NEGLIGENCE LIABILITY FOR OMISSIONS – SOME FUNDAMENTAL DISTINCTIONS

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The English law of negligence treats omissions as special. A claimant will find it far easier to bring a claim in negligence against a defendant if an act of the defendant caused her harm than she would if she suffered harm as a result of an omission on the part of the defendant. In this article, I don't want to defend the law of negligence's treatment of omissions – at least, not directly. Instead, I simply want to set out some important distinctions that students should bear in mind in trying to understand and evaluate this area of the law.

I. Acts / Omissions

It would make no sense for the law of negligence to treat omissions as special if it were not possible to distinguish between acts and omissions. In fact, it *is* possible to draw a distinction between the two. Acts make things worse. Omissions fail to make things better.

In *Sutradhar* v. *Natural Environment Research Council*,[1] the claimant was made sick drinking water from a well in Bangladesh that was poisoned with arsenic. The defendants had conducted a survey of the water in the area where the claimant lived and their report had been passed on to the Bangladeshi government. The report failed to mention that there was arsenic in the water. Had it done so, the Bangladeshi government would have taken steps to stop people like the claimant drinking the poisoned water. The claimant sued the defendants in negligence for compensation for the fact that he had been poisoned.

Were the defendants guilty of an act or an omission here? The answer is – an omission.[2] The defendants' report did not make things worse for the claimant. The Bangladeshi government may have been misled by the defendants' report into thinking that the water in the area where the claimant lived was safe to drink. However, there was no evidence that had the government not received the defendants' report, it would have detected the problem with the water drunk by the claimant and saved him from drinking it.[3] So – before the defendants conducted their survey and filed their report, the status quo was that the claimant would at some point in the future be poisoned from drinking the water in his area. The defendants' survey and report did not alter that status quo in any respect. So the defendants did not

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[1] [2004] P.N.L.R. 30.

[2] Given that all the defendants were guilty of in *Sutradhar* was an omission, it is not surprising that Kennedy LJ (with the agreement of Wall LJ) dismissed the claimant's claim in negligence against the defendants on the ground that there was no 'proximity' between the parties (*ibid.*, at [24]). In negligence cases involving an omission on the part of the defendant, the defendant will usually only be held liable to pay compensation to the claimant if there was a *special relationship* between the parties.

[3] *Ibid.*, at [10], [45] and [83]. Strangely enough, it was counsel for the claimant who insisted on bringing to the attention of the Court the fact that the Bangladeshi government was so poor, it could not afford to conduct its own surveys of the water in Bangladesh. He must have thought that doing this would help the claimant's claim. In fact, it was fatal to it. If he had been able to argue that the problem with the water drunk by the claimant would have been detected by the Bangladeshi government had it not been lulled into a false sense of security by the defendants' report, then the claimant's case would have been much stronger: see below note 15 and accompanying text.

make the claimant worse off. In acting as they did, the defendants merely missed an opportunity to save the claimant from being poisoned.

II. My Rights / Other People's Rights[4]

English tort law draws an important distinction between the case where I have suffered loss because you have violated *my* rights and the case where I have suffered loss because you have violated *someone else's* rights. In the first case, I will usually be entitled to sue you in tort for compensation for the loss that I have suffered. In the second case, tort law won't normally allow me to sue you for compensation.[5] It follows that if I want to sue you in tort for compensation for some loss that I have suffered, it won't usually do me any good to show that I suffered that loss because you violated someone else's rights; I will normally have to show that I suffered that loss because you violated *my* rights.[6]

For example, suppose that out of the kindness of his heart, Charlie pays Alex – a former martial arts champion – to patrol the streets of Cambridge at night and protect people who are being attacked. One night, Alex was out on her beat and she saw me being attacked. She did nothing to help me. I want to sue Alex in negligence for compensation for the injuries I suffered as a result of being attacked. In failing to help me, Alex undoubtedly violated *Charlie's* rights. Charlie paid Alex good money to help save people like me from being attacked, and as a result he had a right that she protect me from being attacked. But the fact that Alex violated *Charlie's* rights in failing to save me from being attacked won't help me win my case. I'll have to show that *I* had a right that Alex save me from being attacked.

