b) officers of that authority in respect of breach of the duty imposed by the Local Government Finance Act 1982 s 15. Morritt J (at 418-419) relied on a suitable modification of the two questions posed by Lord Bridge in *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 158-159: 'They are (1) whether the provision in question is intended to protect the interests of a class of which the council or the officer is a member, and (2) did Parliament intend to confer on the council or the officer a cause of action for breach of such duty?' *Held* The answer to both questions was in the affirmative as respects the council but in the negative as respects the officers. Morritt J said (at 423) that he was assisted in coming to his favourable conclusion as respects the council by the fact that 'The ability of the council to seek judicial review and such powers as it enjoys enabling it to

determine whether to re-engage that auditor do not provide an adequate remedy in the case of an audit negligently conducted'.

Subsection (10)

The tort of breach of statutory duty does not arise unless the breach gives rise to 'loss or injury of a kind for which the law awards damages': *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 *per* Lord Bridge at 420.

Example 14.9 An action for an injunction was brought by a mental patient to restrain publication of details of his case in alleged breach of the Mental Health Tribunal Rules 1983, r 21(5). *Held* The rules gave no such cause of action. Lord Bridge said in *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 at 420 -

> 'I know of no authority where a statute has been held ... to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss. But publication of unauthorised information about proceedings on a patient's application for discharge to a mental health review tribunal, though it may in one sense be adverse to the patient's interest, is incapable of causing him loss or injury of a kind for which the law awards damages.'

Subsection (11)

Nature of damage Every enactment is passed to remedy a mischief (as to the doctrine of the mischief see Code Part XIX). In determining whether a breach constitutes the tort of breach of statutory duty it is therefore necessary to ask whether the damage suffered by the plaintiff is the type of mischief the enactment set out to remedy. Only if the answer is yes will the breach constitute the tort.

Example 14.10 An order made under the Contagious Diseases (Animals) Act 1869 s 75 required ship owners carrying cattle on deck to fit pens. These were intended to separate cattle, so as to guard against murrain. In *Gorris v Scott* (1874) LR 9 Ex 125 the owner of sheep washed overboard in a storm sued for breach of this duty. If there had been pens fitted, the sheep would have been safe in the storm. *Held* The action failed. The mischief of animals being washed overboard was not that to which the enactment was directed. Pollock CB said (at 131)-

> 'The Act was passed *alio intuitu* ... the precautions directed may be useful and advantageous for preventing animals from being washed overboard, but they were never intended for that purpose, and a loss of that kind caused by their neglect cannot give a cause of action.'

See also *Grant v National Coal Board* [1956] AC 649.

> *Example 14.11 Cutler v Wandsworth Stadium Ltd* [1949] AC 398 concerned the requirement in the Betting and Lotteries Act 1934 s 11(2) that occupiers of dog-racing tracks should make available for bookmakers 'space on the track where they can conveniently carry on bookmaking'. A bookmaker sued for damages on the ground that space had not been made available for him. *Held* The mischief to which the enactment was directed was lack of sufficient bookmaking services for members of the public attending races, not lack of facilities to enable a particular bookmaker to carry on his business. The action therefore failed.

See also *Newman v Francis* [1953] 1 WLR 402 (no cause of action where plaintiff injured by dog whose owner contravened park byelaws, since they were for the protection and regulation of the park only).

> *Example 14.12* Sanctions orders made under the Southern Rhodesia Act 1965 were designed to remedy the mischief constituted by the Unilateral Declaration of Independence ('UDI') which had been made by the Smith regime in Southern Rhodesia. They were not intended to give a cause of action to individuals who suffered economic damage through breach of the orders. As Fox LJ said in an unreported judgment in the court below cited approvingly by Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173 at 186-
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> > 'I cannot think they were concerned with conferring rights either on individuals or the public at large. Their purpose was the destruction, by economic pressure, of the UDI regime in Southern Rhodesia; they were instruments of state policy in an international matter.'

