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Breach of statutory duty in the Supreme Court: Formalism triumphs over functionality

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The author examines the thorny issue of breach of statutory duty in light of the recent Supreme Court decision in Campbell v Gordon [2016] UKSC 38 where the court required to determine whether provisions in the Employers' Liability (Compulsory Insurance) Act 1969 provided the basis for an action for breach of statutory duty against a sole company director.

Introduction

Some statutes provide that breach of their provisions gives rise to an action for breach of statutory duty by someone who is damnified by the breach. The Animals (Scotland) Act 1987 and the Occupiers' Liability (Scotland) Act 1960 are notable examples. Other statutes (for example, the Health and Safety at Work etc. Act 1974, s.47) provide that no such action will arise in event of breach of their provisions. Difficulties arise, however, where a particular statute remains silent on the issue of whether civil liability results from a breach of its provisions. In such situations, the courts are faced with the task of determining Parliament's unstated intention, a task which has been likened to solving a "guesswork puzzle" (*Island Records Ltd v Corkindale* [1978] Ch. 122, per Lord Denning M.R. at pp.134–135). While certain presumptions exist to assist the courts, the judges' task is far from an easy one, as the recent case of *Campbell v Gordon* [2016] UKSC 38; [2016] 3 W.L.R. 294 demonstrates. Indeed, at the Supreme Court stage of the litigation, reference was made (by Lord Toulson at para.35) to Judge Richard Posner's statement to the effect that "[t]he judges face hieroglyphs without a Rosetta Stone." (Divergent Paths-The Academy and the Judiciary, Harvard University Press, 2016, p.172). In this article, the author tracks the judicial path of the litigation in *Campbell* having first set out the facts of the case, the relevant statutory framework and the existing authorities. The author concludes that the litigation in *Campbell* illustrates the difficulty of predicting how courts might respond to particular statutory provisions and suggests that reform of the law is overdue.

***Campbell v Gordon* - the alleged facts**

The pursuer, an apprentice joiner, sustained injuries in June 2006 in the course of his employment with the first defenders, Peter Gordon Joiners Ltd. The company went into voluntary liquidation in December 2009 and there were no company funds available to meet the pursuer's claim. The employers' liability insurance taken out by the company excluded any legal liability arising out of the use of electrically powered woodworking machinery, which was the very context in which the pursuer's injuries had been sustained, the accident having involved an electrically powered circular saw. The claim against the company was therefore worthless. Accordingly, the pursuer also sued the second defender, Peter Gordon, who was the sole director of the company and responsible for its day to day operation. It was alleged that the company's failure to have in place appropriate insurance was a breach of its obligations under s.1(1) of the Employers' Liability (Compulsory Insurance) Act 1969 and

that Mr. Gordon, who, as sole director, had arranged such insurance as there was, was liable under s.5 of that Act.

The statutory framework

Given that the task of the court in such cases is one of statutory construction, the key provisions of the 1969 Act require to be set out. Section 1 of the Act provides as follows:

“1. Insurance against liability for employees.

Except as otherwise provided by this Act, every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business ...”

Section 5 of the Act goes on to provide:

“5. Penalty for failure to insure.

An employer who on any day is not insured in accordance with this Act when required to be so shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding level 4 on the standard scale; and where an offence under this section committed by a corporation has been committed with the consent or connivance of, or facilitated by any neglect on the part of, any director, manager, secretary or other officer of the corporation, he, as well as the corporation shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.”

These provisions of the Act have already received considerable judicial attention, as will be discussed below.

Existing authorities in England and Scotland

The Employers' Liability (Compulsory Insurance) Act 1969 applies both in Scotland and in England and Wales. (It has no application in Northern Ireland- see s.7 of the Act). It should be said at the outset that there is no express provision in the 1969 Act creating *civil* liability on the part of an employer for the failure to insure. The Act is silent on the matter. Prior to the litigation in *Campbell v Gordon*, there had, however, been attempts to found an action for breach of statutory duty based upon the provisions of the Act. Interestingly, different results had ensued north and south of the border. In *Richardson v Pitt-Stanley* [1995] QB 123, the English Court of Appeal (by a majority) held that the 1969 Act did *not* give rise to civil liability on an employer's part and it would therefore be anomalous if civil liability was imposed on the employer's directors or other officers. A relevant factor underlying the court's decision was that breach of the Act would not occasion direct physical injury to the plaintiff but would involve him only in economic loss, namely an inability to recover damages from the relevant employer. Stuart-Smith LJ took the view that insurance was normally taken out to protect the insured (the employer) against the potentially disastrous consequences of a large claim and the Act should not be regarded as imposing a duty solely or principally for the protection of the employee. Stuart-Smith LJ also regarded the level of the fine capable of being imposed on the company and the delinquent director, as “to some extent a special penalty, a feature which militates against civil liability” (at p.133). While acknowledging that none of those reasons was determinative in itself, Stuart-Smith LJ took the view that cumulatively those