Now – substitute 'the government' for 'Charlie' in the above situation and imagine that Alex was a police officer. It is important to recognise that making these changes has no effect *whatsoever* on the fundamentals of what has to be established if I want to sue Alex for compensation. If I want to sue police

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[4] When I use the word "right" in this article, I mean "*legal* right". I will have a right that you do *x* if the law imposes a duty on you to do *x* and it does so for my benefit. If the law imposes such a duty on you for my benefit, we can say that you *owe me* a duty to do *x*. So if one person says that, "A is held liable in tort to pay compensation to B because he violated B's rights" and another person says that, "A is held liable to B because he breached a duty owed to B", *they are saying exactly the same thing*. With some torts (such as battery or trespass to land) the courts tend to describe the basis of a defendant's liability as being the fact that he violated the claimant's rights. With other torts – notably negligence – the courts tend to say that a defendant's liability arises out of the fact that he breached a duty owed to the claimant. But, in the latter case, the courts could equally well say – as I am doing in this article – that the defendant's liability arises out of the fact that he violated the claimant's rights. It's merely a different way of saying the same thing.

[5] Suppose, for example, that A beats me up and as a result I have to take a lot of time off work, with the result that my employer C suffers loss. C won't be able to sue A in tort for compensation for his loss because in beating me up, A only violated *my* rights, not C's.

[6] Some academics would disagree with this statement. Those who adopt a *fault-based* view of tort law say that if I want to sue you in tort for compensation for some loss that I have suffered, it will usually be sufficient for me to show that you were at *fault* for the fact that I suffered that loss. There's no need for me to go the extra mile and show that you violated my *rights* in acting as you did. However, the fault-based view of tort law is seriously faulty. There are many situations (for examples, see *D* v. *East Berkshire Community Health NHS Trust* [2005] 2 A.C. 373, at [100]) where I will not be allowed to sue you in tort for compensation for some loss that I have suffered even though you were plainly at fault for the fact that I suffered that loss. Adherents to the fault-based view of tort law usually say that the reason you will not be held liable in those situations – contrary to the expectations created by their theory – is that 'public policy' demands that you not be held liable. But there are many situations of no-liability-despite-fault where this explanation does not work. For example, in the situation set out in note 5, above, it is hard to see why 'public policy' demands that C not be allowed to sue A in tort. A far more satisfying explanation of why A is not held liable to C is that A has not violated C's rights. See Zipursky, "Rights, Wrongs and Recourse in the Law of Torts" (1998) 51 Vanderbilt L.R. 1.

officer Alex, I will still have to establish that she violated *my* rights in allowing me to be beaten up. Now – it may be that allowing me to sue Police Officer Alex for damages would be in the public interest. For example, it may be the case that if I were allowed to sue police officer Alex, the police generally would be encouraged to do their jobs properly. But that is irrelevant to tort law. If I want tort law to give me a right to sue Police Officer Alex for damages, I must first establish that she violated my rights. It is not enough for me to show that giving me a right to sue her for damages would be in the public interest.

III. Starting and Stopping / Not Starting

I am sunbathing on a deserted beach. I decide to go for a swim. Shortly after I enter the water, I am hit by a large wave. I swallow a large amount of water and start to struggle. I scream for help. You have just come onto the beach. You are the only person to hear my cries for help.

Now – let's consider two different scenarios. In Scenario A, you completely ignore my cries for help and I drown. In Scenario B, you respond to my cries for help by rushing into the water. You then change your mind about saving me, go back onto the beach and I drown. Should the law discriminate between these scenarios? Should it say that I had no right that you save me from drowning in Scenario A, but say that once you commenced a rescue attempt in Scenario B, I had a right that you save me from drowning? It would be strange if the law did discriminate between the two different scenarios. If it did, then the law would seem to indulge nasty people who don't lift a finger to help others, while punishing nice-but-weak people who rouse themselves to try and help those in need, but then fail to follow through on their initial good intentions. The law must not do this. It must say that I had a right that you save me from drowning in both situations or in neither.

In *Hedley Byrne & Co Ltd* v. *Heller & Partners*,[7] Lord Morris ignored the need for the law not to discriminate between cases where you started to help me and then stopped and cases where you did not bother to try to help me. Lord Morris suggested that if I am lying unconscious in the street and a doctor comes across me and *starts to treat me*, I will have a right that he treat me with a reasonable degree of care and skill.[8] This cannot be correct. If it were, the doctor would have been better off had he ignored my plight and walked straight past me. In such a case, I would not have been able to say that I had a right that he treat me properly. Fortunately, the Court of Appeal has since made it clear that Lord Morris was wrong. In *Capital & Counties plc* v. *Hampshire CC*, Stuart-Smith LJ said that if a passing doctor "volunteers his assistance [to help the victim of a traffic accident], his only duty as a matter of law is not to make the victim's condition worse."[9] So whether the doctor chooses to treat the victim of the accident or not will not make any difference to the rights of the victim of the accident. The only right he will ever have is that the doctor does not make his condition worse.