Physical injury Where Parliament is dealing with a new or increased social mischief involving high risk to the personal safety of individuals, the likelihood is that it intends the law to give them adequate protection: *Black v Fife Coal Co Ltd* [1912] AC 149 at 165; *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 at 413. (For social mischiefs see Code s 292).

> *Example 14.13* In *Groves v Lord Wimborne* [1898] 2 QB 402 the defendant was in breach of a statutory duty to fence dangerous machinery, for which the Act only laid down a fine of £100. As a consequence of the breach the plaintiff workman suffered serious injury. *Held* The plaintiff was entitled to damages. The fine was not recoverable by the injured party and, as Rigby LJ said at 414-5, 'the legislature cannot have seriously intended that whether the workman suffered death or mutilation the liability of the master should never exceed £100'.
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> *Example 14.14* The Road Traffic Act 1930 was passed to deal with the growing danger to life and limb posed by motor cars on public roads. Section 35(1) required the owner of a car to be covered by third-party insurance, a penal

sanction being laid down. In *Monk v Warbey* [1935] 1 KB 75 the plaintiff was injured by a negligent driver to whom the owner had lent his car, and who was not covered by his insurance policy. *Held* The plaintiff was entitled to recover damages from the owner. Maugham LJ said (at 85-86)-

> 'There is sufficient ground for coming to the conclusion that s 35 was passed for the purpose of giving a remedy to third persons who might suffer injury by the negligence of the impecunious driver of a car ... It was within the knowledge of the Legislature that negligence in the driving of cars was so common an occurrence with the likelihood of injury to third persons that it was necessary in the public interest to provide machinery whereby those third persons might recover damages ...'

See also *Couch v Steel* (1854) 3 E & B 402 (defendant bound under statutory penalty to keep medicines on shipboard for health of crew: seaman who suffered through breach held entitled to recover damages). Cf *Vallance v Falle* (1884) 3 QBD 109 (defendant bound under statutory penalty to hand over seaman's discharge certificate: no civil remedy for breach).

Subsection (12)

There are dicta to the effect that every breach of statutory duty imports negligence. In *Caswell v Powell Duffryn Colliery Co* [1940] AC 152 at 168 Lord Macmillan stated as a general proposition that 'if the plaintiff can show that there has been a breach of the statute he has established the existence of negligence. It remains for him to prove that the accident was due to that negligence'.

However the better view is that, in the absence of an express indication in the statute laying down the duty, the question is what state of mind is by implication required by the legislature? A further point is that it is preferable in this context to refer to carelessness rather than negligence, to avoid confusion with the tort of negligence: see *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353. (For the applicability of the tort of negligence see subsection (16) of this section and note thereon below).

Where the enactment laying down the statutory duty imports a mental element it is necessary to ask whether the defendant was in the required state of mind. Some statutory duties impose strict liability, while others are not broken unless there is carelessness. What the latter impose is a duty to take reasonable care, a qualification which may be express or implied.

> *Example 14.15* An example of an express provision is the Occupiers' Liability Act 1957 s 2. This imposes on occupiers of land what it calls the 'common duty of care', defined as a duty to take such care as in all the circumstances is reasonable to see that the visitor will be reasonably safe. Here the plaintiff cannot recover without proof of carelessness (or of course recklessness or deliberate intention).

Example 14.16 An example of an implied provision is the Metropolis Management Act 1855 s 72. This imposed on the vestry a duty of properly cleaning the sewers vested in them by the Act. In *Hammond v Vestry of St Pancras* (1874) LR 9 CP 316 a civil action was brought for breach of this duty. *Held* No action would lie without proof of carelessn ess. Brett LJ said (at 322)-

> 'It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care or skill could obviate. The duty, notwithstanding, may be absolute, but if so, it ought to be imposed in the clearest possible terms.'

In *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 367 Lord Browne-Wilkinson said that a plaintiff could not recover for carelessness in the performance of a statutory duty unless the duty of care arose at common law (that is apart from the statute). However it is undoubtedly the case that on its true construction an enactment *may* be found to confer a right of action in such a case even though no duty of care exists at common law. It depends on the wording.