reasons pointed strongly against the creation of any civil liability on the part of a director who had committed an offence under s.5 of the 1969 Act. The Court of Appeal's decision in *Richardson* attracted academic criticism (see O'Sullivan, "Industrial Injuries and Compulsory Insurance-Adding Insult to Injury" (1995) CLJ 241) and in the subsequent Scottish case of *Quinn v McGinty* 1999 S.L.T. (Sh Ct) 27, Sheriff Principal Bowen declined to follow it. The Scottish court took the view that the Act's purpose was to protect employees from the risk of being deprived of lawful compensation - it was no part of the intention of Parliament to confer a benefit on employers. (This had also been the view of Sir John Megaw who had voiced a strong dissenting judgment in *Richardson* ([1995] QB 123 at p.135.) In *Quinn*, the sheriff principal (at p.29) found it "difficult to see that a statute compelling employers to effect insurance in relation to one category of risk only-namely, bodily injury or disease sustained by employees-and fencing that with a daily penalty, was intended to benefit or protect any class of persons other than those employees." It followed, in the sheriff principal's view, that the 1969 Act not only imposed an obligation on company officers to see that insurance was in place but it also gave a correlative right to a person affected to sue for breach of that obligation.

The reference to class protection in both *Richardson* and *Quinn* is important. It has long been established that the question as to whether a statutory duty gives rise to a civil right of action requires consideration of the whole Act and the circumstances in which it was enacted. Certain indicators or presumptions pointing one way or the other have however been identified in a number of key cases. If a statutory duty is imposed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is injured by the breach - otherwise the statutory duty would be "but a pious aspiration" (*per* Lord Simonds in *Cutler v Wandsworth Stadium Ltd* [1949] A.C. 398 at p.407). Where, however, a statute imposes an obligation and imposes a criminal penalty for non-compliance, the general rule is that no civil liability arises (see *Doe d Murray v Bridges* (1831) 1 B & Ad 847 where Lord Tenterden CJ said (at p.859) that "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". That general rule is itself subject to exceptions. The primary exception, (being the one which would become relevant to the arguments in *Campbell v Gordon*), is "where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation" (*per* Lord Diplock in *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1982] AC 173 at p.185). Well-known examples of the application of the exception can be found in *Groves v Lord Wimborne* [1898] 2 QB 402 which related to obligations to fence machinery in the Factory and Workshop Act 1878 and *Black v Fife Coal Co Ltd* 1912 S.C. (H.L.) 33 which concerned the Coal Mines Regulation Act 1887. In both cases, contravention of the relevant statutory provision was punishable by way of fine but an action on the statute was nonetheless permitted at the instance of the injured worker in *Groves* and on behalf of the deceased workman in *Black*. In *Black*, Lord Kinnear said (at p.45): "We are to consider the scope and purpose of the statute, and in particular for

whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mineowners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention. Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the *prima facie* right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability.” On the other hand, statutes which establish a regulatory system *for the benefit of the public at large* tend not to support a right of action: see Lord Browne-Wilkinson in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at pp. 731-2. (See, also, *R v Deputy Governor of Parkhurst Prison, Ex parte Hague* [1992] 1 AC 58 where an action founded upon the Prison Rules 1964 was denied, the rules being said to be “regulatory in character” (*per* Lord Jauncey at p.172)) and *Morrison Sports Ltd v Scottish Power UK plc* 2010 UKSC 37; 2011 S.C. (UKSC) 1; 2010 S.L.T. 1027 which concerned a general regulatory scheme intended for the benefit of the public at large. For a fuller discussion of the various indicators and presumptions which apply in this area of law, see J Thomson (ed.), *Delict* (SULI/ W Green, 2007), ch. 6).

Campbell v Gordon-its journey through the courts

Clearly, the courts’ decisions in *Richardson* and *Quinn* were at variance. In *Campbell v Gordon* [2016] UKSC 38, the Scottish courts had the opportunity to revisit the issue of whether an action for breach of statutory duty could be maintained in terms of the Employers’ Liability (Compulsory Insurance) Act 1969 against a company director.

Approach of the Lord Ordinary [2013] CSOH 181; 2014 SLT 178

The matter came to debate before Lord Glennie. The second defender, Mr. Gordon, sought dismissal on the ground that the claim against him was irrelevant. He submitted that s.5 of the 1969 Act did not give rise to civil liability on his part as company director. Lord Glennie observed that s.1 of the Act placed the obligation on the employer (in this case, the company) to maintain the requisite insurance. His Lordship further observed that s.5 dealt with the penalty faced by an employer who fails to insure in accordance with the Act and also provided that a director who has consented to, connived at or, by neglect, facilitated the offence, was “deemed to be guilty of that offence” and was liable to be proceeded against and punished in accordance with that section. The pursuer averred that the company’s commission of the offence was consented to or facilitated by the neglect of Mr. Gordon but Lord Glennie observed that that was not enough in itself to make Mr. Gordon *civilly liable* to the pursuer. His Lordship stated (at para.7) that “[i]n order to succeed in his action of damages against Mr. Gordon, the pursuer requires to establish that the section gives rise to civil liability on the part of Mr. Gordon, as director of the company.” Lord Glennie continued (at para.10) that the employer’s obligation to insure was “clearly imposed for the benefit of the employees who could, in the event of the employer becoming insolvent and being unable to meet any claim for damages, look to the insurance policy under the Third Parties (Rights against Insurers) Act 1930 (and see now the 2010 Act)...”

