

## Key Contacts



**Godwin Omoaka, SAN, FCI Arb**  
Partner,  
Dispute Resolution  
[godwin.omoaka@templars-law.com](mailto:godwin.omoaka@templars-law.com)



**Nosakhare Iyamu**  
Associate,  
Dispute Resolution  
[Nosakhare.Iyamu@templars-law.com](mailto:Nosakhare.Iyamu@templars-law.com)

# Examining the Tort of Breach of a Statutory Duty

## Introduction

Statutes, whether regulations, enactments of the legislature or some other subsidiary legislations, essentially guide almost every aspect of our daily lives. Statutes often impose obligations and duties on individuals and businesses and may also provide strict sanctions for failure to perform such obligations. However, certain times, businesses and individuals may, in their daily activities, seek to skirt these obligations, particularly where the statute creating such an obligation, omitted to create a specific sanction for the breach of the obligation. This non-compliance may be brought about by a real inability of the entity to comply with the terms of the statute, especially during an economic downturn, such as the one precipitated by COVID-19, however, such non-compliance is not without legal consequences as the entity in question may leave themselves exposed to the tort of breach of a statutory duty.

This piece aims to discuss briefly the tort of breach of a statutory duty as a cause of action and highlight what a prospective Plaintiff must show to successfully obtain a remedy against a party in breach of a statutory duty.

## What Constitutes the Tort of breach of a statutory duty?

There is a dearth of Nigerian decisions relating to the tort of breach of a statutory duty. However, the Tort has been said to arise where, in a hypothetical scenario, B is under a statutory duty to perform an act or, to refrain from doing an act; B does not perform the act, either in accordance with the terms of the statute, or at all or does the act when it should not have done; A then suffers damage as a result of the statutory breach; that statutory breach gives rise to 'a private right of action for damages' at the suit of A.<sup>1</sup>

The tort has however been judicially acknowledged to be somewhat problematic<sup>2</sup>. This is largely because a private right of action for damages in A's favour as per our hypothetical scenario, must have been created by the legislation in question.

<sup>1</sup> Mulheron, *Principles of Tort Law* (1st edn, Cambridge University Press 2016) 421

<sup>2</sup> See *Bedfordshire* [1995] 2 AC 633 (HL) 731 (Lord Browne-Wilkinson).

However, statutes rarely permit or preclude a private right of action outright. Therefore, even though a private right of action for damages has not been expressly created by statute, it may be inferred by the courts which often apply rules of interpretation somewhat inconsistently.

There are however two preconditions that must be met for the tort to apply. Firstly, the statute must not specifically oust a private action for damages. Certain times a statute may expressly bar civil actions for breach of an obligation provided under the said statute. As stated earlier, this is rare especially under Nigerian Law, but it has been known to happen in other jurisdictions such as under the **Health and Safety at Work etc Act 1974** applicable in England and Wales wherein Section 47(1)(a) thereof specifically provides that: '*[n]othing in this Part shall be construed as conferring a right of action in any civil proceedings in respect of any failure to comply with any duty imposed by [Section 2–8]*'.

Secondly, the Statute must have territorial application to the subject matter of the dispute, otherwise, the tort cannot lie. For instance, in the case of **Davies v Global Strategies Group Hong Kong Ltd**<sup>3</sup> an employee of the Defendant, was shot dead through the windscreen of his vehicle by insurgents, on the outskirts of Mosul in Iraq. His widow, sued for breach of various obligations imposed on the Defendant by the **Management of Health and Safety at Work Regulations 1999**, the **Provision and Use of Work Equipment Regulations 1998** and the **Personal Protective Equipment at Work Regulations 1992**. The Court however held that the tort of breach of a statutory duty could not apply as the said Regulations' territorial reach did not extend to Iraq.

## Proving Tort of Breach of Statutory Duty

The conceptual description of the tort of inducing breach of contract may appear simplistic but proving that a person is liable for the tort requires the presentation of certain essential elements. These are:

- The statute imposed a statutory duty or obligation on the Defendant.
- The legislature intended to confer a private law right of action for damages if the duty was breached.
- the Defendant breached the duty which caused damage to the Plaintiff.