In the case of *East Suffolk Rivers Catchment Board* v. *Kent*,[10] Lord Atkin fell into the same trap as Lord Morris. In that case, the claimant's land was flooded when a neighbouring river burst through a sea wall. The defendant river authority took on the job of repairing the sea wall, but took an excessively long time over making good the breach in the wall. The result was that the claimant's land was flooded for longer than it needed to be. Lord Atkin argued that *once the defendants took on the job of repairing*

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[7] [1964] A.C. 465.
[8] *Ibid.*, at 495. See also *Banbury* v. *Bank of Montreal* [1918] A.C. 626, at 689 (*per* Lord Atkinson).
[9] [1997] Q.B. 1004, 1035.
[10] [1941] A.C. 74.

the sea wall, the claimant had a right that they do the job quickly and efficiently.[11] This cannot be right. If it were, then the defendants would have been better off had they not lifted a finger to help the claimant and left him to repair the sea wall himself. In such a case, the claimant would not have been able to argue that he had a right that the defendants repair the sea wall quickly and efficiently. Fortunately, the majority in the *East Suffolk* case took a different view from Lord Atkin and held that the only right that the claimant ever had against the defendants was a right that they not make things worse for him. As the defendants had not violated that right in acting as they did, the claimant had no right to sue the defendants for damages in tort.

Iv. Immunity / no-liability

Imagine that while you are reading this article, I am being beaten up on the street. As you have nothing to do with my being beaten up, I cannot sue you in tort for compensation for my injuries. Suppose that a friend congratulates you on this fact, saying, "you've got an immunity from being sued in this case". You would immediately think there was something a bit weird about this statement. To say that you have an immunity from being sued suggests that the law would *normally* allow me to sue you for compensation. However, the law suspends its normal rules in your case – it grants you a special exemption from being sued by me. But that doesn't describe what is going on in your case at all. Your case is not an exception to the rule. It *is* the rule. You do not have an *immunity* from being sued in this case. You are simply *not liable*.

Now – suppose that Fred, a police officer saw me being beaten up in the street and failed to intervene. He could have easily prevented the attack, but he chose not to do so. I will not be entitled to sue Fred in negligence for compensation for my injuries. The House of Lords has made it clear – most recently in the case of *Gorringe* v *Calderdale MBC*[12] – that the *mere* fact that a public body is in a position to save me from some kind of harm, will not give me a right that that public body take steps to save me from that harm.[13] Something more has to be established before I will acquire such a right, such as evidence that the public body made an undertaking to me that it would help me and I relied on that undertaking,[14] or evidence that the public body acted in a way that discouraged or prevented other people from helping me.[15] In those cases, I *will* have a right that the public body take steps to save me from harm. But absent such special circumstances, I will have no such right, and the public body will commit no tort in failing to save me from harm.[16] Now – these rules not only apply to public bodies, they also apply to those who

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[11] *Ibid.*, p. 90.

[12] [2004] 1 W.L.R. 1057.

[13] *Ibid.*, at [32] *per* Lord Hoffmann: "I find it difficult to imagine a case in which a common law duty can be founded simply upon the failure (however irrational) to provide some benefit which a public authority has [the] power (or a public law duty) to provide." See also Howarth, "Public Authority Non-Liability: Spinning Out Of Control?" (2004) 63 C.L.J. 546, perceptively noting that the effect of the decision in *Gorringe* is to treat "many public services as… social *gifts*, the unreasonable failure to deliver which cannot give rise to liability in negligence" (emphasis added).

[14] This was the case in *Densmore* v. *Whitehorse* [1986] 5 W.W.R. 708, where the defendant fire department told the claimant – whose house was on fire – that a fire engine was on its way to put the fire out. As a result, the claimant did not bother to take any steps to save the contents of her house.

[15] This was the case in *Kent* v. *Griffiths* [2001] Q.B. 36, where the defendant ambulance service's assurances that an ambulance was on its way to pick up a patient suffering an asthma attack discouraged the patient's doctor from taking the patient to hospital herself.