In the absence of any indication that a foreseeability test is being imposed by the enactment in question, such a test is not to be taken as applied. This distinguishes the tort of breach of statutory duty from the parallel tort of negligence.

Example 14.17 Larner v British Steel plc [1993] 4 All ER 102 concerned a claim under the Factories Act 1961 s 29 (duty to provide a safe place of work). Peter Gibson J said (at 112): 'It would ... seem wrong to me to imply a requirement of foreseeability, as the result will frequently be to limit success in a claim for breach of statutory duty to circumstances where the workman will also succeed in a parallel claim for negligence; thus it reduces the utility of the section'.

If Parliament did not intend to give a civil remedy for breach of the statute, the fact that the person bound to perform the duty acted maliciously will not in itself create a remedy: *Davis v Bromley Corpn* [1908] 1 KB 170.

Subsection (13)

In *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 379 Lord Browne-Wilkinson said that various enactments designed to protect children depended on the subjective judgment of the local authority. He added: 'To treat such duties a s being more than public law duties is impossible'. This conclusion is strengthened where an ombudsman has been entrusted with supervisory duties (ibid at 382, 392). See further the note below on subsection (15). (For a detailed examination of the juristic nature of an enactment conferring a discretion or calling for the exercise of judgment see Bennion, "How they all got it wrong in *Pepper v Hart*", [1995] *British Tax Review* 325).

Subsection (14)

Where an enactment is purely regulatory, contravention of a duty laid down by it is unlikely to give rise to an action for breach of statutory duty.

Example 14.18 Lord Goff said in *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 167 that the Prison Rules 1964 (SI 1964/388) 'are regulatory in character and were never intended to confer private law rights on prisoners in the event of their breach' (see also *Cutler v Wandsworth Stadium Ltd* [1949] AC 398).

Example 14.19 In *Melton Medes Ltd v Securities and Investments Board* [1995] 3 All ER 880, which concerned the question whether the Financial Services Act 1986 s 179 (prohibition of disclosure of restricted information) provides by implication a remedy in tort for breach of its requirements, Lightman J said (at 889) that no such remedy was implied because the Act 'creates an elaborate scheme of duties backed by a mix of [express] enforcement mechanisms'.

Lord Browne-Wilkinson said in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 364 'it is significant that your Lordships were not referred to any case where it had been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of the public at large had been held to give rise to a private right of action for damages for breach of statutory duty'.

In *R v Deputy Governor of Parkhurst Prison, ex p Hague* [1992] 1 AC 58 at 170 Lord Jauncey of Tullichettle stated the overall principle regarding the inferred creation of private law remedies as follows-

> '... it must always be a matter for consideration whether the legislature intended that private law rights of action should be conferred upon individuals in respect of breaches of the relevant statutory provision. The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment.' (This dictum was cited by Sir Thomas Bingham MR in *E (a minor) v Dorset County Council* [1994] 3 WLR 853 at 866.)

This is echoed by Lord Browne-Wilkinson in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 364: 'The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action'. However it is submitted that these dicta, which deny the presumption referred to above in the note on subsection (1), are expressed too widely and should be confined to duties of the kind mentioned in subsection (14). It is in this narrower context that Lord Browne-Wilkinson's doubts concerning the decision in *Thornton v Kirklees Metropolitan Borough Council* [1979] QB 626 (see *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 379) should be understood.

Subsection (15)

The courts have drawn a distinction between 'policy discretion' conferred by statute and 'operational powers' so conferred: *Lonrho plc v Tebbit* [1991] 4 All ER 973, affd [1992] 4 All ER 280. The latter involve the implementation, rather than the taking, of policy decisions. If they are implemented improperly then, on usual tort principles, a person suffering damage will be entitled to recover. On the other hand where Parliament has entrusted policy to an organ of the state such as a government minister or a local authority it is not for the courts to intervene save where, on public law principles, there has been a failure of justice (for the principles in question see Code s 329). Lord Browne-Wilkinson said in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 371 (emphasis in original)-

> 'Where Parliament has conferred a statutory discretion on a public authority, it is for that authority, not the courts, to exercise the discretion; nothing which the authority does within the ambit of the discretion can be actionable at common law. If the decision complained of falls outside the statutory discretion, it *can* (but not necessarily will) give rise to a common law liability. However if the factors relevant to the exercise of the discretion include matters of policy, the court cannot adjudicate on such policy matters and therefore cannot reach the conclusion that the decision was outside the ambit of the statutory discretion. Therefore a common law duty of care in relation to the taking of decisions involving policy matters cannot exist.'

