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Preface

Another five years has passed since completing the third edition of this book and once again I have to thank my family, friends and colleagues for their support during the writing of this new edition. In particular I must thank my wife Catherine for suffering the now familiar disruption to domestic life that inevitably accompanies the final stages of writing. I would also like to acknowledge the tremendous influence of my mother, Eileen, who passed away since the last edition was published (and this is not intended to downplay the important influence of other family members). Thanks also go to the faculty and staff of the School of Law at the University of Limerick; particularly Ray Friel, Eddie Keane, Sinead Eaton, Suzanne Nicholas, Carol Huguet, Michelle Hyland and former colleague Dermot Walsh (now at the University of Kent). I must also extend thanks to colleagues in other institutions at home and abroad in the tort section of the Society of Legal Scholars, the European Centre of Tort and Insurance Law, the Institute for European Tort Law of the Austrian Academy of Sciences, the Irish Association of Law Teachers and the Obligations Discussion Group; of those, thanks go in particular to Helmut Koziol, Ken Oliphant and Barbara Steininger. A very special mention must also go to two colleagues who retired (from the bench and from academia respectively) since the last edition – Bryan McMahon and William Binchy. Their seminal work in the field has been invaluable in shaping my knowledge of tort, from the very outset as a student and continuing through my career (right up to the invaluable assistance gleaned from the latest edition which was published as I was writing up this edition); in addition they have always been gracious, affable and supportive when we have met over the years. Finally, I would like to thank everyone at Gill & Macmillan for their excellent work in producing the finished product.

Tort law and tort scholarship, domestically and internationally, has moved on significantly since the last edition and it was even less feasible than previous editions to do justice to the full panoply of new and established material. Rather than simply expand the book to accommodate developments, I have tried to return the book to its roots as a concise statement of the core elements of the various torts, focused on Irish law, but with a selection of comparative materials to assist readers to see the range of perspectives and options available to critically assess and develop the law. This necessarily entailed cutting a great deal of material from the previous edition and limiting the selection of new material. Much of the excised material and new material that didn't make the cut is intended to be presented in an accompanying webpage, which will act

as a supplemental resource, including additional detail on some of the cases and further literature on topics covered; it will also have some historic aspects of the subject, showing how particular principles evolved (which is often an interesting tale, but adds too much length to the core text). There has been a minor restructuring, in that privacy was moved out of the discussion of the action for breach of constitutional rights and now follows defamation in a chapter styled 'Personality Rights'; this conceptual link between the two, long since recognised in civilian legal systems, is now also gaining popularity in common law literature. Chapter 9 has been retitled 'Breach of Constitutional and EU Rights' (rather than 'Emerging Causes of Action' as in previous editions) to reflect its content; this involved another minor change, taking the liability of EU institutions out of Chapter 13.

I have attempted to state the law as I understand it as of 31 January 2014, though coverage of the most recent material is less than comprehensive, due to pressures of time. The webpage will afford an opportunity to give further consideration to recent cases, legislation and commentaries.

EOIN QUILL
March 2014

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Statutory Duties

Introduction

Statutory provisions affect torts in a number of ways; they may amend some of the rules of an established tort or they may regulate some general aspect of tort claims, such as a defence or procedural rules. Those provisions are considered in the relevant chapters. Statutory provisions also provide a rich source of legal rights and obligations, some of which may give rise to tortious liability when they are breached; it is with those provisions that this chapter is concerned. Like negligence, statutory provisions affect a diverse range of interests, relationships and conduct, but, unlike negligence, they do not have a single behavioural standard for the discharge of the obligations created. The only unifying element in respect of tortious liability for breach of statutory duties is the source of the defendants' obligation towards the plaintiffs – a statutory provision. Not all statutory obligations can be enforced through an action in tort; the availability of an action can be determined in one of three ways, viz.:

- (i) there may be a statutory scheme of liability in which all the elements of the tort action are contained in the statute, such as the Liability for Defective Products Act 1991 and the Occupiers' Liability Act 1995;
- (ii) there may be a specific section in the statute expressly governing actionability, such as section 21 of the Control of Dogs Act 1986;
- (iii) where there is no express provision in a statute governing the availability of a civil action to enforce the obligations contained therein, it is a matter of judicial interpretation of the statute to determine whether such an action is available.

An action under the first of these three options is described as a statutory tort, while the second and third involve the common law action for breach of statutory duty. We will begin with the common law action; then deal with particular issues related to express provisions on actionability; and, finally, the schemes of liability in relation to defective products and occupiers of property will close the chapter.

Before dealing with these issues a brief note should be made of the approach taken in the American and Canadian courts, which embraces statutory provisions within the framework of the tort of negligence rather than using a separate tort of breach of statutory duty. Statutory provisions are used to determine the

level of behaviour required of the defendant in order to discharge the duty of reasonable care.¹

Breach of Statutory Duty

This is a common law action because, although the obligation on the defendant (or the right of the plaintiff) originates in a statutory provision, the principles governing civil liability for breach of the obligation are determined by judicial decisions, based on precedent. The degree of regard to the provisions of the legislation varies from case to case.

Requisite elements

1. an actionable duty;
2. breach of duty;
3. damage;
4. causation;
5. lack of defence.

Actionable Duty

Unlike many negligence cases, the existence of the obligation on the defendant is not normally in doubt in respect of statutory obligations;² the contentious issue is whether the obligation can be enforced by way of a tort action. Matters would be greatly simplified if statutes made express provision in respect of civil liability for breach of the duties they contained, a point eloquently made by Lord du Parc more than half a century ago:

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 careful examination and

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- 1 For the American approach, see Johnson, *Mastering Torts*, 3rd edn (Durham: Carolina Academic Press 2005) at Chapter 5, Section 6. For Canada, see Klar, 'Breach of Statute and Tort Law' in Neyers, Chamberlain & Pitel, *Emerging Issues in Tort Law* (Portland, OR: Hart 2007). See also Foster, 'Statutes and Civil Liability in the Commonwealth and the United States: A Comparative Critique' in Pitel, Neyers & Chamberlain, *Tort Law: Challenging Orthodoxy* (Oxford: Hart 2013).
 - 2 There are cases where there may be doubt as to whether a particular statutory obligation is applicable to the facts of the case, particularly where the statutory obligation carries flexible prerequisite characteristics; see, for example, *Dunleavy v Glen Abbey Ltd* [1992] ILRM 1.

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, 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.³

Unfortunately the provision of express guidance is still lacking in many instances, leaving the courts with the difficult task of interpreting provisions invoked by plaintiffs, in order to determine whether those provisions were intended to create actionable duties. The difficulty of this task is compounded by the lack of coherence and consistency in the available case law with respect to the development of principles of interpretation, a lack so great as to lead Lord Denning MR to say:

The dividing line between the pro-cases and the contra-cases is so blurred and ill-defined that you might as well toss a coin to decide it. I decline to indulge in such a game of chance. To my mind, we should seek for other ways to do 'therein what to justice shall appertain'.⁴

The solution he offered was that a right of action should be available in cases where the plaintiff's 'private rights and interests are specially affected by the breach'.⁵ The orthodox position, however, is that the issue is to be determined by the use of established criteria to determine the intent of the legislature.⁶ The law in Ireland and England is substantially similar on this issue at present,⁷ though the Irish cases provide little discussion of principle. The factors taken into account in reaching decisions, however, are broadly similar to those used in English decisions up to the 1980s. More recent developments in English law have yet to be considered in the Irish courts. One notable variation on the

3 *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, at p. 410; see also Thornton, *Legislative Drafting*, 4th edn (London: Butterworths 1996) at pp. 227–8 on provisions in respect of civil liability.

4 *Ex parte Island Records Ltd* [1978] Ch 122, at pp. 134–5.

5 [1978] Ch 122, at p. 139.

6 For a more extensive discussion of the techniques of statutory interpretation see Byrne & McCutcheon, *The Irish Legal System*, 5th edn (Dublin: Butterworths 2009) at Chapter 14*.

7 See McMahon & Binchy, *Law of Torts*, 4th edn (Dublin: Bloomsbury 2013) at Chapter 21.

subject in Ireland is the possible use of constitutional argument by plaintiffs to support their claims.

There are two types of provision that give rise to difficulty. One is where the legislation creating the obligation provides some mode of enforcement, such as a criminal sanction for breach, but does not deal with civil liability. The second is where no means of enforcement of any kind are expressly provided. The general rule governing the first situation is that enunciated by Lord Tenterden CJ in *Doe d, Bishop of Rochester v Bridges*: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 ...’⁹ Exceptions to this rule developed over time and Lord Diplock, in *Lonrho Ltd v Shell Petroleum Co. Ltd and Others*,¹⁰ summarised the position by stating that there are two categories of exception:

- (i) where the provision is designed for the protection or benefit of a particular class of persons and a member of that class is injured as a result of the breach; or
- (ii) where the provision generates a public right, but the plaintiff has suffered particular injury over and above the type of harm suffered by the public generally.

These are no more than general guides as to the categories of cases where actions have been permitted and are not to be regarded as definitive criteria. Thus, where a case falls under one of the two headings it is still open to the court to hold that the statutory provision in question is not actionable in tort. This point is made patently clear by Lord Jauncey in *R v Deputy Governor of Parkhurst Prison (Ex p Hague)*,¹¹ when he stated that:

... 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 legislation intended such conferment.¹²

8 (1831) 1 B & Ad 847.

9 Ibid., at p. 859; see also *Morrison Sports Ltd v Scottish Power* [2010] UKSC 37; [2010] 1 WLR 1934.

10 [1982] AC 173.

11 [1992] 1 AC 58.

12 Ibid., at pp. 170–1.

In fact, the courts have used a variety of factors to determine whether a tort action should be available and have not confined themselves to those outlined by Lord Diplock. Such factors include the purpose of the legislation as a whole (as distinct from the purpose of the particular provision), the adequacy of other remedies and public policy considerations. These will be discussed in more detail presently.

The 'general rule' clearly reflects a literal interpretation of statutory provisions, confining the enforcement of legislative provisions to the means expressly authorised by the legislature. The exceptions involve an acknowledgment that legislative provisions cannot always be satisfactorily implemented by a literal interpretation, but on occasion require the courts to have regard to the purpose and intent of the legislation (thus the whole may be greater than the sum of its individual parts). The cases demonstrate that a variety of factors may be taken into account in determining the legislative intent and no listing of such factors should be regarded as complete, given the level of ingenuity and creativity shown by the judiciary in dealing with claims for breach of statutory duty.