[16] It follows from what was said in the section above on "Starting and stopping/not starting" that *if* I have no right that a

work in the public sector, such as police officers or fire engine drivers. So the mere fact that Fred was in a position to save me from being beaten up will not mean that I had a right that he take steps to save me from being beaten up. Something more will be required before the courts will find that I had such a right. As that 'something more' was not present in my case, Fred did not violate any of my rights when he failed to save me from being attacked. So I will not be able to sue Fred in negligence for compensation for the injuries I sustained as a result of being beaten up.

Some lawyers will say, almost as a matter of routine, that Fred enjoys an 'immunity' from being sued by me in the situation we are discussing.[17] Students should avoid following their example. This is for two reasons.

First of all, it is simply not true to say that Fred enjoys an immunity from being sued here. There is no evidence that the law would *normally* hold Fred liable here, but instead grants him a special exemption from being sued by me. If Fred had been a private citizen who watched me being beaten up when he could easily have stopped the attack, I would not have been entitled to sue Fred for compensation for my injuries. So how can we say that the law treats Fred the police officer as a special case when it says that I cannot sue *him* for compensation? The truth is the other way round. If the law *did* allow me to sue Fred for compensation, it would *then* treat Fred as a special case, imposing liabilities on him that other people would not be subject to.[18] The truth is that Fred does not enjoy an *immunity* from being sued here. He is simply *not liable*.

The second reason why students should not say that Fred enjoys an immunity from being sued in this situation is that to say such a thing encourages students to think that I *should* be allowed to sue Fred for compensation in the situation we are considering. A student asks, 'Why should the law grant Fred a special exemption from being sued in this situation?' There is, of course, no earthly reason why it should. So the student concludes that the law should stop treating Fred as a special case and allow me to sue him for compensation. But, of course, the law does *not* treat Fred as a special case. By saying that Fred enjoys an 'immunity' from being sued here, we create an illusion that the law gives him special treatment and make the law look ridiculous.

If we want to make a *good* argument that the law in this area is in need of reform, we need to put all illusions aside and focus on the *real* reason why I at thot allowed to sue Fred for compensation. The real reason is that the law currently says that the mere fact that a public body is in a position to save me from harm does not give me a right that that public body intervene to help me out. If you want to argue that the law in this area is in need of reform, then you have to argue that the law is wrong to say this, and that it *should* say that if a public body is in a position to save me from harm, then I will normally have a right that it take steps to help me out.[19]

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public body save me from harm, then the *mere* fact that the public body has started to try to save me from harm will not give me a right that it conduct its rescue efforts with reasonable skill and care. (Though, obviously, I will acquire such a right if the public body's attempts to save me have put other people off trying to save me.)

[17] This is invariably because the lawyers in question adopt a fault-based view of tort law (see above, note 6), and assume that the law will normally hold a defendant liable to pay compensation to a claimant for some harm suffered by that claimant if the defendant was at fault for the fact that the claimant suffered that harm. If this view of the law is correct (which it is not – again, see note 6, above, and accompanying text), the law *does* treat Fred as a special case; it exempts him from its normal rule that a defendant who was at fault for harm suffered by the claimant will be held liable for that harm.

[18] See Feldthusen, "Failure to Confer Discretionary Public Benefits: The Case for Complete Negligence Immunity" (1997) 5 Tort L.R. 17, 24-29.

[19] Whether the law *should* say this or not is a matter of policy (or, as some would say, 'distributive justice'). It seems to me

V. The Courts / Parliament

The final distinction I would like to emphasise in this article is the distinction between the courts and Parliament; in particular, the fact that the courts are *subordinate* to Parliament. This feature of our law is, of course, more relevant to constitutional law than tort law. However, it does have a big impact on the law on negligence liability for omissions.

Suppose that an Act of Parliament allocates £500,000 to Cambridgeshire County Council to make grants to the residents of Cambridge so that they can protect their homes against flooding. The Act specifies that in considering whether or not to accept an application for a grant, Cambridgeshire County Council is free to take into account any factors it likes "so long as they are not manifestly unreasonable".

Maria lives in an area in Cambridgeshire that is at high risk of flooding and she makes a grant application to the Council. Her application is turned down: the Council takes the view that she is so well off she does not need to be given a grant to flood-proof her house. Maria applies for a judicial review of the Council's decision, arguing that it is 'manifestly unreasonable' for the Council to discriminate against rich people in making flood defence grants. While the application is being heard, Maria's house is flooded. Shortly afterwards, the courts turn down Maria's application for judicial review, holding that the Council acted within its powers – *intra vires* – in refusing to give her a grant. Maria then launches a new action against the Council, arguing that it is liable in negligence to compensate her for the property damage she suffered when her home was flooded.

