Private Law and the State

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The Liability of Statutory Authorities for Torts

JAMES EDELMAN*

I. Introduction

This chapter considers the proper legal approach to assessing the liability of public authorities for wrongdoing, and in particular in the law of torts. The public authorities which I will consider are those whose existence and functions are governed by statute. By focusing on statute I am not concerned with either: (i) any authority that exercises the prerogative powers of the Crown (as they are sometimes called); or, (ii) any authority that exercises the non-prerogative, non-statutory powers of the Crown (assuming the correctness of the presently fashionable view that AV Dicey was wrong to identify all Crown powers as prerogative).[1] For simplicity and accuracy I will refer to these public authorities as statutory authorities.

There are, in broad terms, only two ways by which a statutory authority might be liable for a tort. The first route is primary liability. The statutory authority can be primarily liable for delegable or non-delegable duties. In other words, the statutory authority can be liable for primary duties that can be discharged by choice of a reasonable delegate and also for primary duties that can be performed by an agent but not by a delegate. In either case, the authority is under a primary duty and an act or omission attributable to the authority constitutes a breach of that duty.

The second route is vicarious liability. The statutory authority can be secondarily liable where another party breaches a duty and the authority is vicariously liable based on the liability of that other party. Although the focus of this chapter is on the first category, primary liability, vicarious liability is discussed towards the end of the chapter to illustrate that the central point applies equally in both cases. The central point is that the existence and content of a duty of a statutory authority ultimately depends upon the statute which creates the statutory authority and which confers upon it not merely its rights and powers, but also its duties and liabilities.

* Particular thanks to Penelope Bristow for comprehensive research and discussion for, and review of, this chapter.

[1] See the discussion in *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, (2023) 408 ALR 381 [127]–[137] (Kiefel CJ, Gageler and Gleeson JJ).

The recognition that the existence and content of the duty of a statutory authority is a matter of statutory interpretation does not mean that the common law is irrelevant. It is a basic category error to think that statutes, and their interpretation, stand apart from the common law. A statutory provision might expressly adopt the common law. Or it might adopt the common law but expressly or impliedly amend it. Or it might impliedly adopt, or presuppose, the operation of the common law unamended. This basic point is, of course, equally true for the duties of statutory authorities. Importantly, even where the legislation presupposes the existence and operation of other duties, including the common law of torts, it should not be forgotten that the ultimate foundation for those duties is the legislation. Whilst the entire scope of the duties of a statutory authority might seem to come from the common law, that is only because the terms, scope or purpose of the legislation have expressly or impliedly adopted those common law duties.

I will discuss three broad categories of case:

(1) where the statute expressly provides for the relevant duty of the statutory authority and also for a private remedy for compensation for breach of that duty;
(2) where the statute expressly provides only for the relevant duty of the statutory authority but implies a private remedy for compensation for breach of that duty; and
(3) where the statute implies both the relevant duty of the statutory authority and the private remedy for compensation for the breach of that duty.

II. Where the Statute Expressly Provides for the Relevant Duty of the Statutory Authority and for a Private Remedy for Compensation for Breach of that Duty

I begin with the instance where legislation provides expressly for both the duty on the statutory authority and for a private remedy for compensation for breach of that duty. In these circumstances, however, the common law can still have a significant role to play.

An example of a circumstance where legislation expressly provides for the duty and for the private remedy for compensation for breach but where the common law still has a significant role is the decision of the High Court of Australia in *Young v Chief Executive Officer (Housing)*.[2] In that case, Ms Young was granted a lease to premises in the Northern Territory by the Chief Executive Officer (Housing), a statutory authority established under the Housing Act 1982 (NT).[3] For numerous years, the premises that were leased to Ms Young did not have an external back door. The failure of the statutory authority to provide an external back door was held to be a breach of the term created by section 49(1) of the Residential Tenancies Act 1999 (NT).[4]

[2] *Young v Chief Executive Officer (Housing)* [2023] HCA 31, (2023) 97 ALJR 840.
[3] Housing Act 1982 (NT), s 6.
[4] *Young v Chief Executive Officer, Housing* [2020] NTSC 59, (2020) 355 FLR 290 [87] (Blokland J).

The issue in *Young* concerned the assessment of damages for breach of the term created by section 49(1). Section 122 of the Residential Tenancies Act relevantly provided that the Northern Territory Civil and Administrative Tribunal may order compensation for loss or damage suffered by a tenant if the landlord failed to comply with the tenancy agreement or with an obligation under the Act relating to the tenancy agreement. A provision, section 120, expressly required contract rules about mitigation of loss or damage to be applied in the assessment of compensation under section 122 for breaches of terms such as those arising from section 49(1). Two members of the High Court (Gordon J and I) held that section 122 also impliedly required the application of common law rules of remoteness. Three members of the Court (Kiefel CJ, Gageler and Gleeson JJ) held that section 122 applied a unique statutory rule of remoteness, which would have to be worked out over future cases (perhaps by a similar method to the common law). The important point, however, is that the case is an example of where a statute provides for both the duty and the remedy, with the remedy picking up at least some aspects of the common law. The application of the common law is also an application of the legislation.

In summary, in cases where both the statutory authority's duty and the remedy for breach of that duty are expressly provided for by statute, common law rules may still play a role. To the extent that those rules are incorporated, either expressly or by implication, they assist in the mechanics of identifying the boundaries of the express statutory duty and the limits of the expressly provided statutory remedy of compensation.

III. Where the Statute Expressly Provides for the Relevant Duty of the Statutory Authority but Implies a Private Remedy for Compensation for Breach of that Duty

A statute might expressly provide for a duty owed by a statutory authority, but not for the remedy. This issue arose directly for consideration by the Court of the King's Bench in *Rowning v Goodchild*.[5] The plaintiff brought an action for damages against the deputy postmaster of Ipswich for the non-delivery of certain letters directed to the plaintiff. Under the postal legislation, the postmaster had a duty to deliver all letters and packets. The deputy postmaster received 10 letters by the London post addressed to the plaintiff, which he did not deliver to the plaintiff, but instead held in his office for 10 days. The central question was whether the meaning of 'delivery' in the statute required the deputy postmaster to deliver the letters to the plaintiff's abode. The Chief Justice in Common Pleas, De Grey CJ, delivered the opinion of the Court, saying that it did. The deputy postmaster then argued that although he had breached this duty, he could not be liable for damages for breach of the statute because the legislation expressly provided for a penalty but not for damages. The Chief Justice responded that the penalty was an 'accumulative sanction' so that an action for compensation could be brought, as it had been, according to rules of the 'common law'.[6] Judgment was given in favour of the plaintiff for one shilling in damages and costs.