With respect to the second situation, where the statute has failed to provide any remedy, it is useful to begin by returning to Lord Tenterden CJ in *Doe d, Bishop of Rochester v Bridges*: 'If an obligation is created, but no mode of enforcing its performance is ordained, the common law may, in general, find a mode suited to the particular nature of the case.'¹³ This epitomises the view that where there is a right there must be a remedy. This does not mean, however, that a right to damages is necessarily available, as other remedies may provide sufficient means of enforcement.

In general, the types of factors taken into account in determining whether an action for damages is available are the same as those mentioned above in relation to provisions where criminal sanctions have been provided. Early Irish authority on the subject, *M'Daid v Milford Rural District Council*,¹⁴ suggests that, for an action to be available, the plaintiff must be a member of a class that the provision was designed to benefit and have suffered harm over and above that suffered by the other members of that class.¹⁵ This appears, at first sight, to conflict with Lord Diplock's later formulation in *Lonrho* as it requires both elements to be present. If one takes a broader perspective and considers the Irish decision, not as a definitive statement of the only situation where an action is available, but as part of a wider principle that either criterion is insufficient on its own, then the case can be seen as compatible with modern English authorities. As we have already seen, Lord Diplock's two categories

13 (1831) 1 B & Ad 847, at p. 859; see also *Restatement (Second), Torts* §874A.

14 [1919] 2 IR 1.

15 *Ibid.*, per Ronan LJ at pp. 21–2 and Molony LJ at p. 27 (CA).

are only broadly descriptive of the situations where duties have been treated as actionable and each will need additional elements. Similarly the decision in Ireland in *M'Daid v Milford Rural District Council* may be regarded as indicating that benefit of a class is an insufficient criterion to ground an action, but when accompanied by additional factors, such as suffering particular harm, there will be sufficient reason to make an action for damages available.

All the statements of principle so far are rather vague, so we must consider their application to the facts of the cases in order to get a clearer picture of the significance of the principles in practice.

Benefit of a Particular Class

There appears to be general acceptance in common law jurisdictions that industrial safety legislation gives rise to a right of action to those workers whom the legislation was designed to protect.¹⁶ In *Doherty v Bowaters Irish Wallboard Mills Ltd*¹⁷ for example, section 34(1)(a) of the Factories Act 1955, concerning the condition of lifting tackle, was held to be actionable at the suit of an employee who was injured when the hook of a crane broke and dropped the load that was being carried, causing extensive personal injuries. Similarly in *Gallagher v Mogul of Ireland Ltd*¹⁸ the plaintiff's employer was held liable for a breach of a statutory duty which included an obligation of '... supporting the roof and sides of every ... working place as may be necessary for keeping [the place] secure',¹⁹ when the plaintiff was injured by a fall of rock from the roof of the mine he was working in.

Careful examination of provisions is required, however, to determine the extent of the class covered, as the Supreme Court decisions in *Daly v Greybridge Co-operative Creamery Ltd*²⁰ and *Roche v P. Kelly & Co Ltd*²¹ demonstrate. Both were concerned with the provisions of the Factories Act 1955, and it was held that only persons working for the benefit of the employer who was subject to the statutory duty were intended to benefit, but that this class could include persons not directly employed by him. Walsh J stated the position as follows: '... the object of the Act is to protect only those persons who, broadly speaking, are employed in the factory premises at the work in which the factory is engaged or at work incidental to it'.²² The plaintiff in the former case was a lawful visitor to the premises of the defendant, but not

16 McMahon & Binchy, *op. cit.*, at [21.10].

17 [1968] IR 277.

18 [1975] IR 204.

19 S. 49(1) of the Mines and Quarries Act 1965.

20 [1964] IR 497.

21 [1969] IR 100.

22 *Daly v Greybridge Co-operative Creamery Ltd* [1964] IR 497, per Walsh J at p. 502 (Ó Dálaigh CJ and Haugh J concurring).

engaged in any work for the defendant's benefit and, consequently, fell outside the protected class; whereas in the latter case the plaintiff, although not an employee of the defendant, was engaged in work for the benefit of the company and was within the protected class.

The Safety, Health and Welfare at Work Act 2005 is now the principal statute governing occupational safety. This Act has a much wider scope of application than the older occupational safety legislation and so may have a greater impact in tort. The duties are imposed on a wider range of persons; they are not simply addressed to employers, but also include self-employed persons, persons in control of places of work (such as landlords) and others, such as designers, manufacturers, importers and suppliers of items used in workplaces, as well as those involved in the construction of workplaces. The class of beneficiaries is also wider; while employees are the principal focus of the obligations, section 12 obliges employers to ensure, so far as reasonably practicable, that third parties are protected from risks arising out of the conduct of work done for them. Thus, customers coming to buy goods or services, suppliers' representatives coming to sell and even mere passers-by, may all legitimately claim the protection of the legislation. The general obligations of the Act provide a framework under which a vast range of more detailed provisions is supplied under statutory instruments.²³

While industrial safety cases are dominant in terms of successful actions for breach of statutory duty, the courts have occasionally held other types of statutory obligation to be actionable. In *Moyne v Londonderry Port & Harbour Commissioners*,²⁴ for example, the High Court held that the defendants' duty to maintain a docks and pier at a specific harbour was owed to the people living and working in the vicinity of the harbour rather than to the public as a whole, and that an action for damages was available to members of the class suffering damage as a result of a breach of the duty.²⁵ The obligations under the Education Act 1998 on the State, schools and others involved in education may be amenable to civil enforcement; the possibility of such claims formed part of the reasoning for rejecting a constitutional claim against the State in *Sinnott v Minister for Education*.²⁶

23 The Safety, Health and Welfare at Work (General Application) Regulations 2007 (SI 299/2007) provide the most wide-ranging set of provisions.

24 [1986] IR 299.

25 The duty in question arose under s. 33 of the Harbours, Docks, and Piers Clauses Act 1847 in conjunction with a number of provisions under the Londonderry Port and Harbour Acts 1854, 1874 and 1882.

26 [2001] IESC 63; [2001] 2 IR 545; noted by Quill, 'Ireland', in Koziol & Steininger (eds), *European Tort Law 2001* (Vienna: Springer 2002) at [6]–[8]. In *O'C v Minister for Education & Science & Ors* [2007] IEHC 170, Peart J preferred negligence to breach of statutory duty as a basis for liability.

Plaintiffs Suffering Particular Harm

Damage is an essential ingredient of the action for breach of statutory duty; however, it may also be necessary to show that the harm suffered by a plaintiff differs from that suffered by other members of the class of persons intended to benefit from the legislative provision. Plaintiffs falling within a protected class who have suffered harm which is no different from that suffered by the class as a whole are unlikely to succeed in an action for breach of statutory duty. In *M'Daid v Milford Rural District Council*²⁷ the defendants allocated a cottage to a person not falling within the class of persons to whom they owed a statutory duty in respect of such allocation. The plaintiff was a member of the class to whom the duty was owed, but, since only one person could be allocated the cottage, the plaintiff's disadvantage was no different from that of any other member of the class and his claim for damages was rejected by the Court of Appeal. In other words, all members of the class of persons eligible for allocation were equally disadvantaged by the allocation and the plaintiff did not suffer any particular harm which would distinguish him from the others.

It is debatable whether the reverse proposition holds true – that plaintiffs suffering particular harm who are not members of a class of persons intended to benefit from the legislative provision can recover damages. In a number of cases plaintiffs have suffered particular harm, but have failed to recover damages either because they were not members of the protected class, as in *Daly v Greybridge Co-operative Creamery Ltd*, or because the legislation was designed for the benefit of the general public, and not for the protection of a particular class of persons, as in *Atkinson v Newcastle & Gateshead Waterworks Co.*²⁸

The phrasing of Lord Diplock's judgment in *Lonrho* seems to indicate that plaintiffs suffering particular harm may succeed, even in the absence of being members of a protected class, though in practice examples of such cases are difficult to find. *Ex parte Island Records Ltd*²⁹ involved an application for an *Anton Piller* order³⁰ by performers and record companies in respect of unauthorised reproductions of their performances. Clearly the performers were within the class of protected persons, but the companies were, arguably, outside the protected class. The solution offered by the Court of Appeal, that breach of duty would be actionable where a plaintiff's private rights had been interfered

27 [1919] 2 IR 1.

28 (1877) 2 Ex D 441; in this case the defendants breached a duty to maintain water pressure in pipes for supplying the city, thereby precluding the timely extinguishing of a fire in the plaintiff's property. The Court of Appeal held that the duty was not actionable in tort.

29 [1978] Ch 122.

30 This order is a specialised form of injunction to prevent the removal or destruction of evidence, see Chapter 15.

with, was independent of the protected class criterion, but this approach was expressly rejected in *Lonrho*.³¹ In *Herrity v Associated Newspapers (Ireland) Ltd*.³² damages were awarded where the defendant published details of telephone conversations that had been recorded in breach of s.98 of the Postal and Telecommunications Services Act 1983. The Act is designed for the benefit of the general public, rather than a particular protected class, but the plaintiff's right to privacy was plainly violated; the claim was not one for a breach of statutory duty, but for breach of a constitutional right, but the statutory violation was instrumental in determining that a violation of privacy had taken place. *Island Records* and *Herrity* demonstrate that there is some scope for private law action for the enforcement of statutory obligations by plaintiffs unable to establish membership of a protected class, but they are exceptional and, on balance, the courts have shown a reluctance to allow private actions solely on the basis of the suffering of particular harm by the plaintiff.

General Statutory Context

In deciding whether a statutory obligation creates a private right of action, courts will often consider the general objectives of the statute as a whole and not merely the objectives of the particular section of the statute in which the obligation is contained. In some instances this has the effect of strengthening a plaintiff's case by establishing that the statute as a whole has a protective purpose, in addition to the particular protection contained in the provision at issue. This is particularly evident in the industrial safety cases.³³ Resort to the general statutory context can also be used for the contrary purpose of counter-acting the protective language of the particular provision. The English case of *Hague v Deputy Governor of Parkhurst Prison*³⁴ is illustrative of the point. The plaintiff's case was grounded on the breach of regulations introduced under section 47 of the Prison Act 1952 in relation to the segregation of prisoners. Although the regulations included measures for the protection of prisoners' interests, the House of Lords held that the overall purpose of the Act and the regulations was to provide for the proper administration of prisons and not to provide any particular protection to prisoners.

31 [1981] 2 All ER 456, at p. 463; no opinion was given as to whether a record company outside a protected class could succeed were they to proceed alone, without having the performers as co-plaintiffs.

32 [2008] IEHC 249; [2009] 1 IR 316; see also *Sullivan v Boylan* [2013] IEHC 104; *Parsons v Kavanagh* [1990] ILRM 560; *Lovett v Gogan* [1995] 3 IR 132 (IESC); Hogan & Morgan, *Administrative Law in Ireland*, 4th edn (Dublin: Round Hall 2010) at [18.59] ff.