Her action must fail. To make out her claim, Maria would have to show that she had a right that the Council give her a grant to help her protect her home against flooding. Now – according to the court that heard Maria's application for judicial review, Parliament intended that the Council should be free to turn down Maria's application, given her means. Given this, the court hearing Maria's claim in negligence simply cannot say that the Council was not in fact free to turn down Maria's application because Maria had a right to receive a grant from the Council. To say such a thing would run flat contrary to the will of Parliament when it set up the system for making grants for flood defences.

Let's take another example where Parliament's sovereignty over the courts has an effect on the law on negligence liability for omissions. Suppose that the Act we are considering here also imposes a duty on Cambridgeshire County Council to make flood defence grants to people over 65 who are living on their own. The Act specifies that "breach of this duty is not intended to be actionable in tort". Maria's neighbour, Sandy, is 70 years old and lives on his own. He makes an application for a flood defence grant to the Cambridgeshire County Council and it is turned down on the grounds that he is so rich, he does not need a grant to flood-proof his house. Like Maria, Sandy applies for a judicial review of the Council's decision on the ground that the Council had a duty to give him a grant under the Act. Sandy's application is successful and the court orders the Council to reconsider Sandy's case. Unfortunately, before it can do so, Sandy's house is flooded in the same flood that affected Maria's house. Sandy sues the Council in negligence for compensation.

The fact that the Council acted beyond its powers – *ultra vires* – in denying Sandy a grant means that Sandy's claim in negligence is not as fatally flawed as Maria's was. If the courts found that Sandy had

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impossible to say – as some academics have started to do – that policy considerations (or considerations of distributive justice) are irrelevant to tort law. They play a major role in determining what rights we have (or, to put it another way, what duties we owe each other): see Cane, "Distributive Justice and Tort Law" (2001) 4 New Zealand L.R. 401.

a right under the law of negligence[20] to receive a grant from the Council, they would not deprive the Council of a freedom that Parliament intended it to have. Parliament never intended the Council to be free to refuse to give Sandy a grant. At the same time, however, Parliament made it clear that the Council should *not* be held liable in tort *merely* because it breached its statutory duty to give Sandy a grant. This intention of Parliament's would be subverted if the courts found that Sandy had a right under the law of negligence to receive a grant from Council. To find that Sandy had such a right would result in a mere breach of statutory duty on the part of the Council becoming actionable in tort – which is not what Parliament intended.

So – if the law were reformed to say (as it does not at the moment) that I will normally have a right in negligence that a public body take steps to save me from harm if it is in a position to take such steps, the sovereignty of Parliament over the courts would still place a substantial limit on when I would be able to assert that I had a right in negligence to be helped out by a public body. The courts would not be able to find that I had a right to receive a benefit from a public body *if* the sole basis for finding that I had a right to receive that benefit was that the public body was in a position to give me that benefit *and*

> *either* (1) the public body acted within its powers, as laid down by Parliament, in failing to give me that benefit;
> *or* (2) the public body was under a statutory duty to give me that benefit but Parliament intended that breach of that duty should not be actionable in tort.[21]

VI. Conclusion

The law on negligence liability for omissions *is* difficult to understand. This difficulty creates a constant temptation to throw up one's hands and say, 'It's all about policy!' We must resist this counsel of despair. Instead, we must try to come to grips with the fundamental distinctions laid out in this article. Once we do, we will find that considerations of logic and high principle play just as much of a role in shaping this area of the law as do concerns about the public interest.

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[20] It is necessary to add the qualifier "under the law of negligence" or "in negligence" here because Sandy did, of course, already have a *statutory* right to receive a grant – but violation of *that* right will not be actionable in tort because Parliament did not intend that it should be. The question we are considering here is whether the courts could find that Sandy had *another* right ("in negligence"), lying parallel to his statutory right, violation of which *would* be actionable in negligence.

[21] Of course, *at the moment*, in a case where a claimant asserts that he had a right in negligence to receive a benefit from a public body simply because the public body was in a position to give him that benefit, the courts do not need to inquire whether (1) or (2) are true before rejecting the claimant's claim. The House of Lords' decision in *Gorringe* v. *Calderdale MBC* [2004] 1 W.L.R. 1057 makes it clear that the mere fact that a public body was in a position to help a claimant out is not enough to give rise to a right in the claimant that the public body assist him: see note 13, above, and accompanying text.