[5] *Rowning v Goodchild* (1773) 2 Black W 906, 96 ER 536.
[6] ibid 538.

The point being made by the reference to the 'common law' in *Rowning v Goodchild* was not that a separate action could be brought at common law for trespass, trover or detinue. None of those writs had been brought by the plaintiff. The question raised for the Court's consideration was limited to the extent of the deputy postmaster's duty under statute. As Stephen J said, almost exactly 200 years later, the action in such a case is for 'breach of a statutory duty' and in respect of such a breach, 'an action will lie at the suit of the individual affected by the breach'.[7] De Grey CJ's reference to the 'common law' in *Rowning v Goodchild* was a reference to an implication or legislative presupposition that a breach of the statute creates an actionable private remedy governed by common law rules for compensation. The statute expressly provides for the duty, but the implication is that a private remedy is available for compensation. The justification for importing common law rules to assess compensation for breach of the statute, despite the absence of express statutory provision, was given by Sir Edward Coke, who said more than a century earlier that 'the surest construction of a Statute is by the rule and reason of the common Law'.[8]

The use of the common law to elucidate presuppositions of the legislature is not a technique that is limited to instances where a statute expressly imposes a duty on a statutory authority but does not create any express private remedy. There are many, many examples where legislation has been held to contain an implication based upon common law presuppositions. As Byles J said in 1863 in *Cooper v The Wandsworth Board of Works*,[9] in respect of the common law rules of procedural fairness, 'although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature'. Another example is the presupposition that guilt of an offence requires a 'criminal mind',[10] such as knowledge or intention. This has been described as a 'common law presumption' reflected in the legislation.[11] Hence, where an offence is defined only in terms of its physical element, the usual presupposition is that the offence also impliedly contains a mental element. In other words, the implication requires the statutory offence provision to be read as though it contained an express term requiring intention or knowledge. Hence, in *Sweet v Parsley*,[12] Lord Reid said of the implication:

> [T]here has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to mens rea there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require mens rea.[13]

It will be the terms, the scope and the purpose of the statute that determines whether a statute contains an implication that a private remedy for compensation is available, with the remedy governed by common law principles. As Lord-Browne-Wilkinson noted in *X (Minors) v Bedfordshire County Council*:

[7] *Bradley v The Commonwealth* (1973) 128 CLR 557 (HCA) 593 (Stephen J).
[8] E Coke, *The First Part of the Institutes of the Laws of England* (1628), Pt 1, bk 3, ch 8, s 464.
[9] *Cooper v The Wandsworth Board of Works* (1863) 14 CB (NS) 180, 194, 143 ER 414, 420.
[10] E Keedy, 'Ignorance and Mistake in the Criminal Law' (1908) 22 *Harvard Law Review* 75, 81.
[11] *He Kaw Teh v The Queen* (1985) 157 CLR 523 (HCA) 539 (Gibbs CJ); *B (a minor) v Director of Public Prosecutions* [2000] 2 AC 428 (HL) 460.
[12] *Sweet v Parsley* [1970] AC 132 (HL) 148.
[13] See F Wilmot-Smith, 'Express and Implied Terms' (2023) 43 *OJLS* 54.

> There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer.[14]

How then, in the absence of express provision, is a private remedy, incorporating the common law rules concerning compensation, to be determined as a matter of Parliamentary intention by reference to the terms, scope and purpose of the statute? The answer depends upon reading the statute in light of the reasonable expectations that arise from its terms, scope, context and purpose, including particularly the values that are being protected.[15] The more fundamental the value that is protected, the stronger the reasonable expectation of an implied private remedy of compensation, especially where no other remedy is provided.

For a period of time in English legal history it was held that, unless expressly provided otherwise, a breach of a statutory duty should give rise to a private remedy for compensation governed by common law rules as to remedy. In 1854, Lord Campbell CJ said in *Couch v Steel* that there was a 'common law right to maintain an action in respect of a special damage resulting from the breach of a public duty (whether such duty exists at common law or is created by statute)'.[16] The difficulty with that approach is that there is an enormous range of different statutory duties, whether imposed on public authorities or on others. Some of those duties will lead to the public forming a reasonable expectation of a corresponding private remedy, such as 'statutory negligence',[17] where the duty is very similar to that which applies to ordinary, non-statutory persons or where the statutory duty is imposed for the purpose of protecting a class of persons. In those cases it might not be difficult to say, as Fricke did, that 'By allowing a civil remedy [the court] is rendering more effective the legislative will'.[18] But other statutes might impose unique regulatory duties on public authorities with particular penalties and without concern for protection at an individual level. With the increase in legislative action in the century after *Couch v Steel*, the decision of Lord Campbell would have resulted in that which Winfield and Jolowicz described in 1979, as 'absurd … results in creating liabilities wider than the legislature can possibly have intended'.[19]

The approach of Lord Campbell was sidelined, and was the subject of serious doubt, in 1877 in *Atkinson v The Newcastle and Gateshead Waterworks Co.*[20] In that case it was held that there was no private remedy for compensation for damage caused by the failure of the statutory waterworks authority, in breach of its statutory duty, to keep

[14] *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) 731. Cited with approval in *Cullen v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 39, [2003] 1 WLR 1763 [64].

[15] See *Stephens v The Queen* [2022] HCA 31, (2022) 273 CLR 635 [33] (Keane, Gordon, Edelman and Gleeson JJ).

[16] *Couch v Steel* (1854) 3 El and Bl 402, 412–13; 118 ER 1193, 1197. But compare *Doe d Murray, Lord Bishop of Rochester v Bridges* (1831) 1 B & Ad 847, 859; 109 ER 1001, 1006.

[17] *Lochgelly Iron v M'Mullan* [1934] AC 1 (HL) 23. See also M Dyson, *Explaining Tort and Crime* (Cambridge, Cambridge University Press, 2022) 183–86.

[18] G Fricke, 'The Juridical Nature of the Action upon the Statute' (1960) 76 *LQR* 240, 255.