While Lord Glennie accepted that there may also have been a desire to protect a company from being driven into insolvency by large uninsured claims that was not the prime consideration. His Lordship continued (at para.10):

“The duty, after all, is placed on the employer, and the obvious purpose is not to save it from itself but to protect its employees from being left without a remedy. That being the case, that is a strong indication that the statutory obligation is civilly actionable at the suit of an employee, notwithstanding that a hefty criminal sanction is imposed on the employer by s.5 ...”

The Lord Ordinary then turned his attention to the position of the director, manager, secretary or other officer of the corporate employer and observed that the position of those persons was dealt with somewhat differently. His Lordship continued (at para.11):

“They are not mentioned in s.1 of the Act. Their liability to criminal sanctions when the offence of not having insurance has been committed with their consent or connivance or has been facilitated by their neglect is imposed by s.5. In terms of that section they are “deemed to be guilty” of the offence committed by the corporation. It might therefore be argued that the Act does not place any obligation on them to procure that the employer has in force the relevant insurance. To my mind this would be too narrow a reading of the Act. It is clear from s.5 that if the company's failure to effect and maintain the relevant insurance is committed through their “fault”, to use a compendious expression, they are to be regarded as being guilty of the same failure as the company, that is to say the failure to effect and maintain the relevant insurance. That means that they were under a duty (albeit a qualified duty) to ensure that the relevant insurance was in place. That duty is imposed for the benefit of the employees of the company. In those circumstances they stand in the same position as the corporate employer, and there is no reason to consider that breach of that duty should not give rise to civil liability.”

Having considered both *Richardson* and *Quinn*, Lord Glennie declared (at para.20) that he found the reasoning of Sheriff Principal Bowen in *Quinn* “compelling”. He agreed with the minority view of Sir John Megaw in *Richardson* that it was not Parliament’s intention in enacting the 1969 Act to confer a benefit on the employer. While protecting a corporate employer from his own folly might have been a secondary aim, the Act’s prime purpose was the protection of employees. While it was undesirable that courts in England and Scotland should come to different views on the effect of legislation which applies in both jurisdictions, Lord Glennie was ultimately unpersuaded by the reasoning of the majority in *Richardson*. The Court of Appeal’s decision was not binding on a Scottish court and Lord Glennie considered that it should not be followed. Lord Glennie accordingly concluded that the pursuer had pled a relevant case based on breach of statutory duty and allowed a proof on that issue. The second defender reclaimed.

The Inner House [2015] CSIH 11; 2015 SC 453; 2015 SLT 178

The reclaiming motion was heard by an Extra Division of the Inner House comprising Lord Brodie, Lord Malcolm and Lord Drummond Young. By a majority, the Division allowed the reclaiming motion and dismissed the pursuer’s action against the second defender. In this respect the Division arrived at the same conclusion, albeit not by identical reasoning, as the

majority in *Richardson*. In Lord Brodie's view, it did not necessarily follow that where a statute imposed a duty which is seen to be for the benefit of a particular group of people it must be construed as conferring a right on members of that group to sue on breach as the correlative of the duty. Lord Brodie quoted from the speech of Lord Browne-Wilkinson in *X (Minors)*, *supra*, wherein it was stated (at pp.731-2) that in the ordinary case, a breach of statutory duty did not, by itself, give rise to any private law cause of action, but that a private law cause of action would arise if it could be shown, as a matter of statutory construction, that the statutory duty was imposed for the protection of a limited class of the public and Parliament intended to confer on members of that class a private right of action for breach of the duty. Section 1 of the 1969 Act clearly imposed a duty to insure, which had to be seen as being for the benefit of a particular group but that duty was imposed upon the employer and not its director, (Lord Brodie at paras.11 and 23) (see, also, Lord Malcolm at para.70). If the pursuer had a right, it was a right against the company and not against the director. Lord Brodie agreed with the majority in *Richardson* that there was no right to sue an insolvent and uninsured employer for the economic loss consequent upon its failure to insure. That pointed away from the imposition of liability on the second defender. Lord Brodie pointed out that in terms of s.5 of the 1969 Act, a director was "deemed to be guilty" of the same offence as committed by the employer but only the employer could be guilty of the offence. That seemed to underline that the obligation to insure lay with the corporate employer and not the corporate officer. Lord Brodie disagreed with the Lord Ordinary's reading of the expression "consent, connivance or facilitated by any neglect" in s.5 as references to fault. The function of those words was merely to indicate causal connection. If, however, he was wrong on that point, such fault did not arise from a duty imposed by that section-the language of s.5 was not apt to create a duty that did not previously exist. Applying the usual principles of statutory construction, the 1969 Act would not be interpreted as creating a right in someone in the pursuer's position to sue someone in the director's position for the value of awards of damages for personal injuries against the first defender. Moreover, the law was slow to recognise a right to sue in respect of pure economic loss. In addition, company officers were not the guarantors of the company's solvency. Lord Brodie observed (at para.26) that "[b]y entering into a contract of employment or accepting appointment [a manager or company secretary or, indeed director of a limited company] is not undertaking to shoulder all the risks associated with the company's enterprise or to act as an insurer for the company's employees." (See, also the observations of Lord Malcolm at para.67). *Richardson* had "stood for some ten years without provoking corrective legislation" (para.19) and although it was not formally binding, it would, in Lord Brodie's view, represent a significant step for the Division to depart from its conclusion. While the Division had not been persuaded by every aspect of the reasoning in *Richardson*, the construction of the 1969 Act adopted by the majority was correct. For Lord Brodie (at para.20) it was "very significant that nowhere in the Act is a straightforward statement to the effect that an officer of a corporate employer has an obligation to effect insurance." His Lordship continued (at para.20): "Construing the 1969 Act in such a way as to find a right conferred on an employee requires the Act to be construed as imposing

