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PERSONAL INJURY

For this edition of the Personal Injury Briefing we are wrapping up warm, pouring a hot chocolate, passing around the treacle toffee and embracing all things Bonfire Night. Whilst we hope that all our readers enjoy the seasonal celebrations safely, we look at some of the issues that arise when things go wrong.

Laura Johnson KC and Kerry Nicholson discuss occupancy and activity duties in the context of public events, including the more stringent duty on an occupier that applies when they allow particularly risky or hazardous activities to take place on their land.

Sarah Prager KC and Julia Brechtelsbauer consider liability for defective fireworks and the mechanism by which claims for a latent defect can be brought in the jurisdiction even when the firework has been imported from abroad.

Many of our readers will be very interested to read John Schmitt's topical article on the liability of emergency services responding to events such as fires, including a review of last week's decision of the Supreme Court in *Tindall v Chief Constable of Thames Valley Police* [2024] UKSC 33. Andrew Warnock KC and Ella Davis of Deka Chambers acted for the successful Chief Constable in the appeal and Ella's summary of the decision can also be read here.

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Laura Johnson KC and Adam Dawson
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FIREWORKS DISPLAYS: EXTRA HAZARDOUS ACTIVITIES —WHEN THINGS GO WRONG, WHO IS AT FAULT?

Laura Johnson KC and Kerry Nicholson

Some of our readers will remember the days when most people celebrated November 5th in the back garden with a bonfire topped with a homemade Guy, several boxes of mixed fireworks from the local supermarket stored in a biscuit tin and a packet of sparklers. Notwithstanding terrifying 1980s firework safety videos and the annual visit of the local fire brigade to many a school hall to warn of the dangers of wearing a shell suit too close to a flame and similar hazards, injuries still happened. Whilst the worst most children of the era suffered were melted wellies or burned fingers from picking up a used sparkler by the business end, each year life changing injuries were reported in the news.

In the 1990s pressure for firework regulation grew as a result of a huge increase in sales of fireworks and concerns about explosive power and safety. In 1996 recognition that injuries had almost doubled since 1989 and some high-profile deaths from firework explosions led to the Fireworks (Safety) Regulations 1997 and further legislation has been enacted since.

In more recent years there has been a push to reduce the availability of fireworks on sale to the general public and to encourage people to celebrate the evening by attending organised events. With this comes different questions of liability for the rare occasions when these events go wrong.

Fireworks events are commonly held at pubs, schools and community recreation grounds. Often the evening is managed by the organisation that has arranged it and contractors are brought in to provide the display.

A range of risks arise during the course of the evening from tripping over uneven ground in the dark, to the thankfully less common occurrence of injuries as a result of problems with the display or management of the fire.

In celebration of the season, this article reviews the legal framework for liability should a claim arise out of an accident at one of these events.

The Occupier's Liability Act 1957: the "occupancy duty"

S. 2(2) of the OLA contains the common duty of care, being a "duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there."

Confusion can arise however about the scope of this duty.

S. 1(1) of the OLA provides that the provisions of the Act:

"shall have effect in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors **in respect of dangers due to the state of the premises** or **to things done or omitted to be done** on them."

In *Tomlinson v Congleton Borough Council* [2004] 1 AC 46 the House of Lords considered the meaning of "state of the premises" in the context of a claimant who was injured diving into a lake. Although the case was strictly concerned with the OLA 1984, Lord Hoffmann's analysis of this wording which is common to both Acts, applies equally to the OLA 1957.

Lord Hoffmann distinguished between dangers that arise because of the state of the premises and those that occur because

of what the claimant chooses to do on the premises. Unimpressed with both the Claimant's submissions that "the council... were "luring people into a deathtrap" due to allegedly inadequate attempts to stop people swimming in the lake and Ward LJ's opinion that the water was "a siren call strong enough to turn stout men's minds", Lord Hoffmann gave this stark description of the difference between the state of the premises and the activity that is done there:

> "The trouble with the island of the Sirens was not the state of the premises. It was that the Sirens held mariners spellbound until they died of hunger. The beach, give or take a fringe of human bones, was an ordinary Mediterranean beach. If Odysseus had gone ashore and accidentally drowned himself having a swim, Penelope would have had no action against the Sirens for luring him there with their songs. Likewise in this case, the water was perfectly safe for all normal activities."

He also observed "Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity."

As a result the claim under the OLA failed.

If a claimant wishes to bring a claim because they slipped or tripped on an uneven surface then the correct legal framework would be the OLA 1957 (assuming they meet the other requirements of the Act, such as being a visitor). If they were injured because of something that was being done on the premises, then one must look elsewhere for the basis of the claim.

The "activity duty"

Where a danger arises because of activities on land, such as a fireworks display, rather than from the state of the land itself, any duty arising is governed by the general rules of negligence.

As a result issues that are important under the OLA, such as the status of the claimant, are largely irrelevant. As the editors of Clerk & Lindsell observe at 11-04: "this seems right in principle; if A's activity hurts B, the regime governing it should be the same whether or not B happens to have been on A's land at the time."