[19] PH Winfield and JA Jolowicz, *Winfield and Jolowicz on Tort*, 11th edn (WVH Rogers ed, London, Sweet & Maxwell, 1979) 154.

[20] *Atkinson v The Newcastle and Gateshead Waterworks Co* (1877) 2 Ex D 441 (KB).

the pipes of the owner of a house charged with water. Lord Cairns replaced what he described as the 'broad general proposition' of Lord Campbell with one that, as Lord Cairns expressed it, depended 'to a great extent … on the purview of the legislation in the particular statute, and the language which they have there employed'.[21] The legislation was not intended for the protection of particular persons or classes of persons nor did it reflect any basic common law norms. There was no reasonable expectation of the existence of a private remedy for compensation for breach of the statutory duty.

The general test for statutory authorities, reflecting the test to be applied to all other bodies for breach of statutory duty, was set out in *Cullen v Chief Constable of the Royal Ulster Constabulary*[22] by Lord Hutton (with whom Lord Millett and Lord Rodger agreed). His Lordship approved of the test set out by Lord Bridge in *Pickering v Liverpool Daily Post and Echo Newspapers plc*:

> [I]t must … appear upon the true construction of the legislation in question that the intention was to confer on members of the protected class a cause of action sounding in damages occasioned by the breach … I know of no authority where a statute has been held … to give a cause of action for breach of statutory duty when the nature of the statutory obligation or prohibition was not such that a breach of it would be likely to cause to a member of the class for whose benefit or protection it was imposed either personal injury, injury to property or economic loss.[23]

Unsurprisingly, in the century and a half since *Atkinson* this focus led to 'the vast bulk of cases', in the words of Neil Foster, lying in 'the area of industrial safety legislation'.[24] In those cases, the underlying common law norm concerning bodily integrity and the legislative purpose of protection of workers made it easier to infer that the legislation contained an inference that the duty be actionable for compensation by a private person.

As mentioned at the outset of this chapter, these principles are not confined to public authorities. They extend to all bodies for whom statutory duties are created. A well-known Australian example is *O'Connor v SP Bray Ltd*.[25] In that case, the plaintiff employee was injured while using a goods lift and was paid compensation by his employer under the Workers' Compensation Act 1926 (NSW). One issue was whether the plaintiff could recover further compensation at common law for breach of statutory duty. The relevant duty required safety gear to be provided for the lift that the plaintiff used. A majority of the High Court of Australia held that the clause created a private remedy for compensation. Dixon J, in the majority, noted the difficulty involved in the question of interpretation when, as he said, 'the legislature has in fact expressed no intention upon the subject'.[26] After acknowledging that 'a duty imposed by statute to take measures for the safety of others seems to be regarded as involving a correlative private right … because it protects an interest recognized by the general principles of the common law',[27] he recognised that implications should be generally inferred in

[21] ibid 448.
[22] *Cullen* (n 14) [41]. See also *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 (HL) 407–09.
[23] *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 2 AC 370 (HL) 420.
[24] N Foster, 'The Merits of the Civil Action for Breach of Statutory Duty' (2011) 33 *Sydney Law Review* 67, 84.
[25] *O'Connor v SP Bray Ltd* (1937) 56 CLR 464 (HCA).
[26] ibid 477.
[27] ibid 478.

industrial safety cases. He said that a private remedy for compensation would be inferred where the statutory duty prescribes a 'specific precaution for the safety of others'.[28]

That narrow formulation was, however, expanded in the classic Australian decision on the subject: *Sovar v Henry Lane Pty Ltd*.[29] That case concerned section 27(1)(d) of the Factories, Shops and Industries Act 1962 (NSW), which in broad terms imposed a duty upon the occupier of a factory to securely fence, and maintain that fencing around, all dangerous parts of machinery. A majority of the High Court of Australia held that a remedy for compensation could be brought by an employee for breach of the duty. In the majority, and giving the oft-cited reasons which are the foundation for Australian law in this area,[30] Kitto J observed that the provision was one calculated to protect others and said:

> [T]he prima facie inference is generally considered to be that every person whose individual interests are thus protected is intended to have a personal right to the due observance of the conduct, and consequently a personal right to sue for damages if [they] be injured by a contravention.[31]

His Honour emphasised that 'the question whether a contravention of a statutory requirement of the kind in question here is actionable at the suit of a person injured thereby is one of statutory interpretation'.[32] It was not one that was 'conjured up by judges to give effect to their own ideas of policy and then "imputed" to the legislature'.[33] The existence of different results due to different legislation requiring a different inference is 'no justification', he rightly said, 'for seeing the task as other than a genuine exercise in interpretation'.[34]

IV. Where the Statute Implies Both the Relevant Duty of the Statutory Authority and the Private Remedy for Compensation for the Breach of that Duty

The next category is where the action against the statutory authority depends upon an even greater implication: an implication of both the duty *and* the remedy for compensation for breach of the duty. Two situations in which these implications of duty and remedy can occur are as follows: (i) where there is an express statutory power and the implication is of a duty to exercise the statutory power with reasonable care which the statutory authority fails to do; and (ii) where there is an implication of a positive duty to act but the statutory authority acts ultra vires or fails to act at all.

[28] ibid.
[29] *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397 (HCA).
[30] See, eg, *Field v Dettman* [2013] NSWCA 147 [39] (Preston CJ, Beazley P agreeing at [1], Meagher JA agreeing at [2]); *Gardiner v Victoria* [1999] VSCA 100, [1999] 2 VR 461 [26] (Phillips JA, Winneke P agreeing at [1]–[3]); *Owners Strata Plan 50276 v Chee Min Thoo* [2013] NSWCA 270, (2013) 17 BPR 33,789 [207] (Tobias AJA, Barrett JA agreeing at [1]–[21], Preston CJ agreeing at [227]).
[31] *Sovar* (n 29).
[32] ibid 405.
[33] ibid.
[34] ibid.