a corresponding liability on the part of the company officer. Such liability ... may be very onerous indeed. It appears to me that it is at least a factor to be had regard to that if a statute is to impose a liability, whether criminal or civil, it should do so in clear and explicit terms." Lord Brodie stated (at para.23): "I do not find in the 1969 Act an obligation imposed on directors as opposed to employer companies. This is not a matter of subtle wording; as I read the statute the obligation is simply not there. A director may be made criminally responsible for a breach of the company's obligation but that is something different from the imposition of an obligation."

While Lord Malcolm agreed with Lord Brodie that the action against the second defender should be dismissed, Lord Drummond Young issued a dissenting judgment. In Lord Drummond Young's view, s.5 of the 1969 Act, when taken with s.1, imposed civil liability upon any director who had consented to a corporation's failure to insure or who had connived in or facilitated any such failure, if the conditions set out in s.5 were satisfied. His Lordship proffered a number of reasons for extending civil liability to the directors. First, it was clear that the obligation in s.1 was intended for the benefit of particular persons, namely injured employees who were entitled to compensation. Secondly, the objectives and policy that underlay the Act supported the existence of civil liability. His Lordship observed (at para.41): "It is axiomatic that legislation should be construed purposively, in such a way as to give effect to its objectives and the policy that underlies it. Such an approach is apparent in cases such as *Black v Fife Coal Co Ltd*, *Monk v Warbey* and *Houston v Buchanan*. The purpose of compulsory insurance provisions is to ensure that funds are available to compensate persons who are injured and consequently have a claim for damages. That purpose would be frustrated if civil liability under the Act did not exist." Lord Drummond Young stated (at para.42) that if Mr. Gordon's argument (that the Act imposed civil liability only on the company and not the director) was correct then "the existence of civil liability under the Act would rarely if ever be of significance." He continued (at para.42): "Where an employee has a claim for compensation for an accident at work, the employer is *ex hypothesi* liable, whether for negligence or breach of statutory duty. Thus if the employer is solvent there is no need to invoke the Act; an action directly against the employer will produce an effective remedy. It follows that the Act is only significant when the employer is insolvent. In that event, however, any right against the employer under sec 1 would be worthless, and the Act would be of no practical effect. The underlying purpose of the legislation thus supports the notion that a director who is complicit in breach of the statute should be liable as well as the employing company."

Lord Drummond Young further stated that a corporate employer could only act through its officers, who accordingly had a duty to ensure so far as possible that the company fulfilled its statutory duties, thus "it is apparent that section 1, by itself, has the effect of imposing a duty on the directors" (para.43). Citing the dictum of Atkin LJ in *Performing Right Society Ltd v Caryl Theatrical Syndicate* [1924] 1 KB 1 at pp.14-15, Lord Drummond Young went on to state that the common law relating to directors' liability supported the view that a director who was complicit in a company's breach of the s.1 duty should be civilly liable to an injured employee. Moreover, where a director had been responsible for the company's failure to obtain insurance, it was possible

