Trinity Term

[2016] UKSC 38

On appeal from: [2015] CSIH 11

JUDGMENT

Campbell (Appellant) v Gordon (Respondent) (Scotland)

before

Lady Hale, Deputy President

Lord Mance

Lord Reed

Lord Carnwath

Lord Toulson

JUDGMENT GIVEN ON

6 July 2016

Heard on 12 April 2016

Appellant	Respondent
Andrew Smith QC	Roddy Dunlop QC
Craig Murray	Richard Pugh
(Instructed by Lefevre Litigation)	(Instructed by Harper MacLeod LLP)

LORD CARNWATH: (with whom Lord Mance and Lord Reed agree)

1.
The appellant, Mr Campbell, was employed by the company (the first respondent) as an apprentice joiner. The second respondent, Mr Gordon, was the sole director of the company and responsible for its day to day operation. On 28 June 2006 the appellant suffered an injury whilst working with an electric circular saw. Although the company had employers' liability insurance policy, the policy (surprisingly for a business of this kind) excluded claims arising from the use of "woodworking machinery" powered by electricity. It therefore excluded any claim arising out of Mr Campbell's accident. The company's failure to have in place appropriate insurance was a breach of its obligations under section 1(1) of the Employers' Liability (Compulsory Insurance) Act 1969.

2.

The company itself went into liquidation in 2009. Mr Campbell now seeks to hold Mr Gordon, as director, liable in damages for the company's failure to provide adequate insurance cover. Mr Gordon himself is recently bankrupt. We were told by Mr Smith QC, appearing for Mr Campbell, that there are discussions with him with a view to obtaining an assignation of any rights he may have against the broker who arranged the inadequate insurance. However, the sole issue for us is whether civil liability attaches to Mr Gordon for that failure.

3.
The claim was upheld by the Lord Ordinary, but dismissed by the Inner House by a majority (Lord Brodie and Lord Malcolm, Lord Drummond Young dissenting). In this respect they arrived at the same conclusion, albeit not by identical reasoning, as the English Court of Appeal in Richardson v Pitt-Stanley [1995] QB 123 (Russell and Stuart-Smith LJJ, Sir John Megaw dissenting).

4.
The foundation of the claim has to be found in the 1969 Act. The primary duty to insure is placed on the employer by section 1, which provides:

"1. Insurance against liability for employees.

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

Section 4 provides for regulations governing the issue of certificates of insurance and their display for the information of employees and production on demand to inspectors duly authorised by the Secretary of State. These also are obligations placed on the employer.

5.
Section 5 which is at the heart of the appeal provides, as amended:

"5. Penalty for failure to insure.

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

6.
On its face that is an unpromising basis for Mr Campbell's present claim. This provision does not in terms impose any duty to insure on a director or other officer as such, let alone any civil liability for failure to do so. The duty rests on the corporate employer. The veil of incorporation is pierced for a limited purpose. It arises only where an offence is committed by the company, and then in defined circumstances imposes equivalent criminal liability on the director or other officer on the basis, not that he is directly responsible, but that he is "deemed to be guilty" of the offence committed by the company.

7.

For the appellant Mr Smith relies on well-established principles governing civil liability in respect of statutory obligations. He accepts that as a general rule, where a statute imposes an obligation and imposes a criminal penalty for failure to comply, there is no civil liability; but that is subject to exceptions, including -

“where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation” (per Lord Diplock, Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173, at 185)

8.
There are many examples of this exception in practice, dating back more than 100 years, for example (in England) to Groves v Lord Wimborne [1898] 2 QB 402, relating to the Factory and Workshop Act 1878, and in Scotland in Black v Fife Coal Co Ltd, 1912 SC (HL) 33; [1912] AC 149, concerning the Coal Mines Regulation Act 1887. In the latter case, Lord Kinnear said (pp 45 and 165-166):

“We are to consider the scope and purpose of the statute, and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention. Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the prima facie right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability.”