33 A typical example of this approach can be found in *Daly v Greybridge Co-operative Creamery Ltd* [1964] IR 497.

34 [1991] 3 All ER 733.

Dicta from the Supreme Court in *O’Conghaile v Wallace and Others*,³⁵ in contrast, indicate that prisoners in Ireland would be entitled to damages for breach of a provision for their benefit. Fitzgibbon J stated that:

... if it had been proved that the Governor denied to the plaintiff while in custody treatment or privileges to which he was entitled by statute or statutory rules and regulations, I think that the plaintiff would have been entitled to damages ...³⁶

In some instances the examination of context may go beyond the statute and extend to the common law prior to the introduction of the statute,³⁷ to international treaties which have provided the impetus for the legislation in question³⁸ or to provisions of European Union law.³⁹

General policy considerations may also be relevant in considering the broad context of legislative provisions. Courts rarely overtly identify policy issues which influence their decisions as to whether particular obligations are actionable, though it can hardly be doubted that such considerations exist and play an important role in adjudication. Again they may either strengthen or defeat a plaintiff’s case.

Effective Alternative Remedies

The availability and suitability of alternative remedies can be particularly influential in actions for breach of statutory duty. The inadequacy of criminal penalties has occasionally been used as a ground for allowing a tort action.⁴⁰ Confining enforcement to criminal sanctions would deprive the duty of any practical content where breach of duty could lead, at most, to a token sanction.

Where public bodies are subject to statutory duties, public law remedies may be available for the enforcement of the obligations, particularly an order

35 [1938] IR 526.

36 *Ibid.*, at p. 535; see also Murnahan J at p. 570 and Meredith J at p. 577 and p. 579.

37 McMahon & Binchy, *op. cit.*, at [21.21].

38 See, for example, *Merlin v British Nuclear Fuels plc* [1990] 3 All ER 711, where Gatehouse J resorted to the provisions of Art. I(k)(i) of the Convention on Civil Liability for Nuclear Damage 1963 in order to determine the meaning of ‘damage’ for the purposes of s. 7 of the Nuclear Installations Act 1965.

39 On the requirement of member states to interpret national law in accordance with EU law, see *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89); [1990] ECR I-4135; [1992] 1 CMLR 305.

40 *Parsons v Kavanagh* [1990] ILRM 560, at p. 567 per O’Hanlon J (*obiter*); the adequacy of alternative remedies may provide grounds for rejecting a claim, see *ILSI v Carroll* [1995] 3 IR 145, at p. 175, per Blayney J for the Supreme Court.

of mandamus requiring the performance of the duty.⁴¹ If such remedies provide adequate protection for persons injured or disadvantaged by a breach of duty, then private law remedies are likely to be denied.⁴²

In the case of private persons subject to statutory duties the public law remedies will not be available for the enforcement of the obligations; however, the courts may consider the adequacy of equitable remedies when determining whether an action for damages should lie for breach of such duties. Injunctions may provide an adequate means of enforcement in some instances and are particularly appropriate for preventive purposes, allowing an applicant to seek to have a risk offset prior to the occurrence of harm.

Breach of Duty

Statutory duties are not subject to a single behavioural standard; the scope or extent of each obligation is dependent on the interpretation of the relevant statutory provisions. Some statutory provisions give rise to strict liability, where the exercise of reasonable care, or even the greatest possible care, will not suffice to discharge the duty. A duty is likely to be regarded as strict where it is phrased in an imperative form and the statute does not provide any restriction, such as a defence or express conditions for fulfilling the duty.⁴³ Regulation 6 of the Safety, Health and Welfare at Work (General Application) Regulations 2007, for example, states that employers ‘shall ensure that ... sufficient fresh air is provided in enclosed places of work’.⁴⁴ Likewise, the requirements on maintenance and repair of ventilation equipment are expressed in strict terms. Other duties may only require the exercise of reasonable care in the circumstances, in which case they will have the same effect as a duty of care in the tort of negligence. A third possibility is that the statute may involve an intermediate standard, somewhere between strict liability and negligence; for example, a provision may be expressed in strict terms, but the obligation may be offset by special defences, as was the case in *Gallagher v Mogul of Ireland Ltd*,⁴⁵ which we have already considered in the context of the plaintiff’s membership of a protected class. The imperative language of section 49(1) of the Mines and Quarries Act 1965 was offset by the fact that section 137 of the Act excused defendants where fulfilling the duty was impractical. The Supreme Court held that the exercise of reasonable care by the defendants was not sufficient to

41 For detailed consideration of the public law remedies see Hogan & Morgan, *op. cit.*, at Chapter 16 and Collins & O’Reilly, *Civil Proceedings and the State*, 2nd edn (Dublin: Thomson Round Hall 2004) at Chapter 4.

42 *Siney v Dublin Corporation* [1980] IR 400, at p. 412 per O’Higgins CJ.

43 See for example *Doherty v Bowater Irish Wallboard Mills Ltd* [1968] IR 277.

44 SI 299/2007.

45 [1975] IR 204.

establish impracticability for the purposes of the defence because section 137 was ‘not conditioned by considerations of either reasonableness or foresight’.⁴⁶ In *O’Donoghue v Legal Aid Board*,⁴⁷ the obligation under section 5(1) of the Civil Legal Aid Act 1995 to provide aid to eligible persons was qualified by the availability of resources, so a delay of over two years in providing aid was not a breach of the duty as it flowed exclusively from the paucity of funds allocated to the board by the Department of Justice. If such a delay occurred for reasons other than lack of funds, liability could be imposed, even if the board’s failure would not constitute a lack of reasonable care. Many of the occupational safety provisions in the Safety, Health and Welfare at Work Act 2005 and associated regulations require the exercise of such care as is ‘reasonably practicable’ or express obligations in terms such as ‘appropriate’, ‘sufficient’, ‘suitable’, or ‘necessary’ measures to be taken on safety issues. Reasonable practicability and the other qualifying terms used to describe occupational safety obligations are not synonymous with reasonable care and require a higher level of precautions to be taken by an employer than under negligence principles.⁴⁸

The American approach to statutory obligations has produced two different views on the question of the standard of care. One view is that statutory provisions should be treated as a definitive interpretation of the standard of care and that a breach of statute necessarily constitutes negligence. The alternative view is that statutory provisions are to be regarded as relevant factors, to be weighed amongst the other considerations in determining negligence. Under the second approach a breach of statute would constitute evidence of negligence to be considered alongside other evidence. The *Second Restatement* suggests that the first approach should apply where there is an unexcused violation of a statutory provision which has been adopted as the standard of conduct required for the exercise of reasonable care⁴⁹ and a provision should be adopted when its purpose is:

- (a) to protect a class of persons which includes the one whose interest is invaded; and
- (b) to protect the particular interest which is invaded;

46 Ibid., per Walsh J, at p. 209 (Budd and Griffin JJ concurring).

47 [2004] IEHC 413; [2006] 4 IR 204: the state was found liable for a breach of constitutional rights.

48 *Gallagher v Mogul of Ireland Ltd* [1975] IR 205; s.2(6) of the Safety, Health and Welfare at Work Act 2005; see Shannon, *Health and Safety Law and Practice*, 2nd edn (Dublin: Thomson Round Hall 2007) at [3.12–14]. Some High Court cases have wrongly aligned the statutory standard with that at common law, e.g. *Warcaba v Industrial Temps (Ireland) Ltd & Ors* [2011] IEHC 489, at [9].

49 *Restatement (Second), Torts* §288B(1); excused violations are defined in §288A(2).

- (c) to protect that interest against the kind of harm which has resulted;
and
- (d) to protect that interest against the particular hazard from which the harm results.⁵⁰

The second approach should be used in respect of unexcused violation of a provision which has not been adopted as the appropriate standard of conduct.⁵¹ The practical effect of these provisions would mean that compensation is available under roughly the same criteria as it is in Ireland and England. The principal difference would be in the form of pleading used for such an action.

The Canadian courts have favoured the use of the second of the American approaches in respect of all statutory obligations. The crucial decision giving rise to the incorporation of statutory obligations within the tort of negligence was *R. in right of Canada v Saskatchewan Wheat Pool*,⁵² in which the Canadian Supreme Court rejected the use of the first American approach, preferring the flexibility of the second. The major advantage of this approach is that it avoids the complexities attendant on determining the actionability of statutory obligations and places the evaluation of the defendant's conduct within a well-established and coherent, if somewhat fluid, structure.

Damage and Causation

The action for breach of statutory duty requires proof of damage (in the case of an action for damages) or risk of damage (in the case of an application for an injunction). There is a further requirement that the damage suffered or threatened must be of a type that the statutory provision was designed to avert. The most celebrated case demonstrating the effect of this requirement is *Gorris v Scott*.⁵³ The plaintiff's sheep were being transported on the defendant's ship. The defendant failed to fulfil a statutory obligation to provide pens for the sheep and they were washed overboard during the course of the voyage. The provision of pens would have precluded the sheep from being lost, but it was held that the plaintiff's loss was not recoverable because the statutory obligation was designed to prevent the spread of disease, rather than to protect the security of the animals whilst in transit. Similarly in *Merlin v British Nuclear Fuels plc*⁵⁴ Gatehouse J held that economic loss, by way of

50 Ibid., §286.

51 Ibid., §288B(2); see also §288 on criteria for refusing to adopt a provision as the standard of conduct.

52 (1983) 143 DLR (3d) 9. See Klar, *loc. cit.*, on subsequent cases (sometimes misapplying the principle).

53 (1874) LR 9 Exch 125.

54 [1990] 3 All ER 711.

devaluation of the plaintiff's house, was not a type of damage included in section 7 of the Nuclear Installations Act 1965. Thus the plaintiff failed to recover compensation in respect of increased radiation levels resulting from emissions from the defendant's premises in breach of the Act.

Similarly, legislation dealing with personal safety, such as industrial safety legislation, does not extend to property damage or pure economic loss.⁵⁵ Thus, if a breach of an obligation by an employer in respect of the maintenance of equipment led to damage to an employee's car parked nearby or led to a temporary closure of the business with a consequent loss of wages to employees, these losses would not be recoverable by an action for breach of statutory duty.

In common with other tort claims for compensation for damage suffered, the plaintiff in an action for breach of statutory duty must show that the breach of duty was a cause of the damage suffered and that the damage for which compensation is claimed is not too remote a consequence of that breach. Causation and remoteness are discussed later as part of the general issues affecting tortious liability.⁵⁶

Defences

In some instances statutes may provide special defences in respect of the obligations they create or may restrict the application of general defences. We have already considered an example of a special defence, namely section 137 of the Mines and Quarries Act 1965, which was considered in *Gallagher v Mogul of Ireland Ltd*. Thus, in actions for breach of statutory duty, careful consideration must be given to the statute in order to determine whether there are any such special provisions affecting the liability of parties who have apparently breached their obligations.