A. Cases that Concern the Negligent Exercise of the Statutory Authority's Statutory Power

In some cases, the statute expressly provides the statutory authority with a power, but does not expressly provide for an associated duty to exercise that power with reasonable care. Such a duty can arise by implication after close examination of the terms of the statute. The implication will usually draw from the common law. This is a very old principle. In *Geddis v Proprietors of Bann Reservoir*, Lord Blackburn said in 1878:

> For I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorized, if it be done negligently. *And I think that if by a reasonable exercise of the powers, either given by statute to the* [defendant], *or which they have at common law, the damage could be prevented, it is, within this rule, 'negligence' not to make such reasonable exercise of their powers*.[35]

A century later, the point was beautifully expressed by William Wade, who said that statutory interpretation was at the heart of determining the conditions upon the exercise of statutory powers.[36] A recent example of a case in this category is *Electricity Networks Corporation v Herridge Parties* ('*Western Power*').[37] In that case, the High Court of Australia considered the liability of Western Power – a statutory authority with powers and responsibilities in respect of an electricity distribution system – for loss and damage suffered by a large number of landowners resulting from a bushfire. Western Power had exercised its statutory powers by entering the property of a landowner and installing electrical apparatus on a timber pole owned by the landowner. Western Power did not have any system of periodic inspection of timber poles that supported Western Power's live electrical apparatus which had been installed, and which were used, in the exercise of Western Power's statutory powers. The fire started after a timber pole collapsed due to fungal decay and termite damage. The pole's collapse caused electrical arcing which ignited the surrounding dry vegetation. The failure by Western Power to have a system of periodic inspection of its electrical apparatus was held to amount to a breach of a duty of care owed by Western Power.[38]

The High Court of Australia said:

> Western Power had a duty to take reasonable care in the exercise of its powers, and the content of that duty relevantly required it to avoid or minimise the risk of injury to those persons, and loss or damage to their property, from the ignition and spread of fire in connection with the delivery of electricity through its electricity distribution system – an electricity distribution system which it undertook, operated, managed and maintained in the discharge of its functions and powers by placing its apparatus on Mrs Campbell's land. The common law imposed that duty in tort.[39]

[35] *Geddis v Proprietors of Bann Reservoir* (1878) 3 App Cas 430 (Exch), 455–56 (emphasis added), quoted in *Fullarton v North Melbourne Electric Tramway and Lighting Co Ltd* (1916) 21 CLR 181 (HCA) 199–200.
[36] HWR Wade, *Administrative Law*, 1st edn (Oxford, Oxford University Press, 1961) 40.
[37] *Electricity Networks Corporation v Herridge Parties* [2022] HCA 37, (2022) 406 ALR 1.
[38] ibid [16], [52] (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ).
[39] ibid [52].

In describing the duty that was owed by Western Power as one that was 'imposed … in tort' the Court was not suggesting that the duty was a 'freestanding common law rule'. Rather, the Court specifically, and three times, denied such a suggestion.[40] The duty was instead an implication based on the statute, but one which incorporated principles of the common law. The Court emphasised that 'The starting point for the analysis of any such duty is the terms, scope and purpose of the applicable statutory framework'.[41] In other words, the 'common law' duty to exercise its powers with reasonable care was a duty that arose as a matter of statutory implication after analysis of the terms, scope and purpose of the legislation. As the Court said, 'The starting point for analysis of any common law duty of care that might be owed by any statutory authority must always be the particular statutory framework within which the statutory authority operates'.[42] It should be noted that there was no issue, and therefore no mention in the decision, concerning section 5W of the Civil Liability Act 2002 (WA), which in other cases might have modified the duty by considerations including whether the functions required to be exercised by the public authority are limited by its reasonably available resources.

B. Cases that Concern an Ultra Vires Act or an Omission of the Statutory Authority

The decision in *Western Power* involved an implication of a common law duty of reasonableness as a condition upon the exercise of statutory powers. But what of cases where the statutory authority acts in a manner that is beyond its powers entirely or fails to act at all where it is not required to do so? Does the statutory authority have a duty to take reasonable care if the act is unauthorised or a positive duty to act in any instance of an omission to do something that is not required by statute? The answer again lies in a legislative implication but this time in the nature of an underlying presupposition. In *Mersey Docks Trustees v Gibbs*, Blackburn J (delivering the joint opinion of all judges who heard the case) said:

> [I]n the absence of anything in the statute (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works.[43]

In other words, the implication, arising by presupposition, is that a statutory authority which, without authority, exercises a power that an individual can exercise should generally be subject to the same duties as an individual in the exercise of that power. The foundation of that presupposition is Dicey's second aspect of the rule of law – that every person 'whatever be [their] rank or condition, is subject to the ordinary law

[40] ibid [19], [31].
[41] ibid [31].
[42] ibid [20].
[43] *Mersey Docks Trustees v Gibbs* (1866) 11 HLC 685, 707; 11 ER 1500 (HL) 1508–09.

of the realm'[44] – which 'excludes the idea of any exemption of official or others from the duty of obedience to the law'.[45] Again, that presupposition can be displaced. For instance, historically there were circumstances in which the presupposition did not extend to the Crown itself. No suit or action could be brought against the Sovereign.[46] Whatever the remnants of such a rule or presumption today, public authorities did not generally obtain a benefit of Crown immunity when they were created as distinct statutory bodies. As Gibbs CJ said in *Townsville Hospitals Board v Council of the City of Townsville* (with whom Murphy, Wilson and Brennan JJ agreed):

> '[T]here is evidence of a strong tendency to regard a statutory corporation formed to carry on public functions as distinct from the Crown unless parliament has by express provision given it the character of a servant of the Crown' … All persons should prima facie be regarded as equal before the law, and no statutory body should be accorded special privileges and immunities unless it clearly appears that it was the intention of the legislature to confer them.[47]

Once again, therefore, a statutory implication, by presupposition, gives force to common law rules. In this way, as Lord Reed said in *Robinson v Chief Constable of West Yorkshire Police*,[48] public authorities are 'generally subject to the same liabilities in tort as private individuals and bodies'. The statutory presupposition picks up common law rules concerning tortious liability for both acts and omissions. Hence, like private persons who are not liable for an omission to act in the absence of a positive duty to do so, public authorities have not generally been held liable for an omission to act when they have no statutory duty to act.[49] A graphic example is provided by Ames, who said:

> As I am walking over a bridge a man falls into the water. He cannot swim and calls for help. I am strong and a good swimmer, or, if you please, there is a rope on the bridge, and I might easily throw him an end and pull him ashore. I neither jump in nor throw him the rope, but see him drown.[50]

Although expressing doubt about whether the law should continue in this state, Ames said

> however revolting the conduct of the man who declined to interfere, he was in no way responsible for the perilous situation, he did not increase the peril, he took away nothing from the person in jeopardy, he simply failed to confer a benefit upon a stranger … The law does not compel active benevolence.[51]

[44] AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 1st edn (London, Macmillan & Co, 1885) 177–78. See also *Palmer v Western Australia* [2021] HCA 31, (2021) 274 CLR 286 [24]; *Western Power* [2022] HCA 37, (2022) 406 ALR 1 [32].