Occupiers owe a duty to visitors on their land in respect of activities they permit or encourage to be carried out there. If those activities are carried out by an independent contractor, that duty is normally discharged by the occupier taking care to select a reasonably competent contractor.

Further, that duty will not normally extend to the employees or agent of that contractor, who will have a cause of action against the contractor alone for any negligence on the part of the contractor.

As a result, in any case involving an accident arising out of an activity that was taking place on premises, it is important to consider who the occupier is, what the activity is and who is carrying out the activity to identify the correct potential defendant(s).

In *Lear v Hickstead Limited* [2016] 4 W.L.R. 73 Picken J considered a claim arising out of parking arrangements at a horse show. He accepted that in principle a duty of care could be owed in respect of those arrangements, but the case failed on the facts.

In *Bosworth Water Trust v SSR* [2018] EWHC 444 (QB) an amusement park that offered crazy golf was found liable to a child who was injured when another child swung his club and hit his face. The court was critical of the failure to carry out a risk assessment and erect instruction and warning signs.

Extra hazardous activities

It is useful to be aware of the Court of Appeal decision in *Bottomley v Todmorden Cricket Club* [2003] EWCA Civ 1575, which addressed the nature of the duty owed by an occupier who permits particularly hazardous

activities to take place on their land. This case arises on its own particular and rather peculiar facts, but in it the Court of Appeal confirmed there are circumstances in which an occupier will owe a duty of care to supervise a contractor. On the facts of the case the duty was owed to the agent or employee of an independent contractor for that contractor's negligence. One might be forgiven for speculating that the fact that the independent contractor was not appropriately insured was a significant factor in explaining the outcome of the case.

Facts

The Defendant cricket club was holding its annual fundraising event at its premises. This included a pyrotechnic display, for which it contracted "Chaos Encounter" – a two-man stunt team - who had invited the Claimant, one of their friends, along to help them carry out their show on a voluntary basis. He had previously helped with various aspects of shows, but he had no previous experience of stunt work or pyrotechnics.

Chaos Encounter had been known to the Defendant for two years, having previously provided two shows which included pyrotechnic elements. Before securing the first show, it made two presentations and provided material and photographs showing various stunts.

The plan for Chaos Encounter's display included igniting a pair of mortars which were metal tubes set into the ground which had been filled with petrol. The Claimant's task was to prime the mortars by lowering gun powder in a plastic bag into the mortar, which could be ignited remotely. As he was lowering the gunpowder charge into the second mortar tube, the contents ignited and exploded in his face, causing him severe burns and a broken arm.

The trial judge had observed that, even if everything went according to plan (which it did not), what Chaos Encounter had planned was inherently dangerous.

There was no formal contract between the Defendant and Chaos Encounter, and the club had no clear idea of what Chaos Encounter was going to do on the night. All that it knew was that Chaos Encounter's display was going to involve pyrotechnics, and that it would end with a van being driven into the bonfire as it was lit. Chaos Encounter was simply left to get on with its display. The secretary of the committee told the judge that he had no idea that Mr Bottomley was involved in the display, and that, if he had known, he would not have allowed him anywhere near it. The judge was not persuaded that this evidence was directly relevant to the issues he had to decide, but he said that it threw light on the extent of the Defendant's ignorance as to what was going on.

First instance decision

The judge concluded that despite the appearance that it might have given to the club, Chaos Encounter was an amateurish organisation operating in a field which required the highest degree of professionalism if danger was to be avoided.

The judge summarised the relevant underlying legal principles as follows:

1. A person who engages an independent contractor to carry out work is not liable for the negligence of the independent contractor provided that they exercised reasonable care to engage a reasonably competent contractor.

2. An occupier of land does not owe a duty, either under the Occupiers' Liability Act 1957 or at common law, to a servant or agent of an independent contractor who is performing an activity on its land, where the servant or agent is injured as a result of the way in which the work is being carried out.

3. Some activities are regarded by the law as being particularly hazardous or 'extra hazardous'. In such cases, a duty is imposed on the employer to see that

care is taken; and the employer is vicariously liable for any negligence of the independent contractor.

The judge went on to conclude that the Defendant owed the Claimant a duty of care, and that it had been breached. He held that pyrotechnic displays were an obvious and established example of an extra-hazardous activity. Further, he held it unnecessary to decide whether the occupier's liability in respect of extra-hazardous activities extended to injury of the independent contractor's employees, instead finding that it plainly applied to a person who was not employed by the contractor and who came onto the occupier's land pursuant to a general invitation.

The Appeal

The Defendant appealed. On appeal, the Court of Appeal confirmed that there was a clear distinction between the occupancy duties of an occupier (relating to the state of the premises) and the activity duties of an occupier, and that the enactment of the Occupiers' Liability Act 1957 only replaced the pre-existing common law rules in relation to the former. It also upheld the judge's factual findings and confirmed that the Defendant had failed to take care when selecting Chaos Encounter.