9.
The same principle was applied to a failure to insure, in the context of motor insurance, in Monk v Warbey [1935] 1KB 75. Section 35 of the Road Traffic Act 1930 made it illegal to use or to cause or permit any other person to use a motor vehicle on a road unless there was in force in relation to the user of the vehicle a policy of insurance against third party risks that complied with the requirements of the Act. It was held by the Court of Appeal that, where the owner of a car permitted its use by a person uninsured against third party risks and injury to a third party was caused by the negligent driving of that person, the owner was liable in damages to that third party for breach of his statutory duty to insure. That was followed in Scotland in Houston v Buchanan, 1940 SC (HL) 17, [1940] 2 All ER 17.

10.
Mr Smith submits that Lord Diplock’s words are directly applicable to this case. The duty in question was imposed for the protection of employees such as Mr Campbell, and the context is identical to that of the Factories Acts. In its application to the duty to insure, he submits, the case is indistinguishable from Monk v Warbey. As a “cross-check” of the appropriateness of such liability, he relies on the tri-partite test set out by Lord Bridge in Caparo Industries plc v Dickman [1990] AC 605, 617-618 for a duty of care in negligence, including foreseeability, proximity and fairness. He relies also on the statement of Lord Bingham in Fairchild v Glenhaven Funeral Services Ltd [2003] 1 AC 32, 67, referring to the “strong policy argument in favour of compensating those who have suffered grave harm, at the expense of their employers who owed them a duty to protect them against that very harm and failed to do so.” Mr Smith submits that the contrary conclusion arrived at by the English Court of Appeal in Richardson was based on a flawed analysis, not least the view of Stuart Smith LJ (p 131E-H)

that the duty to insure was for the benefit of the employer rather than the employee. He relies on the detailed criticism of that decision by Lord Drummond Young in the Inner House.

11.
In the court below, and in argument before this court, there was some discussion whether Lord Diplock's statement of the exception represented the modern law. Lord Brodie thought that it needed to be seen in the light of more recent judicial statements of high authority, which he read as placing less emphasis on definitive presumptions, and more on the need to ascertain the intention of Parliament in enacting the particular provision (paras 10, 20). He referred in particular to statements by Lord Rodger in Morrison Sports Ltd v Scottish Power UK Plc 2011 SC (UKSC) 1 (at paras 28-29, 41), citing in turn the judgment of Lord Browne-Wilkinson in X (Minors) v Bedfordshire County Council [1995] 2 AC 633, 731-732; and by Lord Jauncey in R v Deputy Governor of Parkhurst, Ex p Hague [1992] 1 AC 58, 170H-171A. This view finds some academic support in Professor Stanton's work on Statutory Torts (2003), paras 2-019-2-020.

12.
For my part I find it unnecessary in this appeal to engage in discussion of the extent to which Lord Diplock's formulation has been modified by later authorities. I would only observe that the statements of Lord Browne-Wilkinson and Lord Jauncey referred to by Lord Brodie were made in the context of cases concerning liability of public authorities, which may raise rather different issues. I am content to assume (without deciding) that Lord Diplock's words remain a reliable guide at least in relation to statutory duties imposed for the benefit of employees. I would also proceed on the basis (agreeing in this respect with Sir John Megaw in the Richardson case: p 135C-D) that the duty of the employer under section 1 of the 1969 Act was imposed for the benefit of the employees, in the sense indicated by Lord Diplock.

13.
This however is not enough for the appellant. The essential starting point for Lord Diplock's formulation is an obligation created by statute, binding in law on the person sought to be made liable. There is no suggestion in that or any other authority that a person can be made indirectly liable for breach of an obligation imposed by statute on someone else. It is no different where the obligation is imposed on a company. There is no basis in the case law for looking through the corporate veil to the directors or other individuals through whom the company acts. That can only be done if expressly or impliedly justified by the statute.

14.
Comparison with Monk v Warbey is instructive. The statute in that case (Road Traffic Act 1930, section 35) provided by subsection (1) that it was not lawful for any person "to use, or to cause or permit any other person to use" a motor vehicle on the road unless insured; and by subsection (2) imposed a criminal penalty on "any person" acting in contravention of the section. It was held that civil liability was not excluded by the separate provision creating a criminal offence. Far from supporting Mr Smith's arguments, this analogy points in the opposite direction. In that case Parliament dealt specifically with both the user, and any person causing or permitting the use, and determined to impose direct responsibility on each. The 1969 Act imposes direct responsibility only on the employer. The equivalent issue would be whether that is to be treated as giving rise to civil liability on the employer for failure to insure, notwithstanding the criminal liability imposed on him by section 5. That issue (on which there were differences in the courts below) does not arise in this appeal. However, there is no analogy with the position of a director or officer. Parliament has recognised that a director or officer may bear some responsibility for the failure to insure, but has

dealt with it, not by imposing direct responsibility equivalent to that of the company, but by a specific and closely defined criminal penalty, itself linked to the criminal liability of the company.