### ***The statute imposed a statutory duty or obligation on the Defendant***

It is elementary that before this tort can be proved, there must be a statutory duty which the law imposes on the party being sued. In the case of **Lyons v QPM**<sup>4</sup>, the Plaintiff ran a garage business. The Defendant, the Chief Constable of Strathclyde Police, wrote to regulatory bodies advising that intelligence held by Strathclyde Police indicated that the Plaintiff was involved in organised crime. Under the **Data Protection Act 1998 (DPA)**, the Defendant would have been deemed to be a data controller of sensitive personal data relating to the Plaintiff. The Plaintiff brought a case of breach of statutory duty claiming that the Defendant failed to make it clear to the recipients of those letters that he was only reporting what was held in his records, and that he was not endorsing the factual accuracy of that data.

The Court however held that the tort of breach of a statutory duty did not apply. The DPA did not impose any duty on the Defendant not to 'endorse' neither did it impose a duty to disclose the identity of the sources of information where the data was held for the purpose of preventing or detecting crime. The Court further held that to have an entitlement to

<sup>3</sup> [2009] EWHC 2342 (QB).

<sup>4</sup> [2013] CSIH 46.

compensation, the Plaintiff must prove that the Defendant contravened an identified requirement or duty of that Act, which he failed to do.

It is necessary to understand that a statutory duty is not a mere discretionary power which a person may decide to exercise one way or another.<sup>5</sup> The Court would not consider this an enforceable duty the breach of which may give rise to the tort.

Also, the duty must be imposed on the Defendant specifically. See the case of **Groves v Lord Wimborne**<sup>6</sup> the English Court of Appeal held that, where an action is based upon a statute, '*[t]here being an unqualified statutory obligation imposed upon the defendant ... [that] defendant cannot shift his responsibility for the performance of the statutory duty on to the shoulders of another person.*'

However, this requirement does not exempt the doctrine of vicarious liability from applying in the tort of breach of statutory duty.<sup>7</sup> The courts have held that for the principle to be inapplicable, the terms of the legislation or the practical effect of the legislation must indicate that the legislature intended, either expressly or impliedly, to exclude the ordinary principle of vicarious liability.

It is important to also point out that the courts have also applied a somewhat restrictive interpretation of this element. The courts have held that if the duty imposed is general in nature and not imposed on a specific person or class of persons, then the said tort cannot arise. A clear example can be found in the case of **Todd v Adams**<sup>8</sup>, where a fishing trawler capsized and sank leading to the death of the entire crew. The relatives of the crew, argued that the vessel was unstable and that the vessel owner failed to comply with safety rules for UK fishing vessels, promulgated under the **Merchant Shipping Act 1995, s 121(1)**. The court however held that the obligations as to safety of hulls, equipment and machinery in s 121(1) were not expressly allocated to any specific person because all that it said was that a fishing vessel of a particular nature should satisfy those rules. The owner or master of the vessel could be criminally liable for a breach of those rules under the Act and that the statutory duty was '*not a duty which the legislature has imposed in terms on any particular person*' – all it had done was to '*state that, where there is an infringement of the rules concerned, the sanction expressly provided for, namely a criminal liability, is to be against the owner or master*'.

### **The Legislature intended to confer a private law right of action for damages if the duty was breached.**

As stated earlier, it is rare for a statute to expressly confer the right to a private action for damages. However, in certain instances, the law may specifically state that the right exists. For instance, Section **41, 55(6) & 72(1) of the Nigerian Copyright Act of 2022** state as follows:

*"41. (1) An infringement of the rights conferred by section 14 of this Act is actionable as **a breach of statutory duty** owed to the person entitled to the right.*

*(2) In any proceeding for infringement of a right conferred under section 14 of this Act, the person whose rights has been infringed upon shall be entitled to an award of damages, injunction and any other remedy as the court may deem fit to award in the circumstances.*

<sup>5</sup> *Ali v Bradford MDC* [2010] EWCA Civ 1282

<sup>6</sup> [1898] 2 QB 402 (CA) 410

<sup>7</sup> See *Majrowski v Guy's and St Thomas's NHS Trust* [2006] UKHL 34, [2007] 1 AC 224 (HL),.

<sup>8</sup> [2002] EWCA Civ 509

55(6) A service provider who fails to comply with the provisions of subsections (1) and (2) of this section, shall be liable for such failure as a **breach of statutory duty** and for infringement of the content which is the subject matter of the notice under section 54 to the same extent as the person responsible for placing the content on the system or network.