Courts are more reluctant to admit the defence of contributory negligence in respect of breach of statutory duties, particularly in respect of occupational safety legislation. It has been suggested that the reason for this modification of the defence is because full application of the defence would diminish the effectiveness of the underlying protective policies in the relevant legislation.⁵⁷ Therefore, although the defence is available, the defendant would have to establish a greater degree of fault on the plaintiff's part than would be the case in a negligence action, if he is to succeed in reducing the damages payable.⁵⁸

55 *Atlantic Marine Supplies Ltd v Minister for Transport* [2010] IEHC 104, at [6.10–13]; *Fytche v Wincanton Logistics plc* [2004] UKHL 31; [2004] 4 All ER 221.

56 Chapter 11.

57 Byrne & Binchy, *Annual Review of Irish Law 1991* (Dublin: Round Hall 1993) at pp. 408–9; McMahon & Binchy, *op. cit.*, at [21.56–69].

58 O'Neill J provides an excellent discussion of the issue in *Smith v HSE* [2013] IEHC 360, at [40] ff.; see also *Fanning v Myerscough* [2012] IEHC 128 and *Meehan v BKNS Curtain Walling Systems Ltd* [2012] IEHC 441.

It is open to question whether this approach is suitable in cases where the statutory obligation closely resembles a negligence claim, or where the statute imposes concomitant obligations on the plaintiff.⁵⁹

Express Provisions

The legislature does, on occasion, make express provision permitting or precluding civil action for damages in respect of injuries resulting from a breach of particular statutory duties. In such cases the need to consider the actionability of the obligation is avoided, but otherwise the foregoing discussion of breach of statutory duty will be applicable. Examples of express statutory provision for civil liability include section 7 of the Data Protection Act 1988 and section 21 of the Control of Dogs Act 1986.⁶⁰ Section 7 of the 1988 Act provides that the obligations on data controllers and data processors under the Act give rise to a duty of care in tort, which is owed to the data subject.⁶¹ A data controller is defined as ‘a person who, either alone or with others, controls the contents and use of personal data’; while a data processor is ‘a person who processes personal data on behalf of a data controller’, excluding employees acting in the course of employment.⁶² This duty applies to persons compiling and controlling the use of information and is owed to the people on whom the information is compiled. The type of information to which the duty applies is termed ‘personal data’, defined as ‘data relating to a living individual who can be identified either from the data or from the data in conjunction with other information in the possession of the data controller’.⁶³ The duty is not actionable *per se*; compensation is only available where damage results from the breach of duty.⁶⁴ The duty does not include recipients of the information, who may have suffered loss as a result of reliance on the information; any duty to such parties would have to be based on common law principles, such as negligent misrepresentation, deceit or breach of contract. In contrast to the provision in respect of controllers and processors, there is no provision made in the Act for civil action against the Data Protection Commissioner for breach of any of the duties imposed on the Commissioner. The inference to be drawn is that an action for breach of statutory duty should not be available in respect of these duties.

59 See McMahon & Binchy, *op. cit.*, at [21.62].

60 The Control of Dogs Act 1986 is considered briefly in Chapter 10; see also s. 45(3) of the Freedom of Information Act 1997 and s.74 of the Consumer Protection Act 2007.

61 The obligations on data controllers and processors are specified in s. 2.

62 S. 1(1).

63 S. 1(1).

64 *Collins v FBD Insurance plc* [2013] IEHC 137.

Express provision may also be made for the exclusion of civil liability in respect of statutory duties, an example of which is section 13(2) of the Postal and Telecommunications Act 1983:

Nothing in section 12 or this section shall be construed as imposing on the company, either directly or indirectly, any form of duty or liability enforceable by proceedings before any court to which it would not otherwise be subject.

The sections in question set out the general objects and duties of the postal company established under the Act to take over the running of the national postal service. The section clearly precludes an action for breach of statutory duty based on any obligations generated by the sections. Section 15(2) provides the same protection to the telecommunications company established under the Act. The Act contains a number of other express provisions against civil liability for breaches of particular duties.⁶⁵

Section 21 of the Building Control Act 1990 provides another example:

A person shall not be entitled to bring any civil proceedings pursuant to this Act by reason only of the contravention of any provision of this Act, or of any order or regulation made thereunder.

This precludes the bringing of an action solely based on breach of obligations contained in the Act, but does not exclude consideration of the statute in the context of an action based on a common law obligation. Thus, for example, in a negligence or nuisance action the courts may take cognisance of obligations under the Act as one of the relevant factors in determining liability. The relevance of the Act in negligence actions was discussed briefly in Chapter 2.

Statutory Torts

Statutory schemes establishing rights and obligations in respect of a particular type of activity or enterprise form a well-established part of modern legal systems. Typical examples of activities regulated in this fashion would include intellectual property, such as copyright or patents, and employment; competition law also provides a private right of action by businesses adversely affected by anti-competitive practices. Although some aspects of these schemes would have similarities with tort actions, they are generally dealt with as part

65 S. 64, s.88 and s. 105; see also s. 14 of the Litter Pollution Act 1997; s. 45 of the Freedom of Information Act 1997; s. 13 of the Licensing of Indoor Events Act 2003; and s. 3 of the Health Insurance (Amendment) Act 2003; for further examples see McMahon & Binchy, *op. cit.*, at [21.08].

of their own specialised branches of law. Legislatures do occasionally enact schemes of liability which are specifically designed to modify the law of torts. Such schemes differ from the statutory material considered above in the level of detail provided in respect of the obligations generated. Schemes in Ireland concern product liability, occupiers' liability and air and sea transport.⁶⁶ The product liability scheme operates in addition to the existing common law principles in respect of products, while the occupiers' liability scheme replaces most of the common law provisions in its area. This chapter will focus on those two schemes.

Liability for Defective Products

Civil obligations in respect of products arise under contract, the tort of negligence and the scheme of liability in the Liability for Defective Products Act 1991. Contractual protection for consumers is significant, but is confined to parties who have contractual relations in connection with the product. Tortious actions fill a void by providing relief for persons who either do not have the benefit of a contractual relationship (such as the recipient of a gift) or cannot obtain satisfactory redress through the law of contract (as would be the case if the seller of goods had gone out of business). The scope of the tort of negligence in respect of defective products has already been examined in Chapter 2 and the statutory action now falls for consideration.

The Liability for Defective Products Act 1991, which came into effect on 16 December 1991,⁶⁷ was enacted in order to comply with Ireland's obligation to implement Council Directive 85/374/EEC on product liability. The recitals to the Directive state its purpose to be the harmonisation of member states' laws on product liability, the need for which is based on, *inter alia*, distortion of competition, impediments to the movement of goods and divergent protection of consumers caused by differences in member states' product liability laws.⁶⁸

Scope of the Act

The Act originally applied to all moveables, excluding unprocessed primary agricultural produce, which were put into circulation within the European

66 For the schemes affecting air and sea transport, see the Air Navigation and Transport (International Conventions) Act 2004 and the European Union (Liability of Carriers of Passengers by Sea) Regulations 2012, Statutory Instrument (SI) No 552/2012.

67 Liability for Defective Products Act 1991 (Commencement) Order 1991 (SI 316/1991). For general consideration of the equivalent English legislation, the Consumer Protection Act 1987, see Howells & Weatherill, *Consumer Protection Law*, 2nd edn (Aldershot: Ashgate 2005) at Section 4.2.4.3.

68 The background to the Directive is traced in Stapleton, *Product Liability* (London: Butterworths 1994) at Chapter 3.

Community after the commencement of the Act. Once primary agricultural produce was put through any form of industrial process which could cause a defect, it became a product for the purpose of the legislation. In 1999 an amending Directive was introduced to include unprocessed primary agricultural produce from December 2000, due to concerns over public health scares involving unprocessed products (particularly the discovery of the connection between BSE and new variant CJD) and the Irish legislation has been amended accordingly.⁶⁹ Raw materials and component parts incorporated into other products or into immoveables are included in the definition of 'product' in section 1.⁷⁰

Products cease to be covered by the Act once the limitation period has expired, which is not, in itself, unusual. The unusual feature of the limitation period under this Act, however, is the provision for the extinguishing of any right of action which has not already been initiated ten years after the product has been put into circulation by the producer, if that right of action has not already terminated under the standard limitation period.⁷¹ Thus, products are prone to the initiation of litigation under the Act for a maximum period of ten years from the date they are put into circulation.

The cause of action established by the Act operates in addition to the existing causes of action in respect of defective products, leaving the injured party with a choice as to the type of action to pursue.⁷² This leaves the victim with a choice of actions – a negligence action, a contractual action (where the injured party has a contractual relationship with someone responsible for the defect and the injury constitutes a breach of that contract) or an action under the 1991 Act – and there is no provision in the Act precluding the claimant from pleading more than one cause of action. Additionally, section 10 prohibits the exclusion of liability, thereby providing some opportunity for redress in cases where other forms of action might be precluded as a result of the plaintiff having waived the right of action.

69 Directive 99/34/EC (1999 OJ L141/20, corrigendum 1999 OJ L283/20); implemented in Ireland by the European Communities (Liability for Defective Products) Regulations 2000 (SI 401/2000), effective from 4 December 2000.

70 Cases have provided further clarification of the definition of a product, see *A v National Blood Authority* [2001] EWHC QB 446; [2001] 3 All ER 289 (blood products included); *Henning Vedfeldt v Århus Amtskommune* [2001] ECR I-3569, noted by Howells (2002) 6 European Review of Private Law 847 (transplant organ).

71 S. 7(2); the standard period of limitation under s. 7(1) is three years from the later of the following: (i) the date of accrual of the cause of action; or (ii) the date the plaintiff did, or ought reasonably to have, become aware of the damage, defect and identity of the producer. This issue is considered further in Chapter 12 *infra*.

72 S. 11. National law may not, in its implementing measures, impose liability which is stricter than that provided for in the Directive; see Case C-52/00 *Commission v France* [2002] ECR I-03827, para 24.

Elements of the Action

The cause of action is stated with stark simplicity in section 2(1): ‘The producer shall be liable in damages in tort for damage caused wholly or partly by a defect in his product.’ Each of the constituent elements – producer, damage, defect and product – is defined in the Act. We have already seen what is meant by ‘product’, so let us turn our attention to the remaining elements.