that he ignored or deliberately disregarded the existence of the statutory duty and in that event he was personally liable for the failure. Lord Drummond Young saw nothing unfair in imposing such liability. Finally, the argument that the difference in structure between s.1 and s.5 indicated that the statutory intention was that a director should only be subject to criminal and not civil liability ran contrary to the fundamental principle of statutory interpretation that effect should be given to the objectives and underlying policy of the statute. His Lordship stated (at para.47): "It is not appropriate to frustrate that policy through an over-literal construction of the statute, or an excessively conceptual approach to its provisions. I think that the argument for the reclaimer can be considered excessively conceptual; it focuses on differences of structure that do not reflect the basic objectives of the statute. Moreover, the common law principles relating to directors' liability strongly suggest that the differences in wording between sec 1 and sec 5 relate to the importance of precision in the definition of a criminal offence rather than any difference of substance. So far as civil liability is concerned, I am of opinion that the objectives of the Act demand that a director who has consented to or who has been complicit in a breach of the duty to obtain insurance, or who has facilitated such a breach through neglect, should incur civil liability. This substantive point should prevail over structural niceties." Lord Drummond Young considered the level of fine (which might be substantial) to be irrelevant to the question of whether civil liability existed, stating (at para.48) that "[t]he level of fine should not frustrate the fundamental purpose of the statute, namely the provision of compensation to injured employees." It followed, in Lord Drummond Young's view, that a director or other corporate officer might be liable in damages where a company was in breach of s.1 of the 1969 Act. Accordingly, he agreed not only with the Lord Ordinary in the present case, but also with the sheriff principal in *Quinn* and with Sir John Megaw in *Richardson*. Lord Drummond Young's view was, however, a minority one. The Division, by majority, allowed the reclaiming motion and dismissed the pursuer's claim against the second defender. The pursuer appealed to the Supreme Court.

The Supreme Court

The sole issue with which the appeal was concerned was whether civil liability attached to Mr. Gordon for the failure to insure. The issue was to split the Supreme Court as it had done the Inner House, the Supreme Court dismissing Mr. Campbell's appeal by a majority of three to two. Lord Carnwath (with whom Lord Reed and Lord Mance agreed) delivered the leading judgment. Having observed (at para.4) that "[t]he primary duty to insure is placed on the employer by section 1", Lord Carnwath continued (at paras.5-6) that s.5 "was at the heart of the appeal" and that it constituted an "unpromising basis" for the present claim. His Lordship stated (at para.6): "This provision does not in terms impose any duty to insure on a director or other officer as such, let alone any civil liability for failure to do so. The duty rests on the corporate employer. The veil of incorporation is pierced for a limited purpose. It arises only where an offence is committed by the company, and then in defined circumstances imposes equivalent criminal liability on the director or other officer on the basis, not that he is directly responsible, but that he is "deemed to be guilty" of the offence committed by the company."

Counsel for the appellant accepted that, as a general rule, where a statute imposed an obligation, and imposed a criminal penalty for failure to comply, there was no civil liability. That was subject to exceptions however, including the class protection exception, as discussed in *Lonrho*, upon which counsel sought to rely. Although the court accepted that the duty of the employer under s.1 of the 1969 Act was imposed for the benefit of employees, in the sense indicated by Lord Diplock in *Lonrho*, that was not enough for the appellant. “The essential starting point for Lord Diplock’s formulation is an obligation created by statute, binding in law *on the person sought to be made liable*” (emphasis added)(at para.13).

There was no authority for the proposition that a person could be made indirectly liable for breach of an obligation imposed by statute on another and it was no different where the obligation was imposed on a corporate body. There was no basis in the case law for looking through the corporate veil to the directors or other individuals through whom the company acts. That could only be done if expressly or impliedly justified by the statute.

Lord Carnwath compared the present case with *Monk v Warbey* [1935] 1 KB 75 where the relevant provision, s.35 of the Road Traffic Act 1930, provided by subsection (1) that it was not lawful for any person “to use, or to cause or permit any other person to use” a motor vehicle on the road unless insured; and by subsection (2) imposed a criminal penalty on “any person” acting in contravention of the section. His Lordship observed that in the 1930 Act the legislature had dealt specifically with both the user, and any person causing or permitting the use, and had imposed direct responsibility on each. The 1969 Act, by comparison, imposed direct responsibility *only* on the employer. Lord Carnwath went on to state (at para.14): “Parliament has recognised that a director or officer may bear some responsibility for the failure to insure, but has dealt with it, not by imposing direct responsibility equivalent to that of the company, but by a specific and closely defined criminal penalty, itself linked to the criminal liability of the company.”

The majority view (as expressed by Lord Carnwath) did not find the observations of Lord Drummond Young in the Inner House helpful in resolving the issue. The appeal did not depend on general questions of “fairness”, but on the interpretation of a particular statutory scheme in its context. As far as Lord Drummond Young’s reference to the judgment of Atkin LJ was concerned, the scope of a potential *common law* claim against a director for ordering or procuring a delictual act was not in issue in the instant case. Rather, the case turned entirely on alleged liability *under the statute*. This required the court “to pay due respect to the language and structure used by Parliament, rather than to preconceptions of what its objectives could or should have been” (para.18).