72(1) An infringement of a right protected under sections 63 and 66 of this Act, shall be actionable **as a breach of statutory duty** and the person having the right shall be entitled to damages, injunction, and account of profits or conversion"

However, more often than not, the right may not be expressly provided, and the court would have to determine if the legislature intended for the tort to be applicable. Drawing from relevant case law, certain factors will be relevant, when determining whether or not a private action was intended by the Legislature.

One factor to consider would be, if the statute provides another remedy for the statutory breach, that is usually an indicator that the availability of a private right of action may not have been intended. See the case of **ex p Hague**<sup>9</sup> where a prisoner who was segregated from other prisoners for 28 days in contravention of **Rule 43 of the Prison Rules 1964** in England, sued for breach of statutory duty. The Court held that there was an alternative remedy available to the prisoner under the said Rules as he could complain to the Governor under rule 8(1) of the **Prison Rules 1964**, and a report could then be made to the Secretary of State under s 6(3) of the **Prisons Act**. Also, the decision of the Secretary of State or the Governor could be subject to judicial review proceedings or he could sue in tort for damages for misfeasance in public office, assault or negligence, if the facts supported those actions.

Another factor is whether the statute imposes a penalty, fine, imprisonment, or other criminal sanction on the defaulter for his contravention of the statute. The presence of such a penalty may indicate that the legislature intended such a penalty to be the only punishment that the defaulter should bear for the breach without the additional liability of having to pay damages in a civil action.<sup>10</sup>

Moreover, where the purpose of a statute is to protect the safety and health of a class of persons, rather than to protect a class against economic loss, then a civil right of action will more readily be construed, and vice versa.<sup>11</sup>

Further, where the legislature has provided that, for some breaches of the statute's duties, there is a right to compensation for loss or injury, but for the particular statutory duty in question, no such private right of action is provided for, then that is a strong indicator that it was never the intention of the legislature for the breach to lead to a private action for damages.<sup>12</sup>

### **The Defendant breached the duty and such breach caused damage to the Plaintiff**

The tort is not actionable per se, therefore a mere breach of the duty, or a failure to perform the statutory obligation without proving that the Plaintiff suffered some sort of quantifiable damage, will not be enough to prove the tort. In **Pickering v Liverpool Daily Post**<sup>13</sup>, the Plaintiff had been convicted of manslaughter and detained as a patient in a mental hospital. The Plaintiff applied to a mental health review tribunal for a discharge.

<sup>9</sup> [1992] 1 AC 58 (HL)

<sup>10</sup> See *Lonrho Ltd v Shell Petroleum* [1982] AC 173 (HL) 185; *Cutler v Wandsworth Stadium Ltd* [1949] AC 398 (HL)

<sup>11</sup> See *Digicel (St Lucia) Ltd v Cable & Wireless plc* [2010] EWHC 774 (Ch) [180] and *Richardson v Pitt-Stanley* [1995] QB 123 (CA) 132–33 (*Stuart-Smith LJ*), citing: *Groves v Lord Wimborne* [1898] 2 QB 402 (CA)

<sup>12</sup> *Welsh Water v Barratt Homes Ltd (Rev 1)* [2013] EWCA Civ 233, [2013] 1 WLR 3486.

<sup>13</sup> [1991] 2 AC 370 (HL)

The Plaintiff's previous application for release had attracted media publicity, so he sued for breach of statutory duty against the Defendant (a newspaper) and sought injunctive reliefs against the newspaper to restrain publication about the new application, on the basis that such publication was prohibited by rule 21(5) of the **Mental Health Review Tribunal Rules 1983** (which imposed a duty not to publish the fact that a named patient had made a release application). The Court however held that the tort of breach of statutory duty did not apply as the publication of unauthorised information about a release application, although adverse to the Plaintiff's interest, was *'incapable of causing him loss or injury of a kind for which the law awards damages.'*

## Conclusion

Overall, the tort of breach of a statutory duty, even though it has been recognized by English courts for centuries, has not yet become popular in Nigeria. Nonetheless, it remains relevant to understand its application and its utility as a potential route to recover losses suffered, not through direct actions of one entity against another, but where such actions are indirect but can be traced to the breach of a well stipulated duty imposed by law.