‘Producer’ is widely defined and not only encompasses the most obvious candidates – those who manufacture (or produce) finished products, component parts or raw materials and processors of agricultural produce – but also includes importers and suppliers in certain instances and persons holding themselves out as producers.⁷³ Importers are regarded as producers where they bring the product into the EU, from without, for the purpose of supply in the course of a business. This is a significant extension of the concept of producer and should ease the jurisdictional problems that would be encountered by a person injured by such a product. Responsibility is placed upon the commercial entity that introduces the product into the EU, which would normally be in a better position than an individual consumer to protect itself against the impact of a defect in the product.⁷⁴

A supplier can be regarded as the producer where the following four criteria are satisfied:

- (i) the identity of the producer cannot be discovered by reasonable steps;
- (ii) the injured party requests the supplier to identify the producer;
- (iii) that request is made within a reasonable time of the occurrence of damage (while the injured party is unable to identify the producer); and
- (iv) the supplier fails to supply the information (or the identity of his own supplier) within a reasonable time of receipt of the request.⁷⁵

The effect of this rather cumbersome provision is that the injured person is not prejudiced by difficulties in identifying the producer. If identification diffi-

73 S. 2(2); see Case U 2003.2288 V (Denmark), noted by Ulfbeck, ‘Denmark’, in Koziol & Steininger, *European Tort Law 2003* (Vienna: Springer 2004) at [12]–[14]. Where two or more people are responsible under the Act for the same damage, s. 8 provides that they are to be treated as concurrent wrongdoers (on which, see Chapter 13).

74 The importer should be able to obtain protection either through the contract by which the product was obtained or through an insurance contract.

75 S. 2(3). The Commission’s third report on the functioning of the Directive, COM (2006) 496 final, noted by Fairgrieve & Howells (2007) 70 MLR 962, rejected a proposal to expand suppliers’ liability.

culties do arise, the injured party is entitled to seek the producer's identity through any supplier that can be identified and the supplier will be treated as the producer in the event of non-compliance with such a request for assistance. This ensures that an injured person has access to redress, while suppliers are not unduly prejudiced given that they can discharge their responsibility by disclosing their source of supply if they themselves are unaware of the producer's identity.

The third group embraced by the extended definition of producer comprises those holding themselves out as such. A person may be regarded as holding himself out to be the producer by engaging in conduct such as putting a trade mark on the product or using some distinguishing feature of his business in connection with the product.⁷⁶ Although the Act indicates the type of conduct which may give rise to a finding of holding out, it does not clearly specify when it will do so. There are a number of possible standards of proof which could be applied to determining whether conduct amounts to holding oneself out as the producer. One is that any conduct within the specified range would be treated *prima facie* as holding out, leaving the alleged producer the opportunity of introducing contrary evidence. On this standard a retailer putting a trade mark on a product might avoid being treated as a producer by including additional information indicating that some other entity had manufactured the product. Another possibility would be that conduct within the specified range should necessarily be treated as holding out, without affording the defendant the opportunity to rebut the inference. This would be an extreme interpretation and would be unnecessarily harsh in cases where it was clear that the goods were independently manufactured. A third possibility would be to require the plaintiff to show that in addition to the specified conduct there was a real likelihood that the effect of this conduct would be to induce the belief that the defendant was the producer. This test seems the fairest and most plausible interpretation, but it is not free from ambiguity as it gives rise to further possibilities as to the standard that should be applied to establishing the likelihood of the effect of the conduct. With regard to this last point, an objective test, based on the effect on a reasonable customer, would seem appropriate and would allow potential defendants to anticipate the implications of their conduct in advance.

'Damage' includes death, physical or mental impairment and certain types of property damage.⁷⁷ It is not entirely clear whether compensation for personal

76 S. 2(2)(d) identifies the range of conduct which may form the basis of holding out as 'putting his name, trade mark or other distinguishing feature on the product or using his name or any such mark or feature in relation to the product'.

77 S. 1 provides definitions of the types of damage covered; see also Stapleton, *op. cit.*, at pp. 275–80.

injury includes compensation for pain and suffering, or whether it is confined to medical costs and consequential economic loss.⁷⁸ A plaintiff can only claim for loss in respect of property damage where the damaged property was not the product itself, was of a type normally intended for private use and was primarily so used by the injured person. Quality defects in products are, therefore, outside the scope of the Act. The exclusion of cases where the damaged item was not used for private purposes, or not intended for such use, emphasises that the focus of the legislation is to benefit consumers. Thus, commercial entities that are more capable of protecting themselves cannot claim for property damage under the Act. The ability to recover for property damage is further restricted by the imposition of a threshold which must be exceeded before such damage is recoverable. At present property damage less than €445 is not recoverable and, where damage exceeds this threshold, only the excess is recoverable.⁷⁹ The threshold may be varied by ministerial order.⁸⁰

A product is 'defective' where 'it fails to provide the safety which a person is entitled to expect, taking all the circumstances into account'.⁸¹ This is a novel feature of the legislation, in that it defines the concept of deficiency from the perspective of consumer expectation, whereas the tort of negligence focuses on the ability of the producer to foresee dangers arising from the product and to take measures to alleviate such dangers. In practice these two perspectives may lead to the same result in many instances, but the shift in focus certainly appears to be pro-plaintiff, making the consumer's expectations the central point of concern, rather than one of a number of competing considerations in determining whether the product is defective. The Act further provides that the relevant circumstances include:

78 See McMahon & Binchy, *op. cit.*, at [11.137–141] for possible interpretations of the Directive. They suggest that the use of the phrase 'damages in tort' in the 1991 Act plainly implies that such damages are included, as they are a standard part of tort actions. However, the Act is subordinate to the Directive and there is no authoritative ruling on the scope of damage under the Directive.

79 This is an approximate conversion of the £350 provided in s. 3(1); Art. 9 had specified 500 ECU, which would translate to €500.

80 S. 3(2) and (3).

81 S. 5(1); see Stapleton, *op. cit.*, at Chapter 10. See also, Case U 2003.2288 V (Denmark), noted by Ulfbeck, 'Denmark', *loc. cit.*; *Abouzaid v Mothercare* [2000] EWCA Civ 348; *A v National Blood Authority* [2001] EWHC 446; [2001] 3 All ER 289; *Tesco Stores Ltd v CFP* [2006] EWCA 393. See Howells & Weatherill, *op. cit.*, at pp. 242–5 for different possible interpretations of consumer expectations; see also Schuster, 'Tortious Liability for Defective Pharmaceutical and Medical Products' (2011/12) 4(3) QRTL 10.

- (a) the presentation of the product;
- (b) the use to which it could reasonably be expected that the product would be put; and
- (c) the time when the product was put into circulation.⁸²

The subsequent introduction of a better product does not necessarily make a product defective;⁸³ thus the definition in terms of consumer expectation is not designed to hamper product development by leaving open the argument that improvements make older products defective by raising consumer expectations. The measurement of consumer expectations is expressly linked to the time of circulation of the product, and the mere occurrence of subsequent improvements is expressly precluded as a basis for holding a product to be defective.

Section 4 provides that the onus of proof in respect of the damage, the defect and the causal relationship between them rests on the injured person. The onus in relation to establishing that the item which caused the damage was a product and that the defendant was the producer is not expressly dealt with in the Act, though ordinary principles of proof would suggest that the onus would lie with the plaintiff.⁸⁴ It is likely that these latter two issues would be non-contentious in most cases governed by the Act, but significant opportunities for dispute exist in relation to, *inter alia*, allegations that a defendant has held himself out as a producer or has processed primary agricultural produce. The effect of section 4 is that the cause of action is *prima facie* one of strict liability and the onus rests with the defendant to establish any of the appropriate defences that may be applicable to the case. Indeed the recitals to the directive expressly indicate that the basis of liability is intended to be strict, rather than fault-based: ‘... liability without fault on the part of the producer is the sole means of adequately solving the problem ... of a fair apportionment of the risks inherent in modern technological production’.⁸⁵ The practical implications of strict liability are partially offset by the range of defences available. In addition, product liability in negligence is, in many cases, stricter in practice than the theory and phrasing of the legal principles would suggest. The principal reasons for this are the availability of the *res ipsa loquitur* principle to assist the plaintiff in proving negligence⁸⁶ and the willingness of courts to make a finding

82 S5(1); see also *Palmer v Palmer & Ors* [2006] EWHC 1284 on the overlap between defectiveness and negligence.

83 S. 5(2).

84 See Chapter 12.

85 Recital 2 of the Directive.

86 On which see Chapter 12.

of negligence when faced with a seriously injured plaintiff and a well-funded or well-insured defendant.⁸⁷

Defences

Section 6 sets out six separate defences, any of which, if established by the producer, would completely exclude liability. In addition, contributory negligence provides a partial defence under which a producer's liability may be reduced where the injury suffered was, in part, caused by the negligence of the plaintiff (or some person for whose conduct the plaintiff is deemed responsible).⁸⁸ Furthermore, where damage is caused partly by a defect in a product and partly by the conduct of a third party (neither the producer nor the injured person), the liability of the producer to the injured person is not diminished, but the producer may seek a contribution from the third party under the provisions of Part III of the Civil Liability Act 1961.⁸⁹ As mentioned previously, section 10 of the Act precludes the use of exclusion clauses to curb a producer's liability; therefore, the defences under section 6 or the absence of one of the elements of the cause of action provide the only means by which liability can be completely averted.

The most significant defence is the so-called 'development risks' defence, which relieves the producer of liability where 'the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered'.⁹⁰ The scope of this defence was considered by the Court of Justice in *EC Commission v UK*.⁹¹ The relevant state of knowledge is not confined to established practices within the particular industrial sector in which the producer operates; rather, it is based on scientific information generally, 'including the most advanced level of such knowledge', provided that the knowledge was 'accessible at the

87 For a comparison of liability in negligence and under the statutory scheme see Schuster, 'Product Liability Litigation in the 1990s' in Schuster (ed.), *Product Liability: Papers from the ICEL Conference, March 1989* (Dublin: ICEL 1989) (the comparison is with the provisions of the Directive, rather than the Act); Cane, *Atiyah's Accidents, Compensation and the Law*, 8th edn (Cambridge: CUP 2013) at pp. 101 ff. (comparison with the equivalent English legislation).

88 S. 9(2) makes the contributory negligence provisions of the Civil Liability Act 1961 applicable to actions under the 1991 Act.

89 S. 9(1); see Chapter 13 on the right to contribution in respect of concurrent wrongdoers.

90 S. 6(e); Newdick, 'Strict Liability for Defective Drugs in the Pharmaceutical Industry' (1985) 101 LQR 405 argues that this defence may entirely undermine the strict nature of the liability.

91 Case C-300/95; [1997] 3 CMLR 923; See also Howells & Weatherill, *op. cit.*, at pp. 247-8.

time when the product in question was put into circulation'.⁹² This means that manufacturers are to be judged on the basis of the best available standards and practices.