[45] Dicey (n 45) 215.

[46] H Broom, *A Selection of Legal Maxims* (London, Maxwell & Son 1845) 12–13. But compare now in England, Crown Proceedings Act 1947 (UK), s 2; and in Australia, Judiciary Act 1903 (Cth), s 64.

[47] *Townsville Hospitals Board v Townsville City Council* (1982) 149 CLR 282 (HCA) 291, citing *Launceston Corporation v Hydro-Electric Commission* (1959) 100 CLR 654 (HCA) 662 (Dixon CJ, Fullagar, Menzies, Windeyer JJ), *State Electricity Commission (Vict) v City of South Melbourne* (1968) 118 CLR 504 (HCA) 510 (Barwick CJ, McTiernan, Taylor and Menzies JJ).

[48] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [2018] AC 736 [32].

[49] ibid [34]. See also *N v Poole Borough Council* [2019] UKSC 25, [2020] AC 780 [64].

[50] J Ames, 'Law and Morals' (1908) 22 *Harvard Law Review* 97, 112.

[51] ibid 112.

Putting aside the possibility of a limited form of recovery based on general reliance, which was briefly left open in *Stovin v Wise*,[52] this principle has been affirmed in relation to public authorities in England.

The position in Australia is not as clear. Whilst the 'general' position in England treats the powers of public authorities in the same way as the equivalent powers of private individuals, the Australian position, at least until recently, has treated the general position in the opposite way, starting from an assumption that the exercise of power by a public authority is not generally comparable to the exercise of power by a private individual.[53] The difficulties arise from the decisions of the High Court of Australia in two cases involving the liability of public authorities for torts: *Pyrenees Shire Council v Day*[54] and *Brodie v Singleton Shire Council.*[55]

Pyrenees Shire Council v Day involved two appeals concerned with a local council's liability for the damage caused by a fire that had destroyed the premises occupied by the appellant tenants in the second appeal and a nearby shop owned by the respondents in the first appeal. The fire that caused the damage escaped due to a defect in the tenants' chimney of which all the respondents had been unaware. The council had a power to carry out works for the prevention of fire. It also had a power to issue notices requiring fireplaces or chimneys to be altered so as to make them safe for use. Prior to the fire, the Council had inspected the fireplace and had identified a defect. The Council had written to the former tenants, detailing the defect, and telling them that the chimney must be repaired and must not be used in the meantime. But the Council did not take any significant further steps. Two members of the Court, Toohey and McHugh JJ, held that the Council was liable to the shop owners but not to the tenants because the shop owners, but not the tenants, placed general reliance upon the Council to protect them from such a fire.[56] Two others, Gummow and Kirby JJ, held that the Council was liable to both the shop owners and the tenants because it had breached a duty of care owed to both.[57] Brennan CJ saw the case as one of private compensation for breach of a public duty. He held that the Council was liable to both the shop owners and the tenants because it had a public law duty to exercise its powers.[58]

The view of Gummow and Kirby JJ, which was ultimately to prevail, eschewed the doctrine of general reliance as a fiction: there was no real reliance at all.[59] Rather, their Honours resolved the case on the basis that the Council should have exercised its powers to protect the tenants and the shop owners. The manner in which Gummow J expressed it, which was ultimately to be adopted in *Brodie*, was that the Council was in a position of control over both the tenants and the shop owners in relation to fire. The distinction

[52] *Stovin v Wise* [1996] AC 923, 937–38, 953–54. Compare *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15, [2004] 1 WLR 1057, 1070 [43].

[53] See *Davis v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2023] HCA 10, (2023) 408 ALR 381 [132]–[135] (Edelman J). Compare the intermediate position in Canada in *City of Nelson v Marchi* 2021 SCC 41, (2021) 463 DLR (4th) 1 [39].

[54] *Pyrnees Shire Council v Day* (1998) 192 CLR 330 (HCA).

[55] *Brodie v Singleton Shire Council* [2001] HCA 29, (2001) 206 CLR 512.

[56] *Pyrnees* (n 54) [81]–[82], [111]–[117].

[57] ibid [171]–[172], [254]–[256].

[58] ibid [28].

[59] ibid [163], [231].

between misfeasance and non-feasance was doubted, but not overruled.[60] Although the case did not involve anything that was done by the Council to increase the risk of fire, Gummow J considered that this was a case of misfeasance by the council.[61]

Brodie concerned two applications for special leave to appeal which were heard as though they were appeals with special leave granted in the court's reasons.[62] In the first appeal, Mr Brodie claimed damages for the injuries he sustained when the truck he was driving fell through the timber decking of a bridge on a public road.[63] The supports for the bridge had deteriorated as a result of dry rot or white ant infestation. In the second appeal, Ms Ghantous claimed damages for personal injuries sustained when she tripped and fell while stepping from a concrete footpath onto the verge. Erosion had caused unsealed strips on either side of the footpath to degrade such that they were not level with the footpath. In each case, the Council had the care, control and management of every public road within its municipal area, including roads on bridges and pathways. Under section 240 of the Local Government Act 1919 (NSW) it had the power to repair any such road or pathway, but had no positive duty to do so.

A majority of the Court (Gaudron, McHugh, Gummow and Kirby JJ) held that the Council could be liable to Mr Brodie for negligence and remitted the matter to the Court of Appeal for further consideration.[64] The second appeal was unanimously dismissed by the Court on the basis that there was no negligence by the Council disclosed on the facts.[65] The foundation for the potential liability in negligence was statutory. The assumption made by the majority was that a presupposition of the Local Government Act 1919 (NSW) was that the common law of torts would apply to the council just as it applied to other persons.