The majority drew further support for its view from the fact that other statutory provisions which imposed criminal liability on directors and other officers for offences by their companies had not been treated as giving rise to civil liability. (Section 1255 of the Companies Act 2006 and s.22 of the Interpretation Act (Northern Ireland) 1954 were provided by way of example). Lord Carnwath concluded (at para.23):

“[T]he language of section 5 was deliberately chosen and is intended to mean what it says. The formula is specifically directed at criminal liability, and as far as we know has always been used in that context. Where Parliament has

used such a well-established formula, it is particularly difficult to infer an intention to impose by implication a more general liability of which there is no hint in its actual language.”

For all these reasons, Lord Carnwath agreed with the conclusion reached by the majority of the Inner House. Lord Mance and Lord Reed agreed with Lord Carnwath and the appeal was accordingly dismissed.

Lord Toulson would have allowed the appeal. He issued a dissenting judgment with which Lady Hale agreed in a separate dissent. For Lord Toulson, the effect *in substance* of the drafting device in s.5 of the Act (the deeming provision) was to place a legal obligation on a company director not to cause or permit the company to be without the required insurance by consent, connivance or neglect, on pain of a criminal penalty. In Lord Toulson’s view, the imposition of criminal responsibility for a specified act (or omission) carried with it a legal obligation not to act (or omit to act) in such a way. His Lordship observed that the approach favoured by the majority concentrated on the *form* of the language. The majority view was that the structure of the Act was such that the only duty created by it was explicitly placed on the company by s.1(1), and that the mechanism of the deeming provision was consistent with and supported that proposition. Lord Toulson, however, favoured a functional approach to interpreting the legislation, namely one “which looks at the function and substantive effect of the deeming provision in real terms” (para.30). In choosing between a formal or functional approach Lord Toulson asserted that the context was important, that context being “legislation for the protection of a vulnerable group, a company’s employees” (para.30). He agreed with Lord Drummond Young’s observation in the Inner House that in the context of legislation directed at employee protection the formalist approach is “excessively conceptual; it focuses on differences of structure that do not reflect the basic objectives of the statute” (2015 S.C. 453 at para.47).

Although Lord Toulson preferred a functional approach to the interpretation of the Act, he took the view that, even if a formal approach was applied, Mr. Gordon would still incur liability to the appellant under the Act. On a formalist approach, the effect of the deeming provision, in Lord Toulson’s view, was that in the eye of the law the director was guilty as a principal of failing to insure. The language of the Act did not impose an accessory liability on him. Lord Toulson further observed that, since Victorian times, the courts had consistently held that breaches of legislation aimed at employee protection were actionable at the suit of the employee suffering the breach (for example, *Groves, Black (supra)*). If the legislation was silent on whether there should be civil liability, the judges’ role was to fill the gaps. Where legislation was passed to protect employees, then, in accordance with Lord Diplock’s dictum in *Lonrho*, a breach would ordinarily give rise to a cause of action, absent a clear statutory intention to the contrary.

For Lady Hale, too, it was “absolutely plain” (at para.43) that Parliament *did* intend there to be civil liability towards an employee for breach of ss.1 and 5 of the 1969 Act. Having reviewed a number of authorities, including *X (Minors)* and *Morrison Sports*, her Ladyship observed that the difference between *Morrison Sports* and the present case “could hardly be greater” (at para.48). The 1969 Act concerned a very specific statutory duty imposed upon employers, but also imposed upon certain officers where the employer was a

limited company. In Lady Hale's view, there could be no difference in substance between imposing criminal liability for a failure to do something and imposing a duty to do it. The purpose was to protect a specific class of people, namely employees who might be injured by the employer's breach. The protection intended was that such employees should be compensated for their injuries even if the employer was unable to do so. The minority in the Supreme Court took the view that the majority's rigid interpretation of ss.1 and 5 of the Act actually went some way to frustrate the purpose of the Act by removing from employees the very protection which the Act was meant to bestow. Lord Toulson and Lady Hale believed that the emphasis placed by the majority on formality, as opposed to functionality, was wrong. That minority view echoed Lord Glennie's rejection in the Outer House of "too narrow a reading" of the Act and Lord Drummond Young's criticism in the Inner House of an "over-literal construction" or an "excessively conceptual approach".

Has the law changed?

One point of particular interest arising from *Campbell v Gordon* is the issue of whether the law in this area has changed. In the Supreme Court, Lord Carnwath observed (at para.11) that there had been some discussion in the Inner House as to whether Lord Diplock's statement of the "class protection" exception in *Lonrho* represented the modern law. Lord Brodie thought that it must be seen in the light of more recent judicial statements which appeared to place less emphasis on definitive presumptions, and more on the need to ascertain the intention of Parliament in enacting the particular provision (paras.10, 20). Those more recent judicial statements were to be found in the speeches of Lord Rodger in *Morrison Sports*, Lord Browne-Wilkinson in *X (Minors)* and Lord Jauncey in the *Parkhurst* case. Lord Carnwath observed (at para.12) however "that the statements of Lord Browne-Wilkinson and Lord Jauncey ..were made in the context of cases concerning liability of public authorities, which may raise rather different issues." Lord Carnwath was therefore "content to assume (without deciding) that Lord Diplock's words remain a reliable guide at least in relation to statutory duties imposed for the benefit of employees." (at para.12)