15.
I would accept that the adoption of a particular statutory model is not necessarily critical. Lord Brodie (para 12) referred to the decision of the Court of Appeal in Rickless v United Artists Corpn [1988] QB 40, in which it was held that a provision which on its face "did no more than classify a specified act as a criminal offence did indeed create civil liability". The relevant provision was section 2 of the Dramatic and Musical Performers' Protection Act 1958, by which "if a person knowingly … makes a cinematograph film … from … a dramatic or musical work without the consent in writing of the performers … he shall be guilty of an offence …" Giving the leading judgment Sir Nicholas Browne-Wilkinson V-C accepted that the form of the provision pointed against civil liability:

"although this point is far from decisive, it is easier to spell out a civil right if Parliament has expressly stated the act is generally unlawful rather than merely classified it as a criminal offence." (p 51G-H)

However, he held that other factors showed an intention to create civil liability, including the clear purpose of providing protection for performers, and the need to comply with this country's obligations under the relevant international conventions (p 53A). This accordingly was a somewhat special case. But there was no suggestion that civil liability could be imposed other than on those made directly responsible by statute for compliance with the primary obligation.

16.
Lord Drummond Young gave a number of reasons for extending civil liability to the directors. A corporate employer could only act through its officers who accordingly had a duty to ensure so far as possible that the company fulfils its statutory duties. In that way he thought "it is apparent that section 1, by itself, has the effect of imposing a duty on the directors" (para 43). He relied also on the common law rules governing liability of directors for acts of the company, citing for example the "relevant principle" as stated by Atkin LJ in Performing Right Society Ltd v Ciryl Theatrical Syndicate [1924] 1 KB 1, pp 14-15:

"Prima facie a managing director is not liable for tortious acts done by servants of the company unless he himself is privy to the acts, that is to say unless he ordered or procured the acts to be done. … I conceive that express direction is not necessary. If the directors themselves directed or procured the commission of the [wrongful] act they would be liable in whatever sense they did so, whether expressly or impliedly." (Emphasis added)

"Consent, connivance and facilitation through neglect" were the criteria for the imposition of criminal liability under section 5 of the Act; "on general common law principles they are also sufficient to render the director civilly liable for the company's breach of section 1" (paras 44-45).

17.
He saw nothing unfair in imposing such liability, given that the director may have "ignored or deliberately disregarded" the existence of the statutory duty and so incurred personal liability, and that, if he has relied on professional advice from an insurance broker, he will have a right of recourse against the broker (para 46). He criticised the majority for an approach which frustrated the policy of the Act "through an over-literal construction" and "an excessively conceptual approach". In his opinion, the objectives of the Act demanded that a director who has consented to or who has been complicit in a breach of the duty to obtain insurance, or who has facilitated such a breach through

neglect, should incur civil liability. “This substantive point should prevail over structural niceties.” (para 47)

18.
With respect to him, I do not find these observations helpful in resolving the issue before us, which depends not on general questions of fairness, but on the interpretation of a particular statutory scheme in its context. The fact that the company can only act through its officers tells one nothing about their potential liability to third parties for its acts or failures. The judgment of Atkin LJ to which he refers affirms the rule (supported by reference to a statement of Lord Buckmaster in Rainham Chemical Works v Belvedere Guano Co [1921] 2 AC 465, 476) that directors are not in general liable for the tortious actions of the company. The scope of a potential common law claim against a director for ordering or procuring such a tortious act is not in issue in this case, which turns entirely on alleged liability under the statute. This requires the court to pay due respect to the language and structure used by Parliament, rather than to preconceptions of what its objectives could or should have been.