The majority treated the liability for negligence of the Council, a statutory authority, as the same as that of an individual. A special rule of immunity from liability for a local authority in relation to highways was rejected.[66] And the potential liability of the Council to Mr Brodie for negligence was based on a principle that was expressed in terms that are equally applicable to individuals. That principle was based on a rejection of the distinction between misfeasance (negligent action) and non-feasance (an omission to act) as artificial.[67] Instead, the joint judgment of Gaudron, McHugh and Gummow JJ said that a duty of care may be imposed on a statutory authority obliging it to exercise its statutory powers where those powers 'give it such a significant and special measure of control over the safety of the person or property of citizens'.[68]

It is possible, however, to recognise that liability can arise in some cases of non-feasance without abolishing a general distinction between misfeasance and non-feasance

[60] ibid [174]–[177].
[61] ibid [178].
[62] *Brodie* (n 55) [8], [49] (Gleeson CJ), [184] (Gaudron, McHugh and Gummow JJ), [339] (Kirby J), [366], [380]–[382] (Callinan J).
[63] And the owner of the truck, the second applicant, claimed for damage to the truck.
[64] *Brodie* (n 55) [185] (Gaudron, McHugh and Gummow JJ), [249] (Kirby J).
[65] ibid [8], [49], [167] (Gleeson CJ), [184] (Gaudron, McHugh and Gummow JJ), [244], [339] (Kirby J), [355], [366] (Callinan J).
[66] ibid [134]–[139] (Gaudron, McHugh and Gummow JJ), [193] (Kirby J).
[67] ibid [84]–[90], [199].
[68] ibid [102].

or acts and omissions to act. In particular, when a person (either an individual or a statutory authority) has failed to act then that person can be liable if they have, by their conduct, assumed a responsibility to act.[69] One significant, although not exclusive, indicator of an assumption of responsibility to act is where a person has assumed control over a situation. In *Western Power*, the High Court of Australia explained that the references in *Brodie* to the significant and special measure of control that the authority had been given should be understood in this sense of assumption of responsibility.[70] It was, of course, unnecessary to decide in *Brodie* whether the Council had, in fact, acted in such a way as to assume responsibility to repair in light of the significant control that it had. The joint judgment did, however, observe that the Council had 'patch[ed] the bridge to make it capable of bearing traffic … creat[ing] a superficial appearance of safety'.[71] The matter was remitted to the New South Wales Court of Appeal to decide whether the Council was liable under the ordinary principles of negligence.[72]

In summary, the position where a statutory authority acts beyond its powers or where it fails to act is based on the same approach as where a statutory authority acts within its powers but unreasonably. In all cases, the legislation is the ultimate source of liability, but there is usually a legislative presupposition that the common law will apply, with the effect that liability rules for torts apply to statutory authorities in the same manner as they do to individuals or other bodies. The presupposition that the common law will fill a gap in expression in the legislation is the same presupposition as where legislation expressly provides for both a statutory duty and a remedy, but impliedly leaves the mechanics of the remedy to the common law or where the legislation provides for the duty but impliedly creates a private remedy for compensation with the compensation to be determined according to the common law.

V. Vicarious Liability of Public Authorities

In this chapter I have focused upon the primary liability of statutory authorities for torts – liability that is imposed on statutory authorities for a breach of their own duties. But the same questions of statutory implication arise where the liability to be imposed is vicarious rather than primary – where 'vicarious' is used to mean a liability derived from the liability of others. The same approach applies whether the duty is one that is expressly imposed by statute or whether it is one imposed as a result of the statute impliedly picking up common law duties from the law of torts. The common law rules that are impliedly picked up by the statute include the rules of vicarious liability for torts.

Where legislation has adopted the common presupposition of the common law duties of the law of torts, it will almost inevitably be the case that the legislation

[69] *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL); *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36, (2014) 254 CLR 185 [122] (Hayne and Kiefel JJ); *Junior Books Ltd v Veitchi Co Ltd* [1983] 1 AC 520 (HL).

[70] *Western Power* [2022] HCA 37, 406 ALR 1 [23] (Kiefel CJ, Gageler, Gordon, Edelman and Steward JJ).

[71] ibid [177].

[72] ibid [185], [249].

presupposes the operation of the associated common law rules of vicarious liability. For instance, in *Majrowski v Guy's and St Thomas's NHS Trust*,[73] the defendant NHS Trust was held vicariously liable for a breach of the statutory duty not to harass under the UK's Protection from Harassment Act 1997 (UK). Lord Nicholls said that 'Unless the statute expressly or impliedly indicates otherwise, the principle of vicarious liability is applicable where an employee commits a breach of a statutory obligation sounding in damages while acting in the course of [their] employment'.[74] And Baroness Hale added that their Lordships were 'not policy-makers and legislators, but judges construing the language used by Parliament, in the context of the general law of vicarious liability of which Parliament must be presumed to have been aware'.[75]

But the question will, as always, be a question of statutory interpretation. In *Majrowski*,[76] Lord Nicholls referred to one case where, as a matter of statutory interpretation, there was no presupposition of the rules of vicarious liability. That case was the decision of the High Court of Australia in *Darling Island Stevedoring and Lighterage Co Ltd v Long*.[77] Mr Long, a wharf labourer, was injured when an unsecured hatch beam became displaced during the loading and unloading operations of a ship, and he was thrown into the hold. Regulation 31 of the Navigation (Loading and Unloading) Regulations 1928 (Cth), made under the Navigation Act 1912 (Cth), imposed a duty on the 'person-in-charge' to secure, before loading or unloading, any hatch beam that was left in place on any vessel. The 'person-in-charge' was relevantly defined as the person in control of loading or unloading. The maximum penalty for a breach of Regulation 31 was £100.

Mr Long sought damages of £10,000 from his employer, a stevedoring company, for the personal injuries that he suffered as a consequence of the breach of Regulation 31. One issue was whether a breach of the duty in Regulation 31 could lead to an award of compensation. The three members of the High Court of Australia who expressed an opinion on this issue were Williams, Webb and Fullagar JJ. All of them held that, as a matter of statutory interpretation, the Regulations impliedly recognised a right of compensation for the breach.[78] As Dixon J had stated 20 years earlier in *O'Connor v S P Bray Ltd*,[79] a duty imposed by statute to take measures for the safety of others 'will give rise to a correlative private right [to compensation] unless from the nature of the provision or from the scope of the legislation of which it forms a part a contrary intention appears'. Nevertheless, Mr Long's action failed. Three members of the Court (Webb, Kitto, and Taylor JJ) held that Regulation 31 imposed no duty on Mr Long's employer, because it was the supervisor or foreman, not the employer, who was the 'person-in-charge'.[80] At least for Kitto J, that was the only method by which liability could have been imposed on Mr Long's employer. In other words, for Kitto J, liability was never really vicarious: the liability of someone is never attributed to another in the law of

