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Assumptions of Irresponsibility: Liability for Omissions following *Tindall v Chief Constable of Thames Valley*

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ABSTRACT

This case commentary analyses the present state of negligence liability in English tort law as set out in the recent case of *Tindall v Chief Constable of Thames Valley*.[1] Despite recent landmark decisions regarding acts and omissions, the boundaries of the distinction between the two remain to be fully explored. Following the decision in *Tindall*, it is suggested that a temporary conferral of a benefit must always fall to be classified as an omission. It is then argued that, for a claimant to establish that a defendant has assumed a responsibility to them, first it must be shown that the defendant has a relationship with the claimant that is sufficiently distinguishable from the general public. It is the lack of such a relationship that prevented the claimant in *Tindall* from successfully arguing that the police had assumed a responsibility to all road users. This commentary concludes that *Tindall* further elucidates key duty of care principles under the law of negligence, whilst also highlighting important questions that will require clarification from the courts in the future.

Keywords: negligence; duty of care; omissions; assumption of responsibility; public authorities

I. FACTS

After *Robinson v Chief Constable of West Yorkshire*[2], the position on when a public authority will owe a duty of care to an individual is no longer in flux. Settling a long line of conflicting case law, Lord Reed held, at [32], that "at common law,

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1 *Tindall v Chief Constable of Thames Valley* [2022] EWCA Civ 25 [2022] PIQR P10.

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

public authorities are generally subject to the same liability in tort as private individuals and bodies". This case note seeks to analyse the expansion of Lord Reed's position offered by the Court of Appeal concerning liability for omissions in *Tindall*.

The facts of *Tindall* are as follows: K, a driver, skidded on a patch of black ice and suffered non-life-threatening injuries. While waiting for the emergency services, K began to warn fellow road users about the dangerous, icy stretch of road. When the police arrived, K stopped warning other drivers and was taken to the hospital by ambulance. Meanwhile, the police erected a "Police Slow" sign and cleared the road of debris. Upon finishing, they retrieved the sign and exited the scene, leaving the black ice behind with no police presence to warn of its existence. Just twenty minutes later, T, another driver, collided with an individual who had lost control of their car on the ice. T died in the accident, and his widow brought a claim on his behalf

II. Decision and Comment

The Chief Constable appealed against the Master's refusal to strike out the claim at first instance, and succeeded in the Court of Appeal. Stuart-Smith LJ gave the leading judgment of the court, taking the opportunity to address the principles governing omissions liability comprehensively.

The initial distinction drawn, and one which must be drawn in any negligence claim, was whether the defendant's conduct amounted to an act or an omission.[3] Conduct that makes matters worse (at least, worse than if the defendant had done nothing), is generally considered an act. Such was the case in *Robinson* itself, when a group of policemen knocked into a frail and elderly woman whilst attempting to arrest a suspected drug dealer in a busy street. Conversely, omissions involve a failure to confer a benefit or a failure to prevent harm. The leading case is *Michael v Chief Constable of South Wales*[4], where a victim's emergency call to the police was given a lower priority than it should have had, resulting in the police's late arrival and their consequent discovery that the victim had already been stabbed to death by her former partner. In *Tindall*, Stuart-Smith LJ held that the police's conduct fell into the omissions category, dismissing two submissions made by the claimant in the process.

The first submission (at [67]) was that the police *had* made matters worse through their transient intervention of placing and then removing the "Police Slow" sign. Upon placing the sign, the police improved the situation by warning

3 ibid [69(4)] (Lord Reed SCJ) "[A]lthough the distinction, like any other distinction, can be difficult to draw in borderline cases, it is of fundamental importance."

4 *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] AC 1732.

all road users about the dangerous condition of the road. When they subsequently removed the sign, the police made matters worse than they had been during the temporary period in which the sign was placed. The rationale for dismissing this submission is rooted in the idea that the defendant's removal of a temporary benefit they provided is not to be considered, in law, as a material worsening of the situation.[5] Stuart-Smith LJ's observation succinctly articulated the point, stating that "[the police] did not make matters worse: they merely left the road as they found it."[6] This observation does, however, invite further discussion. In avoiding confusion in more complex cases, it is worth discerning the limits of the concept of leaving something "as they found it", and if doing so should *always* be classified as failure to confer a benefit.

To illustrate the point, consider a situation where the police had, instead of erecting and removing the warning sign on an *ad hoc* basis as they did in *Tindall*, placed the sign down years earlier when dealing with another accident. Upon arriving at the scene and clearing debris off the road at present, would it then have been open to the police to retrieve the sign that they had placed so many years before? Two alternative answers appear available in response:

1. Leaving a situation "as they found it" is limited by temporal proximity to the improvement. After some arbitrary time period, a temporary intervention evolves into a permanent one, and its subsequent removal by the authority constitutes an act because it involves a worsening of the new state of affairs; or
2. Regardless of the elapsed time period, a defendant removing a benefit that they provided is always a failure to confer a benefit and must be construed as an omission.

Whilst the second option is demonstrably less generous towards claimants, it supports the general trend of case law that points away from finding liability when the actions of the defendant do not render individuals worse off than if the defendant had done nothing at all. It is submitted, therefore, that the second option reflects the current position of the law and, as Stuart-Smith LJ emphasised, no amount of incompetence on the part of the defendant in failing to confer the benefit or in removing the benefit that they provided can convert an omission into an act.