The existence of this defence is an acknowledgment of the fact that the ability to develop products often outstrips our capacity to appreciate the risks associated with them. Thus, product development inevitably involves an element of risk and such risks were deemed to be inappropriate subjects for the strict form of liability contained in section 2. Persons injured as a result of the materialisation of such risks must use some other tort to ground their action. Negligence is the most likely candidate, leaving the courts to determine whether the release of the product, prior to the development of scientific knowledge in respect of the attached risks, fell below the requisite standard. It is paradoxical that a negligence action may be available when an action under the Act would not. An example would be the development of an experimental drug. If the best scientific knowledge available could not discern any risk, then a defence under section 6 would be available in respect of a statutory action; however, a court might accept that the release of the drug was negligent, on the basis that it is reasonable to expect the manufacturer to develop new scientific knowledge.

The statutory action makes no provision for a continuing duty to provide warnings, or even recall products, in respect of dangers which become discoverable after the product has been put into circulation. Persons suffering injury or damage in such cases will have to rely on common law actions.⁹³

Two of the defences are designed for the protection of producers who did not cause the defect. If the defect was not present when the product was put into circulation by the producer, but came into being at some later point, then the producer is not liable under the Act.⁹⁴ In order to establish this defence the producer would have to show, as a matter of probability, either the absence of the defect at the time of circulation or a subsequent independent cause of the defect. Clearly the producer will be in a stronger position if an outside source can be shown to be the cause of the defect, but the probable absence of the defect at the time the product was put into circulation is sufficient to establish the defence. The extent of the quality control measures employed by the producer is likely to be an important feature in establishing this defence, along with matters such as the producer's production practices and safety record. Latent defects appearing some time after the product was put into circulation, but developing from normal use of the product, ought to be regarded as existing

92 [1997] 3 CMLR 923, at [26]–[29] of the judgment; see also the opinion of the Advocate General at [20].

93 S.6 of the EC (General Product Safety) Regulations 2004 (SI 199/2004) may also be relevant.

94 S. 6(b).

at the time the product was put into circulation. Thus, where a product fails after an unduly short period in normal usage, the failure should be properly regarded as resulting from defective production, rather than from its treatment while in circulation.⁹⁵

The producer of a raw material or component part is relieved of responsibility for defects in the finished product if such defect can be attributed to either the design of the product or the instructions given by the manufacturer of the finished product.⁹⁶ This defence relieves the producer of the raw material or component of liability on the basis that the flaw in the finished product results from the manner in which the raw material or component was used rather than the manner in which it was produced and the misuse is not caused by the producer of the raw material or component.

Two further defences are available to producers who are not responsible for commercial circulation of the product. The first covers producers who have not put the product into circulation at all.⁹⁷ This would clearly apply to situations where the product was stolen and distributed by the thief, but would also appear to cover damage caused while the product is still in the producer's possession, such as an injury to an employee or visitor in the producer's factory. Such persons would have to look to other causes of action as a source of a remedy for their losses. The second circulation defence covers producers who were neither producing or distributing in the course of business nor distributing the product for sale or other economic purpose.⁹⁸ It is not clear whether the two aspects of the defence are to be read conjunctively or disjunctively, though the phrasing of the section appears to favour the former interpretation. If both aspects must be satisfied then a producer selling for charitable purposes, but not acting in the course of a business, would not fulfil the requirements of the defence. Similarly, a commercial manufacturer giving a gift of a product for social rather than economic purposes might not be able to establish the defence if the goods were of a type manufactured and sold in the ordinary course of business.

95 So, if the brakes in a car work perfectly for a short period after the car is sold, but fail inexplicably after six months of average driving, the fact that the brakes worked properly when the car was sent out by the manufacturer should not be sufficient to establish that they were not defective at that time. If the potential for failure in the product exists, but does not materialise for some considerable time, the product is defective and is, in fact, more dangerous than a product which does not work at all. In many cases the production deficiency may be easily identifiable, but there are likely to be cases where the source of deficiency cannot be identified and in such cases the injured party will be assisted by placing the burden of proof on the producer to establish the absence of the defect at the time of circulation.

96 S. 6(f).

97 S. 6(a).

98 S. 6(c).

The final defence available under section 6 is where the defect arises due to compliance with requirements of national or EU law.⁹⁹ It seems fair to producers to relieve them of liability where the defect arises from legally mandated conduct, rather than purely voluntary conduct. At first glance it may appear unlikely that legislators would mandate the production of defective products; however, it is possible that such a situation could arise. Technical requirements are often imposed on manufacturers and are usually based on the technical information available at the time. Over time deficiencies may be discovered in the technical requirements, but law reform may be slow to follow or may not follow at all. In such cases the producer could fall foul of the criminal law by departing from the technical specifications, but could be producing an unsafe product by following them. The availability of a defence, at least in respect of a strict liability claim, would seem reasonable in such circumstances.

Comment

The type of liability introduced by the Act is not truly strict, given the range of defences available, yet it departs from negligence with regard to the evaluation of vital issues such as the constitution of a defect. The most significant development under the Act is the extended definition of producer, particularly with the imposition of responsibility on importers. The other notable feature is that the scope of the development risks defence carries the potential for more extensive liability for producers than the tort of negligence. The principal difference between the statutory regime and negligence in respect of development risks is that the former only excuses producers where technology could not discover the defect, whereas the latter may excuse the producer where the technology was available, provided it was reasonable not to utilise the available technology.

In contrast to the Irish (and European) approach to product liability, the American courts have developed strict liability for personal injury and property damage caused by dangerous products through an evolution of the common law.¹⁰⁰ This liability is truly strict in that it is not encumbered by the variety of defences present under the Act. This approach may prove instructive if the present state of the law fails to develop to the satisfaction of injured consumers. Given that the Act does not greatly advance the level of protection afforded to

99 S. 6(d); see the EC (General Product Safety) Regulations 2004 (SI 199/2004).

100 See *Prosser & Keeton on Torts*, 5th edn (St Paul, MN: West 1984) at §§98–100; *Restatement (Second), Torts* §402A; the *Restatement (Third) (Product Liability)* confines strict liability to production defects and uses a fault standard for design defects and information deficiencies, requiring the plaintiff to show a better alternative that could have been used by the defendant.

consumers and has so far failed to play any noticeable part in product liability litigation, such a failure is a very real possibility.

Occupiers' Liability

The Occupiers' Liability Act 1995 came into effect on 17 July 1995 and introduced a scheme of liability governing the relationship between occupiers of property and entrants to that property, replacing the common law except to the extent that common law is preserved by s.8.¹⁰¹ The Hotel Proprietors Act 1963 and the Safety, Health and Welfare at Work Act 2005 provide additional measures in respect of particular occupiers, which extend beyond the obligations in the 1995 Act in some instances.

Scope of the Act

The Act replaces the common law rules governing the 'duties, liabilities and rights which heretofore attached to occupiers' in respect of dangers to entrants due to the condition of the occupied property.¹⁰² The effect on purely common law principles is that they are no longer applicable, save as preserved by s.8. Provisions which are purely statutory are unaffected; but what of provisions involving a mixture of statutory provisions and common law? The action for breach of statutory duty, in cases where the statute makes no express provision for civil liability, involves a duty imposed by statute, but liability attaches by virtue of the common law. It is arguable that liability under such a provision should be regarded as replaced by the 1995 Act; thus the original statutory duty would survive, but an action for damages would no longer be available for its breach. The converse argument is that the action for breach of statutory duty is based on the presumed intent of the legislature, and while common law principles apply to 'discovering' the intention, the source of liability is the statute itself. This would preserve the action for breach of the duty and, it is submitted, should be preferred. An example of such a duty is section 16 of the National Monuments Act 1930, which was held to be actionable in *Clancy v Commissioners of Public Works in Ireland*.¹⁰³ This provision is partly catered for in the 1995 Act, as entrants entering free of charge to monuments covered by the section are classed as recreational users and are consequently owed a restricted duty. Whether the duty owed to fee-paying entrants should

101 The commencement date is specified in s. 9(2). For analysis of the Act, see McMahon & Binchy, *op. cit.*, at [12.59] ff.

102 S. 2(1). Curiously, the Act was not cited in *Ryan (A Minor) v Golden Vale Co-operative Mart Ltd* [2007] IEHC 159, where a child was hit by a swinging gate (no liability was imposed).

103 [1991] ILRM 567, analysed by Byrne & Binchy, *op. cit.* at pp. 396–8.

be regarded as falling under the 1930 or the 1995 Act is uncertain, though the scope of the duty would be the same under each provision.

The definition of ‘occupier’ is based on control over the state of the premises and the dangers arising out of such state, and there may be more than one occupier, with the duty of each being related to their degree of control.¹⁰⁴ An occupier, in some instances, may also be a member of a particular class of persons on whom the law has placed special obligations and these are not affected by the Act. The Act specifically lists some examples, such as employers’ duties towards employees and duties imposed under a contract of bailment or of carriage for reward,¹⁰⁵ but the list is not exhaustive. Thus, the Act is designed to regulate the obligations in respect of occupation only and is not intended to inhibit duties arising in respect of other characteristics of the occupier.

The definition of ‘premises’ is rather wide and includes land, water, fixed or moveable structures and means of transport.¹⁰⁶ The duties under the Act relate to dangers ‘due to the state of the premises’.¹⁰⁷ This mirrors the common law distinction between ‘static conditions’ (to which special principles applied) and ‘active operations’ (which were subject to a duty of care under the tort of negligence).¹⁰⁸ The distinction between the two situations could be problematic in some cases; for example, should equipment such as machinery or materials be classified as part of the state of the premises or as a part of active operations?¹⁰⁹ In *Weldon v Mooney and Fingal Coaches*,¹¹⁰ Ó Caoimh J held that the Act was not applicable to a case involving a youth falling from the luggage compartment of a bus, which he sneaked into for the purpose of obtaining a free ride home; the possibility of a successful negligence action was accepted by Ó Caoimh J in refusing to dismiss the proceedings. Clearly this was an accident related

104 S. 1(1); in England control has been given a broad interpretation; in *Harris v Birkenhead Corporation* [1976] 1 WLR 279, a local authority was held to have sufficient control to be an occupier where it had served a notice, asserting its right of entry, in the course of compulsory purchase of a premises, even though it had not taken actual possession.

105 S. 8(b).

106 S. 1(1).

107 S. 1(1).

108 *Gallagher v Humphrey* (1862) 6 LT 684; see *Allen v Trabolgen Holiday Centre Ltd* [2010] IEHC 129, at [1]. If the premises is not particularly hazardous, but the entrant engages in an activity that makes it so, the case may fall outside the parameters of the legislation, see *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] 1 AC 46, at [26–9] per Lord Hoffmann; [66] & [69–71] per Lord Hobhouse of Woodborough; though see the dissent of Lord Hutton on this point at [53].