[73] *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224.
[74] ibid [17].
[75] ibid [74].
[76] ibid [12]–[14].
[77] *Darling Island Stevedoring and Lighterage Co Ltd v Long* (1957) 97 CLR 36 (HCA).
[78] ibid 49–50, 53–54, 55–56.
[79] *O'Connor* (n 25) 478.
[80] ibid 54, 59–60, 66.

torts, only the actions of someone. However, two members of the Court (Williams and Fullagar JJ) considered whether the employer could be vicariously liable; that is, whether the liability of the supervisor to compensate Mr Long could be attributed to the employer. Both concluded that it could not. On a proper interpretation of Regulation 31, including the fact that it imposed criminal penalties only upon the person in charge, the implication of a right to compensation for breach of Regulation 31 was limited to breaches by the person in charge and vicarious liability was impliedly excluded.[81]

As a matter of statutory interpretation, the possibility of excluding vicarious liability in a case like *Darling Island* is the flip side of the statutory creation of a non-delegable duty. A non-delegable duty interpretation means that the statutory duty cannot be discharged by delegation and a non-vicarious liability interpretation means that the statutory liability cannot be extended to an employer.

VI. The Position in Canada

In conclusion, it is necessary to address the jurisdiction which is the most antagonistic to the thesis that I have presented: Canada. For some time, the Canadian approach denied the existence of what has been described as a tort of breach of statutory duty. In other words, Canadian law rejected the second category described above where legislation expressly provides for the duty but impliedly assumes the existence of a private right to compensation for breach of that express statutory duty with the quantum of compensation to be determined by common law principles. This category was rejected because it was said that the implication is a fiction. Instead, it was thought that there should be a free-standing application of the common law independently of the statute. The same type of reasoning would necessarily also apply to the third category discussed above.

The background to the approach that was taken in Canada was academic criticism of legislative implications based on common law presuppositions or assumptions. For example, Fleming had written that in cases where a statute provides for an express duty but does not expressly provide for a private remedy for compensation for breach of the duty then 'the statute just does not contemplate, much less provide, a civil remedy'.[82] Fleming thought that liability arose instead due to common law principles of negligence which operated on the statutory authority entirely outside the statute. Prosser took a similar approach describing a statutory implication in such circumstances as 'judicial legislation' and as 'pure fiction … when the legislators said nothing about it'.[83]

There were numerous problems with this view. First, the notion that an implication cannot arise because the legislators said nothing about the subject involves a basic misunderstanding of implications. Almost every statement ever made involves implications about things that are not said. Our use of language to convey meaning is built upon assumptions and presuppositions. As explained earlier in this chapter, these presuppositions and assumptions are informed by our underlying expectations which are in turn informed by social values and norms.

[81] See esp ibid 52–53.
[82] J Fleming, *The Law of Torts*, 5th edn (Sydney, Law Book Co, 1977) 124.
[83] WL Prosser, *Handbook on the Law of Torts*, 4th edn (St Paul, West Publishing Co, 1971) 191–92.

Secondly, if statutory interpretation were to proceed without regard to any presuppositions or assumptions then it really would be judicial legislation for the common law to take a statutory duty that did not exist or have any counterpart at common law and create an entirely new common law tort from it. For instance, in a case like *Rowning v Goodchild*, without any suggestion of any common law tort such as conversion or negligence, the liability for failure to deliver the mail could only arise at common law by the creation of a new tort of failing to deliver mail to a person's home. This would not be to use the statute as a marker of contemporary norms from which the common law could develop. It would be to use the statute as a means of judicially legislating for a new tort. If the principled reason for the creation of such a tort is the policy of the legislation, then surely it should be for Parliament to create the tort. Indeed, if the legislation were amended then would the common law tort be amended accordingly?

Thirdly, and perhaps due to the problems of the second point above, Fleming and Prosser adopted an ahistorical approach of suggesting that liability in every case of breach of statutory duty should be replaced by the existing tort of negligence rather than the creation of a new tort. This approach is obviously contrary to all of those earlier cases where liability was found to be based on an express statutory duty, such as a duty to fence machinery or a duty to provide safety gear for use in a lift. The liability of a defendant to compensate in those and many other cases was not based on general principles of negligence. The liability was based on the particular and express statutory duty. More fundamentally, as I have already explained, the existence of a general negligence liability is itself a necessary implication, an assumption of the legislation that the statutory authority should be treated in the same way as an individual. In other words, even if private liability based on a breach of an express statutory duty were to be replaced with private liability based on the tort of negligence, that would still involve a statutory implication: the legislation would necessarily contain an implication by presupposition, incorporating the rules from the common law tort of negligence. The existence of unspoken implications is not avoided.

Unfortunately, the views of Fleming and Prosser were highly influential in the leading decision of the Supreme Court of Canada in *R v Saskatchewan Wheat Pool*,[84] a decision that has not been followed in England or Australia.[85] That case involved a claim for damages made by the Canadian Wheat Board against the Saskatchewan Wheat Pool for economic loss suffered as a result of a shipment of wheat being infested with rusty grain beetle larvae. As a result of the infestation, the ship had to be diverted. The Board suffered losses including the cost of unloading and reloading the grain and the fumigation of the grain and holds. The Board relied entirely on a claim of breach of statutory duty that was said to give rise to a private remedy of compensation. The Wheat Pool was alleged to have breached the statutory duty in section 86(c) of the Canada Grain Act, which prohibited the delivery of infested grain out of a grain elevator.[86]

At trial, Collier J found in favour of the Board and held that section 86(c) 'point[ed] to a litigable duty on the defendant, enforce[able] by persons injured or aggrieved by

[84] *R v Saskatchewan Wheat Pool* [1983] 1 SCR 205.

[85] *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 (HCA) 459 (Mason J). See also KM Stanton, 'New Forms of the Tort of Breach of Statutory Duty' (2004) 120 *LQR* 324, 333; Foster (n 25) 67, 80–81.