19.
My view of the provisions is reinforced by a factor which was not addressed in the courts below or the written cases, but was drawn to our attention by Mr Dunlop QC for the respondent in the course of oral submissions. This concerned the statutory background of the wording of section 5. It seems that provisions in similar form, imposing criminal liability on directors and other officers for offences by their companies, have a long history. We were told that a Westlaw search (looking for statutory provisions using all three of the words “consent”, “connivance” and “neglect”) had disclosed more than 900 examples of this type of formula, all apparently in the context of corporate offences (although, as Mr Smith pointed out, examples of precisely the same wording are much rarer). This general picture has been confirmed by a similar exercise carried out by legal assistants for the court. We have received nothing from the appellant since the hearing to suggest otherwise.

20.
A typical example is found in the Companies Act 2006 itself. Section 1255 (repeating a provision first introduced in this form in 1981) provides:

“(1) Where an offence under this Part committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, an officer of the body, or a person purporting to act in any such capacity, he as well as the body corporate is guilty of the offence and liable to be proceeded against and punished accordingly.”

21.
A much earlier example to which Mr Dunlop referred us (dating from before the 1969 Act) comes from the Interpretation Act (Northern Ireland) 1954. This is of general application to all corporate offences created by subsequent statutes in Northern Ireland. Section 20(2) provides:

“Where an offence under any enactment passed after the commencement of this Act has been committed by a body corporate the liability of whose members is limited, then notwithstanding and without prejudice to the liability of that body, any person who at the time of such commission was a director, general manager, secretary or other similar officer of that body or was purporting to act in any such capacity shall, subject to sub-section (3), be liable to be prosecuted as if he had personally committed that offence and shall, if on such prosecution it is proved to the satisfaction of the court that he consented to, or connived at, or did not exercise all such reasonable diligence as he ought in the circumstances to have exercised to prevent the offence, having regard to the nature of his

functions in that capacity and to all the circumstances, be liable to the like conviction and punishment as if he had personally been guilty of that offence." (emphasis added)

22.
There are differences of wording between the three statutes. The 1954 statute talks not of "neglect", as in the 1969 Act and the Companies Act, but of failure to "exercise reasonable diligence". On the other hand the reference to liability "as if he had personally been guilty" seems to anticipate the language of "deemed" criminal liability in the 1969 Act, but is not replicated in the Companies Act. However, the general pattern is the same in these and in the other examples to which we have been referred. In spite of the apparent frequency of the use of this formula, the researches of counsel and our own legal assistants have not disclosed any reported authority in which its significance or meaning has been considered, nor any previous suggestion that it might be treated as giving rise to civil liability.

23.
I would be reluctant to attach too much weight to a point which has emerged so late in the day. Without more substantial research it is impossible to know to what extent this formula has been used in comparable contexts involving protection of employees. However, to my mind it tends to confirm the view that the language of section 5 was deliberately chosen and is intended to mean what it says. The formula is specifically directed at criminal liability, and as far as we know has always been used in that context. Where Parliament has used such a well-established formula, it is particularly difficult to infer an intention to impose by implication a more general liability of which there is no hint in its actual language.

24.
For all these reasons, I would agree with the conclusion reached by the majority of the Inner House and dismiss the appeal.

LORD TOULSON: (dissenting) (with whom Lady Hale agrees)

25.
The issue before the court is a) whether Mr Gordon breached a statutory provision intended for the protection of a particular class including Mr Campbell and b) if so, whether Mr Gordon should be held liable for Mr Campbell's resulting loss.

26.
Lord Carnwath has set out sections 1 and 5 of the 1969 Act. The object of the Act is that a company's employees should have the protection, in the event of suffering an illness or injury arising out of their employment for which the company is liable, of the liability being covered by insurance up to a specified sum. Failure by the company to arrange and maintain such insurance carries a penal sanction. But the pool of those bearing legal responsibility for seeing that such protection is in place is not confined to the company itself. It extends to the company's relevant officer or officers. In order to bring such persons within the pool, the drafter has used the device of a "deeming" provision. The form of the drafting device is that a director, manager, secretary or other officer of the company who consents to, connives at or by neglect facilitates, a failure to maintain the requisite insurance is "deemed" to be guilty of the same offence as the company. The effect in substance is to place on such an officer a legal obligation not to cause or permit the company to be without the required insurance by consent, connivance or neglect, on pain of a criminal penalty. To say that the imposition of criminal responsibility for a specified act (or omission) carries with it a legal obligation not to act (or omit to act) in such a way is to state the obvious. The two are opposite sides of the same coin.