109 See McMahon & Binchy, *op. cit.*, at [12.70–73].

110 [2001] IEHC 3, noted by Byrne & Binchy, *Annual Review of Irish Law 2001* (Dublin: Thomson Round Hall 2002) at p. 591 ff.

to the driving and management of the vehicle and not its fixed condition. The statutory action would be appropriate to injuries inflicted by something like a protruding seat spring, or a defective door hinge.

Despite the abolition of common law provisions within the sphere embraced by the Act, there is still some scope for the courts to impose obligations on occupiers at common law by using a refined classification of situations. One route would be to hold the defendant to be a member of a class subject to a special duty, a route previously used to circumvent the common law principles on occupiers' liability. In *Purtill v Athlone Urban District Council*¹¹¹ the plaintiff was injured when exploding a detonator, which he had taken from the defendants' abattoir. The defendants argued that the plaintiff was a trespasser and therefore not owed any duty of reasonable care by them as occupiers under the applicable law. In the Supreme Court, however, it was held that they did owe such a duty, not as occupiers, but as custodians of dangerous chattels.¹¹² One possible example of such a special relationship that could be used is that between a publican and the clientele of the establishment. The extent of the duty at common law would be no different from the statutory duty where the customer is a visitor, but it could make a difference if the customer was a trespasser, having had his permission to be on the premises revoked.

A second possible route to using the common law rather than the Act would be to classify the danger as part of the defendant's activities, rather than as part of the static conditions. This would be a feasible option in respect of injuries resulting from equipment used by an occupier. Such an approach could be regarded as undermining the effectiveness of the legislation and so contrary to the legislative intent; alternatively it could be construed as a legitimate, albeit narrow, construction of the true scope of the Act.

Duties

The Act imposes a 'common duty of care', akin to the duty in negligence, on occupiers in respect of visitors. The extent of this duty is 'to take such care as is reasonable in the circumstances ... to ensure that a visitor to the premises does not suffer injury or damage by reason of any danger existing thereon'.¹¹³ Any of the following categories of entrant will be a 'visitor':

- (i) an entrant as of right;
- (ii) an entrant by virtue of a contractual provision (excluding recreational users);

111 [1968] IR 205.

112 Ibid., per Walsh J at p. 211 (Ó Dálaigh CJ and Budd J concurring).

113 S. 3; this is equivalent to the common law negligence standard – *Vega v Cullen* [2005] IEHC 363; *Newman v Cogan* [2012] IEHC 528.

- (iii) an entrant present at the invitation or with the permission of the occupier (excluding recreational users);
- (iv) a member of the occupier's family;
- (v) an entrant at the express invitation of a member of the occupier's family;
- (vi) an entrant for social purposes connected with the occupier or a family member.¹¹⁴

This effectively means that lawful entrants, other than those defined as recreational users, are visitors, whether their visit is for social or commercial purposes, and the occupier owes them a duty of reasonable care to ensure that the premises are in a safe state.

Recreational users and trespassers are owed a more restricted duty than visitors. The occupier owes them a duty not to intentionally injure them or damage their property and not to act with reckless disregard for their person or property.¹¹⁵ 'Act' here must refer to conduct affecting the state of the premises, as section 2(1) places an overriding constraint that the Act only applies to hazards due to the condition of the premises. It remains to be seen whether the term can be stretched to include a reckless omission to remove a hazard.¹¹⁶ Recreational users are entrants whose purpose is to engage in recreational activity, excluding members of the occupier's family, entrants at the express invitation of the occupier or a member of the occupier's family, or entrants whose recreational activity is in connection with the occupier or a member of the occupier's family. They may have entered with or without permission, and they may be charged a reasonable amount in respect of the cost of providing parking facilities.¹¹⁷ The distinction between recreational users and social visitors can be gleaned by a careful reading of the statutory definitions. Although the definitions are cumbersome, their application to particular facts should not prove problematic.¹¹⁸ An issue left unresolved by the Act is a person who enters premises contrary to a prohibition by the occupier. In theory such a person could be a recreational user if they enter for a recreational purpose; this would affect the occupier's ability to use reasonable force to remove them, as the Act only preserves the right to use force against trespassers. Such an

114 S. 1(1).

115 S. 4(1).

116 For detailed consideration of the possible meanings of s. 4(1)(b) see Byrne & Binchy, *op. cit.*, *Annual Review 2001* at p. 594.

117 S. 1(1); recreational activity is defined so as to include open-air activities, such as sport or nature study, 'exploring caves and visiting sites and buildings of historical, architectural, traditional, artistic, archaeological or scientific importance'.

118 Though see *Byrne v Dun Laoghaire/Rathdown County Council* (2001) 20 ILT (ns) 16 (CC, 13 November 2001, Smyth P).

interpretation would amount to finding that the Act provides recreational users with a right of entry onto property. It is submitted that the courts would not readily imply such a constraint of the occupier's right to determine entry and that such persons would be classified as trespassers. Trespassers are entrants who are neither visitors nor recreational users. Thus, they are entrants who lack any form of authority to be on the premises and whose purposes are other than the conduct of recreational activity. The classification of entrants was considered in *Williams v TP Wallace Construction Ltd*.¹¹⁹ The general manager of a firm of distributors of building materials went to visit a building site where a problem had been encountered with guttering supplied by the firm. When he arrived, the workmen were on a break and the architect was not there, contrary to expectations. The plaintiff took it upon himself to inspect the guttering and was injured when an unsecured ladder slipped as he was descending. The judge held that he was not a visitor, as he had no authority to conduct the inspection; neither was he a recreational user, as his purpose related to his employer's business; consequently he was a trespasser. Having relied exclusively in his pleadings on the common duty of care owed to visitors, his action failed.

There is an additional duty on occupiers in respect of structures, other than an entry structure such as a stile or gate, provided primarily for recreational users. The duty is 'to take reasonable care to maintain the structure in a safe condition'.¹²⁰ This duty would embrace structures such as dressing rooms in public sports grounds and playground equipment. It is essential that the structure is primarily for recreational users, so public access and a predominantly outdoor aspect to entrants' activities will be required.

These duties may be modified in accordance with the provisions set out in section 5. They may be extended simply by express agreement or by notice given by the occupier, but the duty towards recreational users and trespassers may not be restricted or excluded, while the duty to visitors may be restricted or excluded subject to certain conditions. Any express agreement purporting to restrict or exclude the duty towards visitors must be reasonable¹²¹ and is not binding on strangers to a contract in which it is contained.¹²² Any notice purporting to restrict or exclude liability must be reasonable and reasonable steps must be taken to bring it to the attention of the visitor.¹²³ The modification or

119 [2002] 2 ILRM 63; see also *Heaves v Westmeath County Council* (2001) 20 ILT (ns) 236 (CC, 17 October 2001, Judge McMahon).

120 S. 4(4).

121 S. 5(2)(b)(i).

122 S. 6(1); this provision applies even if the contract requires the occupier to admit the stranger to the premises, though it would be open to the occupier to seek an indemnity from the other party to the contract.

123 S. 5(2)(b); s. 5(2)(c) provides that prominent display of the notice at the normal entrance is presumed to constitute reasonable notice, though this presumption is rebuttable.

exclusion of the duty owed to visitors may not permit the occupier to intentionally or recklessly cause injury or damage to a visitor.¹²⁴

Hotel proprietors are subject to the duties set out in the Hotel Proprietors Act 1963. In most instances these will be coextensive with the duties in the 1995 Act, but there may be situations where the duties under the former Act are more extensive than those under the latter. The hotel proprietor's duty in respect of the personal safety of guests is 'to take reasonable care of the person of the guest and to ensure that, for the personal use by the guest, the premises are as safe as reasonable care and skill can make them'.¹²⁵ It appears that the latter part of this provision would make a hotel proprietor responsible for the negligence of independent contractors.¹²⁶ Under the 1995 Act an occupier is only liable for the negligence of independent contractors where he knows or ought to know of the negligence¹²⁷ or where the work involved a non-delegable duty on the occupier.¹²⁸ In relation to property damage, a hotel proprietor is strictly liable for damage to property received from guests for whom sleeping accommodation is engaged,¹²⁹ though there is a £100 (€127 approximately) limit in the absence of fault.¹³⁰ The limit does not apply to damage to cars or property deposited by guests expressly for safe custody.¹³¹

Standards of Care

The duty to visitors under section 3 of the 1995 Act incorporates a standard of reasonable care and expressly includes two particular factors as relevant to determining what is reasonable in the circumstances. The first is the level of care that visitors can be expected to take in respect of their own safety.¹³² The second concerns visitors in the company of others and the level of supervision and control which those other persons can be expected to exercise over the visitors. The express inclusion of these factors does not in any way constrain the

124 S. 5(3).

125 S. 4(1) of the 1963 Act; s. 4(2) states that this duty is independent of any duty owed by the proprietor as an occupier. See also *Duggan v Armstrong* [1993] ILRM 222; analysed by Byrne & Binchy, *Annual Review of Irish Law 1992* (Dublin: Round Hall 1994) at pp. 588–91.

126 McMahon & Binchy, *op. cit.*, at [12.57]; LRC, *Consultation Paper on Occupiers' Liability* (Dublin: LRC 1993) pp. 7–8.

127 S. 7.

128 S. 8(c). Non-delegable duties are discussed in Chapter 14.

129 S. 6 of the 1963 Act.

130 S. 7 of the 1963 Act.

131 S. 7 of the 1963 Act.

132 For interpretation of the equivalent English provision, see *West Sussex County Council v Pierce* [2013] EWCA Civ 1230; *Staples v West Dorset District Council* (1995) 93 LGR 536, *Simms v Leigh Rugby Football Club Ltd* [1969] 2 All ER 923, at p. 927 per Wrangham J and *Roles v Nathan* [1963] 1 WLR 1117.

courts in determining what is relevant, but does serve to keep to the forefront of attention the relevance of self-responsibility and the duty of control which may be imposed in some cases. Self-responsibility may be a more significant factor in respect of adult visitors than child visitors, while the duty of control will be particularly relevant in cases involving supervised groups, such as school tours. It seems possible that such factors could lead to a complete shift of responsibility to the visitor or supervisor in some cases, rather than a sharing of responsibility with the occupier.