The second submission (at [66]) concerned whether the mere arrival of the police at the scene could give rise to a private law duty owed to road users to prevent them from harm. The claimant argued that, in coming to the accident,

5 *Capital and Counties Plc v Hampshire CC* [1997] QB 1004 (CA).
6 *Tindall v Chief Constable of Thames Valley* [2022] EWCA Civ 25, [2022] PIQR P10 [67] (Stuart-Smith LJ).

the police influenced K to leave in an ambulance, thereby causing him to cease providing warnings about the icy road to other drivers. Dispensing with the submission swiftly, Stuart-Smith LJ held that the police's contribution to K's decision to leave the scene by their mere arrival could not reasonably be described as negligent. McBride and Bagshaw have previously argued that certain case law, in contrast, supports the notion that a defendant who dissuades a third party from assisting a claimant can be held tortiously liable.[7] In *Costello v Chief Constable of Northumbria*[8], a police officer, B, was attacked and injured by a prisoner whilst a police inspector stood by and did nothing. A third officer in the station, H, may have been able to prevent the attack, but had left after noticing the inspector's presence and presuming that the inspector would step in should any violence break out. The authors suggest that the inspector's indication to H was a significant enough *interference* to give rise to a duty of care to B. By analogy, it is not too far a reach to suggest that, if the police had arrived and *told* K to stop warning drivers, they may have been interfering in a way that *was* negligent. As the police had given no such indication, and K had instead personally assumed that there was no longer any need for his presence at the scene, the claimant's argument was dismissed. The distinction is evidently a fine one, but it will be simply a matter for the court to determine whether or not a defendant's actions are meaningful enough to be considered an interference—and subsequently whether that interference can be described as negligent. Having rejected these submissions, the police's actions fell to be classified as an omission. The grounding of a duty of care in omissions cases relies upon the existence of a set of special circumstances beyond the presence of reasonable foreseeability of harm. Tofaris and Steel have summarised these circumstances as follows:

> In the tort of negligence, a person A is not under a duty to take care to prevent harm occurring to person B through a source of danger not created by A unless (i) A has assumed a responsibility to protect B from that danger, (ii) A has done something which prevents another from protecting B from that danger, (iii) A has a special level of control over that source of danger, or (iv) A's status creates an obligation to protect B from that danger.[9]

In *Tindall*, the claimant sought to rely on the first proposition as grounding a duty of care, namely that the police had assumed a responsibility to users on the road or to T himself by taking control of the scene and ineffectually handling the

7 McBride and Bagshaw, *Tort Law* (6th edn, Pearson 2018) ch 6.4.

8 *Costello v Chief Constable of Northumbria* [1999] 1 All ER 550.

9 Tofaris and Steel, 'Negligence Liability for Omissions and the Police' (2016) 75 CLJ 128.

dangerous situation. Upholding this proposition, however, would have required an adverse manipulation of the concept of an "assumption of responsibility". An assumption of responsibility, as a legal term of art, is limited to specific situations such as when a contractual duty exists between the claimant and defendant or when a relationship akin to contract exists under the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[10] Absent of any features differentiating the relationship with the claimant from their relationship with anyone else, Stuart-Smith LJ affirmed the approach that, no matter how irresponsible the behaviour of a public authority is, they can never be said to have assumed a responsibility to the claimant.

This approach lends itself to a re-affirmation of the position established in *Kent v Griffiths*, a case where the ambulance service was held liable for failing to arrive on time to provide care for a patient suffering from bronchial asthma.[11] The decision in *Kent v Griffiths* has not been directly opposed by authority, but the precise ratio is worth discerning considering how, in principle, the ambulance service was held liable for failing to confer a benefit despite not assuming responsibility to the claimant personally. Applying the dicta of Stuart-Smith LJ, it is apparent that the duty of care in *Kent v Griffiths* is grounded by the emergency call to the ambulance service, which in turn establishes a relationship between the ambulance service and patient that is readily distinguishable from their relationship with the public at large.[12] There is no requirement, therefore, for a personal assumption of responsibility to the claimant, as all that is required is a sufficiently distinguishable relationship that the law can recognise as giving rise to a duty to act or confer a benefit. The features required to establish such a relationship will understandably differ under the circumstances of each case. It is safe to presume, though, that the bar for the weakest enforceable relationship requires at least bare knowledge of the existence of the person that the defendant would be assuming responsibility to.[13] In *Tindall*, the knowledge that road users, in general, would approach the dangerous patch of ice was insufficient to surpass that bar.

10 *Stanshie v Troman* [1948] 2 KB 48 (CA); *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL). Liability under the *Hedley Byrne* principle has been confirmed to extend to omissions: *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384 (Ch); *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL).

11 *Kent v Griffiths* [2001] QB 36 (CA).

12 For an alternative explanation premised on the concept of *interference* as discussed above, see McBride, 'Negligence Liability for Omissions - Some Fundamental Distinctions' [2006] Cambridge Student Law Review 10, 13.

13 *Playboy Club London Ltd v Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [2018] 1 WLR 4041. The UKSC held that there had been no assumption of responsibility under the *Hedley Byrne* principle to the claimant as the defendant had negligently supplied a favourable credit reference to the agent's undisclosed principal rather than to the claimant.

III. Conclusion

Stuart-Smith LJ's judgment demonstrates the clarity provided to personal injury claims following Lord Reed's dicta in *Robinson*. As Tofaris has indicated, *Robinson* provided the blueprint for the future development of the law of negligence, and *Tindall* is a decision that carefully places an additional building block upon that new blueprint.[14] Undoubtedly, there will be future cases where the acts-omissions distinction and the boundaries of the assumption of responsibility principle are more difficult to draw than they were here, but the helpful guidance established in *Tindall* will assist the courts in continuing to carve a more consistent path when faced with those challenging cases.

[14] Tofaris, 'Duty of Care in Negligence: A Return to Orthodoxy?' (2018) 77 CLJ 454.