27.
The language of deeming involves artificiality. In addressing sub-issue a), the court has a choice whether to adopt a formalistic approach or to look through the artificiality and consider the function, substance and effect of the provision in real terms. The answer to the question “What does it really do?” is that the provision is a concise means of extending statutory responsibility for seeing that the company is properly insured to the company’s appropriate officer(s), backed by a penal sanction.

28.
As an alternative, the drafter might have used words such as “It shall be illegal for any director, manager, secretary or other officer of a corporation which is an employer carrying on business in the United Kingdom to consent to, connive at or by neglect facilitate a failure by the corporation to insure (etc), and any such person shall be liable on summary conviction (etc)”. This would have been longer but the practical result would have been the same: the director or officer would have been liable to a criminal penalty for his wrongful act or omission, imposed for the protection of employees.

29.
In his dissenting judgment in Richardson v Pitt-Stanley [1995] QB 123, 135, Sir John Megaw made a similar point. He said:

“With great respect, I find it difficult to believe that the parliamentary draftsman would have intended to make provision that there should be no civil right or remedy by using the formula of section 1 of the Employers’ Liability (Compulsory Insurance) Act 1969, ‘shall insure’, followed by section 5 ‘shall be guilty of an offence’; as contrasted with the formula of declaring an act or omission to be unlawful and then separately providing a criminal penalty for the breach.”

I agree.

30.
The approach which commends itself to the majority concentrates on the form of the language. It is argued that the structure of the Act is such that the only duty created by it is explicitly placed on the company by section 1(1), and that the mechanism by which a director or other officer of the company is deemed to be guilty of a breach of that duty is consistent with and supports that proposition. I have set out the alternative approach, which looks at the function and substantive effect of the deeming provision in real terms. The choice between a formal approach and a functional approach in the interpretation and application of statutory language is an aspect of the choice between formalism and realism which has been a fruitful subject since as long ago as the publication of Holmes’s The Common Law in 1881. In deciding which approach is preferable, the context matters. The present context is legislation for the protection of a vulnerable group, a company’s employees. In that context I regard the functional approach as more appropriate. I cannot improve on Lord Drummond Young’s pithy statement, in his dissenting opinion in this case, that in the context of legislation aimed at employee protection the formalist approach is “excessively conceptual; it focuses on differences of structure that do not reflect the basic objectives of the statute” (para 47).

31.
If, however, a formalist approach is preferred, there should be no half measure about it. On the formalist approach, the director in the eyes of the law is himself guilty of committing an offence under sections 1 and 5. The language of the Act does not impose an accessory liability on the director. It would be unnecessary for that purpose. Rather, it explicitly deems him to be himself guilty of the offence of failing to insure and maintain insurance, etc. As a matter of insurance law, it is of course the insurer who insures and someone else (usually the insured) who procures the insurance, but the

meaning of “shall insure, and maintain insurance” in section 1 is clear enough. The effect of the deeming provision is that in the eye of the law the director is guilty as a principal of failing to insure and maintain the necessary insurance. Logic and justice would not permit the director to say that his criminal liability is in substance and reality a form of accessory liability, if one is living in formality land, for, as I have stressed, on the formalist’s approach the director is in law guilty as a principal of failing to insure.

32.
On either approach Mr Gordon breached a statutory provision intended for the protection of a particular class, employees, of which Mr Campbell was a member, but I prefer the former approach for the reasons which I have given.