Subsection (16)

Negligence The tort of negligence at common law will arise where the statutory provisions are merely part of the setting giving rise to a duty of care: *Capero Industries plc v Dickman* [1990] 2 AC 605; *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353. For example if persons are conducting a school or hospital they owe a common law duty of care to pupils or patients whether or not the institution is being run under statutory powers: *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 392-393. For an example see *Walkin v South Manchester Health Authority* [1995] 4 All ER 132 (claim under the tort of negligence where operation for sterilization in National Health Service hospital failed).

The only possible difference is that if it is being run under statutory powers the statute may lay down rules which modify or abrogate duties which would arise at common law. This must be distinguished from the cause of action that may arise where a statutory duty is performed carelessly in circumstances where the enactment imposing the duty is taken to require the exercise of proper care (see subsection (12) of this section and note thereon above).

This liability in negligence has been recognised in a long line of authorities culminating in *Murphy v Brentwood District Council* [1991] 1 AC 398, which concerned the careless failure of a local authority to observe building regulation requirements. In it the House of Lords restricted the scope of the alleged liability in negligence by overruling its own previous decision in *Anns v Merton London Borough* [1978] AC 728 and denying the remedy in cases of economic loss. In consequence, the liability is now probably limited

to injury to the person or to health.[It seems that a reference to physical damage to property should be added here, since 'economic loss' is used in a sense that does not include such damage: see *Murphy v Brentwood District Council* [1991] AC 398 at 487, where Lord Oliver said 'The infliction of physical injury to the person or property of another universally requires to be justified. The causing of economic loss does not'. Cf *Capero Industries plc v Dickman* [1990] 2 AC 605 at 617, where Lord Bridge said 'It is one thing to owe a duty of care to avoid causing injury to the person or property of others. It is quite another thing to avoid causing others to suffer purely economic loss'. See also *Larner v British Steel plc* [1993] 4 All ER 102, noted at Code p 48.

Liability under the tort of negligence (as opposed to the breach tort) may arise where a statutory power is conferred on a person and that person negligently fails to exercise the power.

> *Example 14.20* A highway authority failed to exercise its power under the Highways Act 1980 s 79 to require a neighbouring occupier to remove part of a bank obstructing the view at a junction, even though the authority knew of the danger and had indeed taken steps to exercise that power, which it did not pursue when the occupier failed to respond. *Held* The authority was liable in negligence at common law for failing to pursue the exercise of the power, whereby the respondent suffered loss from a resulting accident: *Stovin v Wise (Norfolk County Council, third party)* [1994] 1 WLR 1124.

Other torts Where a person is authorised by statute to do an act which would otherwise be actionable at common law (for example in nuisance), it is inferred that the exemption from liability is intended to apply only where the act is performed 'with all reasonable regard and care for the interests of other persons': *Allen v Gulf Oil Refining Ltd* [1981] AC 1001, *per* Lord Wilberforce at 1011. If therefore it is performed carelessly the statutory exemption will not apply and the liability will be the same at common law as if no statutory authority had been given: *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353, *per* Lord Jauncey of Tullichettle at 362. Lord Browne-Wilkinson said in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 at 366-

> 'It is well established that statutory authority only provides a defence to a claim based on a common law cause of action where the loss suffered by the plaintiff is the inevitable consequence of the proper exercise of the statutory power or duty: see *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193; *Allen v Gulf Oil Refining Ltd* [1981] AC 1001. Therefore the careless exercise of a statutory power or duty cannot provide a defence to a claim based on a free-standing common law cause of action, whether in trespass, nuisance or breach of a common law duty of care.'