Lord Toulson was more forthright, castigating as a "startling" proposition Lord Brodie's suggestion that the dicta of Lord Kinnear in *Black* and of Lord Diplock in *Lonrho* were "not the modern law" (at para.38). The dicta to which Lord Brodie made reference in support of his assertion were made in cases which were "far removed" from the area of legislation aimed at employee protection." In *X (Minors)*, Lord Browne-Wilkinson referred to *Groves*, *Cutler* and *Lonrho* and nowhere suggested that he considered those cases to be "not the modern law". Lord Toulson stated that "[h]ad [Lord Browne-Wilkinson] intended to depart from long standing authority, including decisions of the House of Lords, there can be no doubt that he would have said so" (para.39). Lord Browne-Wilkinson's reference to *Parkhurst* was made simply as an example of legislation which was not passed for the benefit of a particular class of persons (prisoners), but for the benefit of society in general. (That case concerned a prisoner who had been unlawfully segregated in breach of the Prison Rules.) Lord Jauncey's statement in *Parkhurst*, at pp.170-171, that "[t]he 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” was not to be taken in isolation. Indeed, in the immediately succeeding paragraph, Lord Jauncey described the objects of the legislation as “far removed from those of legislation such as the factories and coal mines Acts *whose prime concern is to protect the health and safety of those who work therein*”.

Lord Toulson observed that, in the present case, the 1969 Act had no purpose other than the protection of employees and concluded (at para.41):

”The principles summarised by Lord Diplock in *Lonrho*..are no more than general principles or default rules, but they have stood the test of time and I would hold that they continue to be the law unless and until the Supreme Court makes a conscious decision otherwise.”

In Lady Hale’s view, it was “quite wrong” to suggest that the trilogy of recent cases had changed the law as it has long been understood to be. In none of the trilogy (*X (Minors)*, *Parkhurst* and *Morrison Sports*) was there any suggestion that the courts’ approach to deciding whether breach of a statutory duty gives rise to civil liability has changed. Indeed, in *X (Minors)*, the principles applicable were said to be “well-established”, albeit difficult to apply (p.731). Her Ladyship stated (at para.44):”Statutory duties imposed upon employers for the benefit of employees who suffer injury as a result of their breach give rise to civil as well as criminal liability, absent a clear statutory intent to the contrary. That is still the law.”

Conclusion

Campbell v Gordon presented the courts with an opportunity to reconsider whether the Employers’ Liability (Compulsory Insurance) Act 1969 supported an action for breach of statutory duty against a director of an insolvent corporate employer. It was perhaps unsurprising that the matter would come before the Supreme Court in view of the conflicting authorities which existed in the shape of *Richardson* and *Quinn*. The Supreme Court ultimately held that the sole director of a company which failed to provide adequate insurance for its employees was not personally liable in damages to an employee who suffered an injury while working. While Parliament had allowed the corporate veil to be pierced to the extent that directors might be guilty of a criminal offence, it had not intended directors to attract civil liability for breach of statutory duty. As Lord Carnwath observed, the Act said nothing about civil liability. The case therefore provides an important precedent for other civil cases brought against individual directors.

A further point of interest of the Supreme Court’s decision lies in its express recognition of the fact that the law remains as stated in *Black* and *Lonrho*. The trilogy of cases discussed in the Inner House (*Parkhurst*, *X (Minors)* and *Morrison Sports*) had not changed the law. Lord Carnwath, delivering the majority opinion, (at para.12) was “content to assume” that Lord Diplock’s words in *Lonrho* remained a reliable guide at least in relation to statutory duties imposed for the benefit of employees, while any suggestion to the contrary was described by Lord Toulson as “startling” (at para.38) and by Lady Hale as “quite wrong” (at para.45).

A further observation arising from the Supreme Court's judgment in *Campbell* is that it seems to follow an apparent trend not to read civil liability into statutory duties. Stanton *et al* have identified "a general disinclination to infer the tort ..in the modern cases." (K Stanton *et al*, *Statutory Torts* (Thomson/Sweet & Maxwell, 2003) at para.2.009). The Supreme Court's judgment might therefore be viewed as reaffirmation of that trend. Perhaps not too much should be made of this point however in view of the fact that many of the modern cases have involved construction of regulatory legislation which is for the public benefit and such legislation tends not to support a civil right of action for breach of statutory duty.