33.
As to sub-issue b), legislation for the protection of employees began in the Victorian age. From the outset the courts have consistently held that breaches of provisions in that class of legislation are actionable at the suit of an employee who suffers from the breach. This was established in Groves v Lord Wimborne [1898] 2 QB 402, a case under the Factory and Workshop Act 1878. Rigby LJ said at pp 414-415:

“The provisions of section 5 are intended for the protection from injury of a particular class of persons, who come within the mischief of the Act. The plaintiff is one of those persons, the possibility of injury to whom through neglect to fence machinery the section contemplates. That being so, the only question seems to be whether the provisions of the Act with regard to the imposition of fines for neglect of the duty created by the section reasonably lead to the conclusion that the Legislature intended that such fines should be the only remedy for breach of that duty. I think that, when those provisions are examined, it is impossible to arrive at that conclusion. The maximum fine that can be imposed in any case, however serious the injury may be, is one of £100. It seems monstrous to suppose that it was intended that in the case of death or severe mutilation arising through a breach of the statutory duty, the compensation to the workman or his family should never exceed £100. Again, section 82 does not provide that the fine imposed under it shall necessarily go to the workman if he be injured, or to his family if he be killed; but only that the Secretary of State may, if he thinks fit, order that the fine or part of it shall do so.

…

Looking at the purview of the whole Act, I cannot think it reasonable to suppose that the Legislature intended the penalty imposed by section 82 to be the only remedy for injury occasioned by breach of the absolute statutory duty created by the Act.”

The reference to the “purview of the whole Act” came from the speech of Lord Cairns LC in Atkinson v Newcastle and Gateshead Waterworks Co (1877) 2 Ex D 441, 448. The maximum fine for an offence under the 1969 Act was originally £200. An offence is committed on any day that a company is not insured in accordance with the Act.

34.
Groves v Lord Wimborne was approved by the House of Lords in Butler (or Black) v Fife Coal Co Ltd [1912] AC 149. Lord Kinnear said at 165-166:

“We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to

make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention. Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the prima facie right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability."

This passage was cited as a statement of general principle by Lord Simonds and Lord Normand in Cutler v Wandsworth Stadium Ltd [1949] AC 398, 407-408, 413-414, and by Lord Diplock in Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173, 185.

35.
As Lord Kinnear's statement indicates, the cause of action is at common law (except in cases where a statute expressly creates a civil right of action). The cause of action which was held to exist in Groves v Lord Wimborne was created by the court. It was founded on a statute but it was the court that determined that breach of the provisions of the Act should be actionable at the suit of the injured party for whose protection the provisions were intended. The conventional jurisprudence is that the court's function is to ascertain as a matter of interpretation whether Parliament intended that there should be civil liability, but that understates the role of the courts in cases where the legislation is silent on the point. In such cases "the judges face hieroglyphs without a Rosetta Stone", to borrow a metaphor of Judge Richard Posner writing extra-judicially (Divergent Paths - The Academy and the Judiciary, Harvard University Press, 2016, p 172). Judge Posner candidly and correctly states that the judges' role in such cases is the active role of filling gaps left by the legislature.

36.
The courts use a combination of methods for this purpose. They examine the whole purview of the legislation and they employ default rules, with which parliamentary drafters may be taken to be familiar. Lord Du Parcq spelt this out in Cutler v Wandsworth Stadium Ltd [1949] AC 410-411. After a plea that Parliament should reveal its intention in plain words, he said:

"… Parliament must be taken to have known that if it preferred to avoid the crudity of a blunt statement and to leave its intention in that regard to be inferred by the courts, the 'general rule' would prevail unless the 'scope and language' of the Act established the exception. It cannot be supposed that the draftsman is blind to the principles which the courts have laid down for their own guidance when it becomes necessary for them to fill in such gaps as Parliament may choose to leave in its enactments."

37.
The default rules were summarised by Lord Diplock in Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173, 185:

"The sanctions Order thus creates a statutory prohibition upon the doing of certain classes of acts and provides the means of enforcing the prohibition by prosecution for a criminal offence which is subject to heavy penalties including imprisonment. So one starts with the presumption laid down originally by Lord Tenterden CJ in Doe d Murray v Bridges (1831) 1 B & Ad 847, 859, where he spoke of the 'general rule' that 'where an Act creates an obligation, and enforces the performance in a specified manner … that performance cannot be enforced in any other manner' - a statement that has frequently been cited with approval ever since, including on several occasions in speeches in this House. Where the only manner of enforcing performance for which the Act provides is prosecution for

the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to this general rule.

The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, as in the case of the Factories Acts and similar legislation. As Lord Kinnear put it in Butler (or Black) v Fife Coal Co Ltd …" (I have cited the passage which followed.)