The standard as applied in the Courts has so far proved uncontroversial. In *Heaves v Westmeath County Council*¹³³ the plaintiff slipped on outdoor steps with some moss on them; no breach of duty was found to have occurred, as the defendant operated an adequate cleaning system and the gardener responsible for the task was in the habit of obtaining and acting upon expert advice. In *Coffey v Moffit*¹³⁴ a two and a half-year-old child in a shoe shop with her mother caught her thumb under a glass shelf; the shelving was held to be satisfactory and the mother could have been expected to supervise the child). In *Boyle v Iarnród Éireann*¹³⁵ a child suffered a needle prick from a used syringe wedged between the seat and seat back on a train; evidence of a safely designed and implemented cleaning system was sufficient to discharge the duty owed. The hazard arose in a very short space of time between cleaning and the plaintiff boarding so it could not reasonably have been discovered before the plaintiff was injured. In *Allen v Trabolgen Holiday Centre Ltd*,¹³⁶ Charleton J found the defendant had breached the standard of care by allowing the accumulation of wet mud on a path used by visitors to get between chalets and other buildings at the centre; he also held that the defendants could expect visitors to be carrying young children on such paths and that they would consequently be at greater risk than if they were walking unencumbered. He did apply a 25% reduction for contributory negligence because the plaintiff was wearing unsuitable footwear, which contributed to her slip. It is interesting to note that the plaintiff's lack of care for her own safety was considered as contributory negligence, rather than completely absolving the defendant of responsibility; this seems to strike a fair balance in respect of the relative responsibility of the parties in the circumstances. In *Newman v Cogan*,¹³⁷ O'Neill J held that a householder carrying out a minor repair would not be expected to have the knowledge and foresight of an expert; here the plaintiff suffered a serious eye injury after being hit by a shard of glass from a panel in a door, when it was

133 (2002) 20 ILT (ns) 236. (CC, Judge McMahon).

134 Unrep. CC, 17 June 2005 (Judge McMahon).

135 Unrep. CC, 30 January 2006 (Judge McMahon).

136 [2010] IEHC 129, at [11].

137 [2012] IEHC 528; relying on *Wells v Cooper* [1958] 2 QB 265.

broken. The householder was not negligent in choosing this glass rather than a sturdier grade of glass that was less likely to shatter.

In relation to the duties towards recreational users and trespassers under section 4, there is no definition of intentional injury or damage, though an objective standard would be more consistent with the use of the term in tort law generally. This would embrace situations where such injury or damage is the natural and probable consequence of the state of the premises, where such state results from the voluntary action of the occupier; this would clearly cover the setting of traps, but would also extend to the creation of risks whereby injury was inevitable, though not subjectively intended by the occupier.

A non-exhaustive list of nine relevant factors is provided in respect of reckless disregard, though all relevant circumstances are to be taken into account.¹³⁸ The listed factors are:

- (i) whether the occupier knew, or had reasonable grounds for believing, that a danger existed on the premises;
- (ii) whether the occupier knew, or had reasonable grounds for believing, that the person or the property was, or was likely to be, on the premises;
- (iii) whether the occupier knew, or had reasonable grounds for believing, that the person or the property was, or was likely to be, in the vicinity of the danger;
- (iv) whether the danger was one against which the occupier should provide protection;
- (v) the burden of eliminating the danger or providing protection against it;
- (vi) the character of the premises (such as a tradition of open access);
- (vii) the conduct of the entrant and the level of care that could reasonably be expected of entrants in relation to their own safety;
- (viii) the nature of any warnings given by any person in respect of the danger;
- (ix) the level of supervision by persons accompanying the entrant that could be expected.

This lengthy list is somewhat unhelpful, in that it gives no indication as to the relative weight of its component parts. All the listed factors would be equally relevant to a negligence enquiry, but clearly the balance between them must differ from negligence-based evaluations where the standard is one of reckless disregard. Quite what is required to breach this standard is not clear. The

¹³⁸ S. 4(2); the provisions in respect of intention and recklessness are equally applicable to cases involving a reduced duty towards visitors, see s. 5(3) and (4).

Law Reform Commission recommended gross negligence as a standard.¹³⁹ The express use of the term 'reckless disregard' by the legislature may have been intended as a departure from the recommendation or may be simply an alternate phrase intended to have the same content as the recommendation. It will ultimately fall to the courts to decide the precise parameters of the standard.

Developments in the old law were principally driven by cases involving injury to children and the courts found a variety of ways to facilitate such claims. Both the Law Reform Commission and the legislature have vacillated on whether to make special provision in respect of child trespassers/recreational users.¹⁴⁰ The enacted legislation has not made any such special provision; nonetheless, the courts may be more willing to classify an occupier's conduct as reckless disregard in respect of child entrants than adults. Despite the significant reformulation of the law contained in the Act, the net outcome in many cases may be no different from what would have occurred under the tort of negligence or the older system of duties. The primary change may well be one of perception rather than substance, as the application of the reasonable care standard was unlikely to lead to the degree of liability feared by those who lobbied for this legislation.

A brief examination of some of the leading cases preceding the Act will serve to demonstrate the similarity of outcome between the common law and the statutory provisions. In *McNamara v ESB*,¹⁴¹ the defendant was held liable for injuries suffered by an eleven-year-old boy, who was electrocuted in an electricity sub-station. The station was located in a residential suburb and the defendant was aware that the fence was in a poor state of repair and that children were in the habit of climbing the fence to play in the sub-station. The defendant failed to repair the fence over a prolonged period, but did have warning signs on the fence. It seems likely that, if such circumstances were to arise in the future, a court would be inclined to hold the defendant to be in breach of the standard of reckless disregard. Factors of particular importance would be the location of the danger, the magnitude of the risk and the defendant's knowledge of the presence of children, who might neither comprehend nor heed the warning

139 LRC, *Consultation Paper*, *op. cit.*, at pp. 97–9; LRC, *Report on Occupiers' Liability* (Dublin: LRC 1994) at pp. 9–10 and 13.

140 LRC, *Consultation Paper*, *op. cit.*, at p. 94 recommended special provision in respect of children; LRC, *Report*, *op. cit.*, at p. 24 retracts that recommendation; s. 4(3) and (4) of the Occupier's Liability Bill 1994, as initiated, made special provisions in respect of children and mentally handicapped trespassers/recreational users, but these sub-sections were dropped and do not appear in the final legislation enacted.

141 [1975] IR 1.

signs. By contrast, in *Keane v ESB*,¹⁴² the defendant was found not to have breached the duty of reasonable care. Again the case concerned an eleven-year-old trespasser in an electricity sub-station. This time, however, the sub-station was in a rural location, not usually frequented by children and was surrounded by fencing. The fencing consisted of a 5 foot 9 inch chain-link wire fence with three strands of barbed wire on top, bringing the total height to 6 foot 9 inches. It is probable that the result would be the same under the statutory rules, as it is difficult to see how the defendant's conduct could be regarded as reckless disregard. Finally, the decision in *Smith v CIE*¹⁴³ is worth noting. The defendant failed to repair a damaged wall alongside its railway track and local residents crossed the track as a shortcut to some shops. The plaintiff, an adult, was injured when he was struck by a train while he was in the process of chasing a youth. The youth had been riding the plaintiff's horse without permission and the plaintiff's intention was to beat him up. The plaintiff saw the approaching train, but persisted in his pursuit of the youth across the uneven terrain, fell and was struck by the train. The Supreme Court held that the defendant could not reasonably have foreseen that the plaintiff would have behaved in this way and that, in the circumstances, there was no breach of the duty of care. Under the statutory provisions the same result would ensue, as the courts are expressly entitled to have regard to the degree of care that the entrant could be expected to provide for himself.

The case law so far provides little clear insight into the shape the reckless disregard will ultimately take. The Supreme Court decision in *Weir-Rogers v The S.F. Trust Ltd*.¹⁴⁴ adds little by way of clarification, since the court found that the defendant's behaviour would not even have breached the reasonable care standard. The court adverted to different possible interpretations of reckless disregard, such as a gross negligence standard and the distinction between objective and subjective recklessness, but did not express any definitive opinion on which was appropriate. The plaintiff sat on a gravel-covered slope near a cliff on the defendant's land; on rising, she slipped and fell over the edge and suffered significant injury. The Supreme Court held that requiring owners to either fence off or place warning signs on every dangerous point near cliffs would be too onerous. The danger was an obvious one and there were no

142 [1981] IR 44.

143 [1991] 1 IR 314; see also *O'Keeffe v Irish Motor Inns Ltd* [1978] IR 85.

144 [2005] IESC 2; [2005] 1 IR 47, noted by Ryan & Ryan (2005) 23 ILT 59; Quill, 'Ireland' in Koziol & Steininger (eds), *European Tort Law 2005* (Vienna: Springer 2006) at [14]–[16]. The court cited *Tomlinson v Congleton Borough Council* [2003] UKHL 47; [2004] 1 AC 46; *Stevenson v Corporation of Glasgow* [1908] SC 1034; *Corporation of the City of Glasgow v Taylor* [1922] 1 AC 44 and *Hastie v Magistrates of Edinburgh* [1907] SC 1102. These cases may give some further assistance in the interpretation of the standard of care.

special circumstances requiring the defendant to take particular care for this plaintiff.

The decision in *Cray v Fingal County Council*¹⁴⁵ establishes (not surprisingly) that ‘the natural uneven and inconsistent nature of the surface’¹⁴⁶ of a beach is part of the character of the premises and not something for which the occupier can be held responsible. In this instance, the plaintiff broke her ankle when stepping from the end of a concrete ramp onto a beach.

Injury or Damage

‘Injury’ is used to refer to harm to the person of the entrant and ‘includes loss of life, any disease or any impairment of physical or mental condition’.¹⁴⁷ This definition embraces fatal accidents, physical personal injuries and psychological harm. As there is no further elaboration on these terms it may be taken that they are to have the same meaning as they are given elsewhere in the law of torts. Damage is used to refer to harm other than personal injury and ‘includes loss of property and injury to an animal’.¹⁴⁸ Property is given an extended definition and includes property ‘in the possession or under the control of the entrant while ... on the premises’,¹⁴⁹ though that property may be owned by another person. This allows entrants to recover for damage caused to property they brought with them, thereby enabling them to compensate the owner of that property for the loss incurred. The Act is silent on whether an entrant can recover for pure economic loss, but since it is not specifically excluded and the definition of damage is not exhaustive, such loss should be recoverable in suitable circumstances. Such a possibility could arise where a vendor of goods, licensed to trade on the occupier’s premises, suffers a loss of profit due to a negligently created hazard driving other entrants away; for example, a food vendor in a sports ground might suffer a loss of business if a section of a stand collapsed and the crowd were to flee the danger, leading to the abandonment of the event in question.

Existing common law principles will apply to issues such as causation, remoteness and quantum of damage. In relation to defences the only special features are those contained in section 8, referred to previously, which restrict the availability and scope of exclusion clauses and preserve the common law rules on defence of persons or property.

145 [2013] IEHC 19.

146 *Ibid.*, at [20]; see also [22]–[24] on the burden of prevention.

147 S. 1(1).

148 S. 1(1).

149 S. 1(1).