A final observation should be made. The question in *Campbell* was essentially whether the 1969 Act supported a civil law remedy at the instance of an injured employee against a sole director of an uninsured and insolvent corporate employer. The Outer House answered that question in the affirmative, the Inner House (by majority) gave a negative response and the Supreme Court by the narrowest of margins (in a 3:2 decision) affirmed the decision of the Inner House. Ultimately, four of the nine judges who heard this case would have allowed civil liability to be maintained against the director in respect of the statutory breach while five would not. The judicial path of the litigation would therefore appear to support the view that this is an "often difficult and controversial area of law." (*per* Neuberger J in *Todd v Adams* [2002] 2 Lloyd's Rep 293 at p.300). While some of the judges in *Campbell* took a purposive or functional approach to the interpretation of the 1969 Act's provisions, others preferred a more rigid, formalist approach. It was that latter approach which would ultimately prevail with the result that, some 10 years after sustaining his injuries, Mr. Campbell's action based on breach of statutory duty was finally dismissed by the Supreme Court. The course of the litigation in *Campbell* demonstrates how judicial responses to any particular piece of legislation may differ quite dramatically. This makes it difficult for litigants and their advisers to predict whether a particular legislative regime will support an action for breach of statutory duty. Protracted and expensive litigation may ensue often with a disappointing outcome, such as that faced by Mr. Campbell. It is suggested that reform of the law is urgently required.

The need for reform

The existence of a right of action for breach of statutory duty is said to depend upon the intention of the legislature but, sadly, that intention is often unstated. Where Parliament "prefers to avoid the crudity of a blunt statement" (*Cutler, supra, per* Lord du Parc at p.411) the courts are left to divine the legislature's intention. They have "the active role of filling gaps left by the legislature" (*Campbell, per* Lord Toulson at para.35). While certain presumptions or indicators have been developed to assist in this regard, those indicators often interact with other considerations such as the type of loss suffered (e.g. physical injury as opposed to pure economic loss), the manner in which the duties are articulated (e.g. highly specific as opposed to more vague or general duties), and whether the statutory regime is merely regulatory in nature. As far as the presumptions and their exceptions are concerned, it can be difficult to identify for whose protection the legislation was promulgated (this, it will be remembered, prompted different responses from members of the judiciary in *Richardson* and *Quinn*.) In seeking to ascertain Parliament's

intention, the courts may find that some factors point to a different conclusion from others. It is scarcely surprising therefore that Lord Denning M.R. suggested in *Island Records, supra* (at p.135) that one simply tosses a coin to decide the matter. Academic commentators have been similarly critical with some having described the determination of Parliament's intention as a "haphazard process" (J F Clerk & WHB Lindsell; *Torts*; (21st edn., A Dugdale, M Jones and M Simpson ed., Thomson/Sweet & Maxwell, London, 2014), at para.9-02) while others have described the judicial techniques of construction as "inadequate and .. liable to lead to arbitrary results." (K Stanton *et al*, *Statutory Torts, supra*, at para.1.009).

If the need for reform is accepted, the question then arises as to what shape that reform should take. An obvious improvement would be express articulation of the legislative intention in new legislation. In 1949, a judicial plea was issued in the following terms:

"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. There are no doubt reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what those reasons may be. I trust, however, that it will not be thought impertinent...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." (*Cutler, supra*, at p.410 *per* Lord du Parcq). Some thirty years later, the legislature stood charged of having "ignored the plea of Lord du Parcq in *Cutler's case*" (*per* Lord Denning M.R. in *Island Records, supra*, at p.134).

Clearly if Parliament were to state its intention explicitly in new legislation, this would be a major step forward. While existing legislation might still provoke difficulties, these difficulties would diminish with the passage of time as older legislation is gradually swept away. As Lord du Parcq acknowledged, however, there may be "reasons which inhibit the legislature from revealing its intention in plain words." It may not be considered politically prudent for Parliament to make express provision on the issue of civil liability. What then are the alternatives? In 1969, in a joint report, the Law Commission and the Scottish Law Commission recommended the adoption of a new rule of statutory construction whereby a presumption of actionability in respect of duties imposed by statute would apply. (*The Interpretation of Statutes* (Law Com. No. 21)(Scot Law Com. No. 11)(1969) at para.38.) The presumption would operate unless express provision was made to the contrary. No action followed however. Stanton *et al*, by contrast, favour a presumption in the opposite direction (i.e. non-actionability), unless express provision is made to the contrary:

"This would produce a result close to the present law but free from its difficulties. On the debit side, it would remove the possibility of the courts utilising the tort to play new roles or to plug gaps in the overall picture of legal protection. This would not be a great loss in view of the uncertainty which must exist at present as to whether rights are going to be inferred and the

general tendency to deny a remedy....[T]his would be the best way of removing the existing difficulties whilst allowing the tort to evolve on a principled basis.” (K Stanton *et al*, *Statutory Torts, supra*, at para.2.042). Although different views may be taken as to what direction legal reform in this area might take, it is submitted (as the present author has previously stated) that “reform of the law in this area is urgently required in order to provide greater clarity and to obviate the arid and wasteful litigation which the current position undoubtedly generates.” (J Thomson (ed.), *Delict, supra*, at para.6.133). Until such time as reform of the law is effected, “guesswork puzzles” such as the one presented to the judiciary in *Campbell* are likely to remain a feature of the legal landscape.