38.
In his opinion in the present case Lord Brodie said (at para 10) that statements of Lord Kinnear and Lord Diplock are "not the modern law". For this (to my mind startling) proposition, Lord Brodie relied on the speech of Lord Jauncey in R v Deputy Governor of Parkhurst, Ex p Hague [1992 1 AC 58, 170-171, and a passage in the speech of Lord Browne-Wilkinson in X (Minors) v Bedfordshire County Council [1995] 2 AC 633, 731, cited by Lord Rodger in Morrison Sports Ltd v Scottish Power UK plc 2011 SC (UKSC) 1, para 28, in a judgment with which the other members of the court (including Lady Hale) agreed.

39.
Those three cases were far removed from the area of legislation for the protection of employees. In the passage from X (Minors) v Bedfordshire County Council, cited in Morrison Sports Ltd v Scottish Power UK plc, by Lord Rodger, Lord Browne-Wilkinson began by describing the principles for determining whether a statutory breach gives rise to a cause of action as well established. He went on to refer to the trilogy of Groves v Lord Wimborne, Cutler v Wandsworth Stadium Ltd and Lonrho Ltd v Shell Petroleum Co Ltd (No 2). He did not suggest that he considered those cases to be "not the modern law"; quite the opposite. Had he intended to depart from long standing authority, including decisions of the House of Lords, there can be no doubt that he would have said so. Lord Brown-Wilkinson referred to R v Deputy Governor of Parkhurst Prison, Ex p Hague, but only to give it as an example of legislation which was treated not as being passed for the benefit of a particular class of persons (those serving prison sentences), but for the benefit of society in general. It provides an illustration of the need for a purview of the whole legislation in question in order to determine whether it is to be regarded as passed for the intended benefit of a particular class.

40.
Lord Brodie and Lord Malcolm each cited Lord Jauncey's statement in the Parkhurst case, at pp 170-171, that "The fact that a particular provision was intended to protect certain individuals is not of itself sufficient to confer private law rights of action upon them, something more is required to show that the legislature intended such conferment." But that sentence should not be taken in isolation. It needs to be understood in its context. The claim in that case was brought by a prisoner who had been deprived for a time of rights of association, by an order of the deputy governor which was held to be in breach of rules under the Prison Act 1952. In addressing the question whether the breach entitled the claimant to damages, the House of Lords held that it was necessary to consider not only the benefit of the rule to the claimant, but the wider purpose of the legislative scheme. In the paragraph immediately following the words quoted above, Lord Jauncey described the objects of the legislation as "far removed from those of legislation such as the factories and coal mines Acts whose prime concern is to protect the health and safety of those who work therein" (emphasis added). In the present case the Act has no purpose other than the protection of employees.

41.

The principles summarised by Lord Diplock in Lonrho Ltd v Shell Petroleum Co Ltd (No 2) are no more than general principles or default rules, but they have stood the test of time and I would hold that they continue to be the law unless and until the Supreme Court makes a conscious decision otherwise. In particular, where legislation is passed for the protection of employees, in accordance with Lord Diplock's first exception, a breach will ordinarily give rise to a potential cause of action, unless the language of the legislation points clearly in the opposite direction.

42.
In this case the legislation was plainly intended for the protection of employees and I do not consider that the form of the language employed by the drafter takes the case in relation to Mr Gordon outside Lord Diplock's first exception. I would allow the appeal.

LADY HALE:

43.
The question for this court is whether in 1969, when Parliament passed the sections 1 and 5 of the Employers' Liability (Compulsory Insurance) Act, it was intended that breach of those sections should give rise, not only to criminal liability, but also to civil liability towards an employee who had been injured by the employer's breach of duty towards him and who, because of the failure to insure, would otherwise not receive the compensation for his injuries to which he was entitled. In my view, it is absolutely plain that Parliament did intend there to be such civil liability.