[86] Canada Grain Act, RSC 1985, c G-10, s 86(c).

a breach of that duty'. The Federal Court of Appeal reversed that decision. The Court unanimously held that the Canada Grain Act did not grant a private remedy to persons who suffered loss resulting from a breach of a statutory duty imposed by that Act. This was broadly on the basis that the Act was not intended to benefit any particular class of persons, but rather was intended to regulate the grain industry and protect the public interest in that industry. Uncontroversially, the Supreme Court of Canada dismissed the appeal. Controversially, the Court took the seemingly radical step of concluding that the civil consequences of a breach of statute should be entirely subsumed in the law of negligence. Dickson J delivered the judgment of the Court. Of the 'civil cause of action' for breach of statutory duty, he said:

> The uncertainty and confusion in the relation between breach of statute and a civil cause of action for damages arising from the breach is of long standing. The commentators have little but harsh words for the unhappy state of affairs, but arriving at a solution, from the disarray of cases, is extraordinarily difficult.[87]

The solution adopted by the Supreme Court was to follow the approach of Fleming and Prosser. Dickson J said:

> [B]reach of statute, where it has an effect upon civil liability, *should be considered in the context of the general law of negligence*. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.[88]

This reasoning encounters the difficulties to which I have already referred. The problems were further compounded by the creation of two exceptions by the Court. The first exception created was in relation to industrial penal legislation. The Supreme Court suggested that the reason for this exception was that industrial legislation in Canada had historically enjoyed 'special consideration'. Yet, as explained above, the cases involving industrial legislation are the prime, and most likely, instances where the inference is drawn that the legislation contains an implication authorising a private remedy for compensation for breach of the statutory duty. As Foster has observed, the exception is 'telling' because it 'would almost eat up the rule'.[89]

The second exception was where the 'statute provides for it'.[90] In other words, a private remedy for compensation for breach of a statutory duty would be available where the statute provided for it. It seems that by reference to the statute 'providing', Dickson J meant that the statute must *expressly* so provide. Later in the reasons, he said that it was necessary to 'refrain from conjecture as to Parliament's unexpressed intent' and that the 'most we can do in determining whether the breach shall have any other legal consequences is to examine what is expressed'.[91] Ultimately, the Court concluded that no private action could lie because the Canada Grain Act did not contain any express provision for damages for a party who receives infested grain out of an elevator.[92]

[87] *Saskatchewan Wheat Pool* (n 84) 211.
[88] ibid 225 (emphasis added).
[89] Foster (n 25) 84.
[90] *Saskatchewan Wheat Pool* (n 84) 223.
[91] ibid 226.
[92] ibid 226.

Even accepting that it was not appropriate to draw an implication in that case, how can implications in a statute be disregarded? That is as impossible to do as disregarding implications in ordinary speech. As the High Court of Australia recently explained in *Kingdom of Spain v Infrastructure Services Luxemborg Sàrl*:

> The meaning of an express term is derived primarily from the content of the words expressed. It contrasts with an implied term, the meaning of which is derived primarily by inference from the conduct of the parties to the agreement and the circumstances in light of the express terms. There can sometimes be difficulty in distinguishing between the two types of terms, because often the imprecision of language means that inferences are required to understand an express term.[93] Even the words of the most carefully drafted [text] are built upon a foundation of presuppositions and necessary implicatures and explicatures.[94]

Fortunately, the strictures of the Canadian position in *Saskatchewan Wheat Pool* were subsequently wound back. In *Cooper v Hobart*,[95] and *Edwards v Law Society of Upper Canada*,[96] one reason that claims for negligence were denied was because the relevant legislation did not expressly *or by implication* permit a novel private law duty. And in *City of Nelson v Marchi*[97] the Supreme Court recognised that some statutory powers generally would involve 'policy' decisions and would not be amenable to (an implication of) a duty of reasonable care. In *Cooper*, the statutory regulator, a Registrar of mortgage brokers, was held not to be liable to investors for losses that they suffered which were alleged to have been caused by the Registrar's failure to suspend the mortgage broker's licence at an earlier point in time. The Supreme Court did not suggest that the duty of care alleged of the Registrar was a free-standing common law duty. Rather, although expressing the notion through the lens of 'proximity', the Court accepted that the duty was one that had to be recognised expressly *or by implication* in the legislation.[98] McLachlin CJ and Major J, delivering the judgment of the Court, said:

> In this case, the factors giving rise to proximity, if they exist, must arise from the statute under which the Registrar is appointed. That statute is the only source of his duties, private or public. Apart from that statute, he is in no different position than the ordinary man or woman on the street. If a duty to investors with regulated mortgage brokers is to be found, it must be in the statute.[99]

With one addition, that expression, and the law of Canada, now aligns neatly with the central point made in this chapter: the starting point and the ending point for a determination of the liability of statutory authorities is the statute. The one addition is that statutory implications, as the loose categorisation in this chapter shows, are not as rare as had previously been supposed in Canada.

[93] Citing F Wilmot-Smith (n 14) 58–59. See also D Wilson and D Sperber, *Meaning and Relevance* (Cambridge, Cambridge University Press, 2012) 149, 168.

[94] *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11, (2023) 275 CLR 292 [24] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

[95] *Cooper v Hobart* 2001 SCC 79, [2001] 3 SCR 537 [42], [44].

[96] *Edwards v Law Society of Upper Canada* 2001 SCC 80, [2001] 3 SCR 562 [13].

[97] *City of Nelson v Marchi* 2021 SCC 41, (2021) 463 DLR (4th) 1.

[98] *Cooper* (n 95) [13].

[99] ibid [43].

VII. Conclusion

The ultimate lesson of this chapter is simple. The liability of public authorities for torts depends upon the statutes which create those authorities and confer upon them their duties and powers. The extent of the liability of an authority that is created by statute is to be determined by statute. The enormous confusion and difficulty that has been generated over the last couple of centuries has arisen due to this question: how, consistently with that basic lesson, can the common law apply to public authorities? The simple, and democratic, answer is that the common law applies by implication. Sometimes the implication is a small one: it involves little more than the legislative assumption that common law rules will operate to provide the mechanics for the operation of the express remedy for compensation for a breach of an express statutory duty. Sometimes the implication is a large one: it involves an assumption that common law rules will operate to recognise both the duty and the mechanics of the implied remedy for compensation for breach of that duty. But although the implication is not strongly explicated from the statutory text, that is not fatal. It is an error to say, as the Supreme Court of Canada unfortunately did in *Saskatchewan Wheat Pool*, but has since retreated from, that it is a fiction to recognise an unexpressed implication. Every implication ever made is, to some degree, unexpressed.