44.
Parliament is presumed to legislate in the knowledge of the current state of the law when it is doing so. In 1969, the law had been clearly laid down in Groves v Lord Wimborne [1898] 2 QB 402, approved by the House of Lords in Butler (or Black) v Fife Coal Co Ltd [1912] AC 149, and again in Cutler v Wandsworth Stadium Ltd [1949] AC 398. Statutory duties imposed upon employers for the benefit of employees who suffer injury as a result of their breach give rise to civil as well as criminal liability, absent a clear statutory intent to the contrary. That is still the law. Parliament understood this when it passed the Health and Safety at Work etc Act 1974, section 47 of which made clear which breaches did not give rise to civil liability, and amended it in 2013, further to restrict the extent of civil liability.

45.
Quite apart from the fact that we are concerned with the Parliamentary intention in 1969, it is quite wrong to suggest (as the majority in the lower House did) that a "trilogy" of more recent cases have changed the law as it has long been understood to be. The traditional understanding was reaffirmed in the House of Lords by Lord Diplock in Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1982] AC 173, 185. It was reaffirmed yet again in the House of Lords by Lord Browne-Wilkinson in X (Minors) v Bedfordshire County Council [1995] 2 AC 633, 732 one of the "trilogy". The other two are R v Deputy Governor of Parkhurst Prison, Ex p Hague [1992] 1 AC 58 and Morrison Sports Ltd v Scottish Power UK plc [2011] SC 1. In none of the three is there any suggestion that the approach of the courts to deciding whether the breach of a statutory duty gives rise to civil liability in damages has changed. In X v Bedfordshire, the principles applicable were said to be "well-established", albeit difficult to apply (p 731).

46.
Those difficulties arise in novel situations rather than in well-established situations like this. In X v Bedfordshire, Lord Browne-Wilkinson stressed that in no previous case "had [it] been held that statutory provisions establishing a regulatory system or a scheme of social welfare for the benefit of

the public at large" gave rise to a right of action for damages (p 731). Although individuals might in fact be protected, the legislation was for the benefit of society in general and not just a particular class. The cases where civil liability had been imposed were very limited and specific "as opposed to general administrative functions imposed on public bodies and involving the exercise of administrative discretions" (p 732). Cutler, being concerned with the regulation of betting at dog races, was an example of such a scheme, which did not give rise to civil liability. Hague, being concerned with the management of prisons, was another.

47.
Something more should be said about Morrisons Sports, as it is a recent decision of this court, to which I was a party. It was concerned with whether there was civil liability for breach of the Electricity Supply Regulations, made in 1988 but to be treated as if made under the power in section 29 of the Electricity Act 1989. Section 29(3) provided that the Regulations might impose criminal penalties for their contravention; but it also provided that "nothing in this subsection shall affect any liability of any such person to pay compensation in respect of any damage or injury which may have been caused by the contravention". Much of the judgment is devoted to explaining why the view of the Inner House that this wording was apt to impose civil liability, as opposed to acknowledging it if it existed, was untenable. When Lord Rodger (with whom the other members of the court agreed) turned to whether the regulations did indeed impose civil liability for breach, he cited the above passage from the speech of Lord Browne Wilkinson in X v Bedfordshire, which referred to, and cast no doubt upon, the law on employers' liability as decided in Groves v Lord Wimborne. There is no suggestion in Morrisons Sports that that is no longer the law. The judgment goes on to look at the overall legislative scheme for regulating the supply of electricity. While this clearly contemplated that there might be civil liability, it did not expressly provide for it. "Looked at as a whole … the scheme of the legislation, with its carefully worked-out provisions for various forms of enforcement on behalf of the public, points against individuals having a private right of action for damages …" (para 37). It was also difficult to identify any limited class of the public for whose protection the Regulations were intended (para 38). In short, this was a general regulatory scheme intended for the benefit of the whole population.

48.
The difference between that case and this could hardly be greater. This is a very specific statutory duty imposed upon employers, and also imposed upon specified officers where the employer is a limited company. There can be no difference in substance between imposing criminal liability for failing to do something and imposing a duty to do it. The purpose was to protect a very specific class of people, namely employees who might be injured by the employer's breach of duty (whether arising by statute or at common law). The protection intended was that they should be compensated for their injuries even if, for whatever reason, the employer was unable to do so. Failure to insure means that the employee is denied the very thing that the legislation is intended to provide for him.

49.
For these reasons, as well as for the fuller reasons given by Lord Toulson, I would allow this appeal and let the case go to proof.