It then went on to consider in detail the nature of the duty owed to the Claimant. First, it is important to note that it was not in issue that the Defendant owed a duty of care to all the people who attended the fund-raising event. However, the Defendant argued that the Claimant was in a different position because he should properly be regarded as an agent of independent contractors who were providing dangerous entertainment.

The court confirmed that there are occasions when an occupier may be liable in negligence in respect of the activities which he permits or encourages on his land, and that this was the "activity duty". It noted that the House of Lords in *Ferguson v Welsh* [1987] 1 W.L.R. 1553 observed at 1560F-H:

> *It may therefore be inferred that an occupier might, in certain circumstances, be liable for something done or omitted to be done on his premises by an independent contractor if he did not take reasonable steps to satisfy himself that the contractor was competent and that the work was being properly done.*
>
> *It would not ordinarily be reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent, to supervise the contractor's activities in order to ensure that he was discharging his duty to his employees to observe a safe system of work. In special circumstances, on the other hand, where the occupier knows or has reason to suspect that the contractor is using an unsafe system of work, it might well be reasonable for the occupier to take steps to see that the system was made safe.*

Having confirmed that the Defendant ought to have taken reasonable care in its selection of a suitable contractor and that it failed to do so, the Court went on as follows (at [49], emphasis added):

> *Occupiers usually escape liability in a case like this because they can show they have taken reasonable care to select competent and safe contractors, and in those cases an injured employee or agent can look no further than his own employer or principal for redress. But as the House of Lords acknowledged in Ferguson v Welsh,* ***there may be circumstances in which the occupier of the land who wishes something dangerous to be done on his land for his benefit may be liable, too, and this in my judgment is one of those cases****. If this result is tested by applying the range of tests for identifying a legal duty of care which*

> *the House of Lords has developed in the years that followed Ferguson v Welsh, the result is in my judgment the same.* ***The injuries suffered by Mr Bottomley were foreseeable if there was no proper safety plan: there was the requisite proximity between the club and Mr Bottomley, who was lawfully on their premises that evening; and it is fair, just and reasonable to impose liability on the club because it did not do what it ought to have done before it allowed this dangerous event to take place on its land****.*

The Defendant's appeal was therefore dismissed. The court found it proper to impose a duty of care on the Defendant in the circumstances, notwithstanding that the Claimant was the agent of Chaos Encounter, noting that (at [50]):

> *[T]he traditional common law response to the creation of a special danger is not to impose strict liability but to insist on a higher standard of care in the performance of an existing duty.*

Practice Points

Hopefully Bonfire Night will pass without incident for the many attendees of organised fireworks events across the UK.

However, if confronted by a claim arising out of such an event the following factors ought to be considered:

- What was the cause of the accident? Was the claimant injured by an issue with the state of the premises for example tripping on an uneven surface? Or was the claimant injured as a result of an activity that was taking place at the premises?

- If the cause of the injury was a defect in the state of the premises then the legal framework is provided by the Occupiers Liability Act 1957. If the claimant cannot establish they were a visitor within the meaning of the Act it may be necessary to look to the Occupiers Liability Act 1984.

- If the cause of the injury was the activity that was taking place then the relevant framework is that of common law negligence.

- When considering the question of who the correct defendant is, both the OLA 1957 and the common law require consideration of whether the occupier was responsible for the problem that caused the claimant's accident, or whether an independent contractor was involved.

- Under both the OLA 1957 (in the case of occupancy duties) and the common law (in the case of activity duties) an occupier may discharge its duty of care by showing they have acted reasonably in appointing competent and safe contractors. In those cases the claim ought properly be directed to the contractor.

- When considering whether the occupier has selected a competent contractor it is necessary to look into the detail of how the contractor was selected, the information that was provided by them, what the occupier knew of the task they were performing and how it was to be performed.

- In cases involving the activity duty where the occupier is selecting a contractor to carry out an inherently dangerous activity, occupiers should take extra care in selecting them because a higher standard of care applies.

WHEN FIREWORKS GO WRONG: IDENTIFYING THE RESPONSIBLE PARTY

Sarah Prager KC and Julia Brechtelsbauer

In 2018/2019 1,835 people attended A&E in England in relation to firework related injuries, mostly burns to the eyes, head or hands. In 2020/2021 116 patients were admitted to hospital for firework related injuries, 21 of whom were children aged 14 or under. Most of these injuries were sustained at small private or family events. Many of them were life changing.

Some of these injuries will have resulted from mishandling or mismanagement of fireworks – but in some cases the pyrotechnics themselves were defective. Moreover, the danger associated with fireworks is not bound by borders of the United Kingdom. The pyrotechnics in question may have been purchased from abroad. Further, although the British uniquely celebrate "Guy Fawkes", equally, an accident can occur in another jurisdiction, whether that be a New Years Eve holiday, or a destination wedding. This article seeks to address (1) how a claim can be made concerning defective fireworks (2) how that claim is applicable to foreign manufacturers or accidents suffered abroad.

Concerning accidents resulting from fireworks, it is often difficult to identify the entity responsible for the injury. A real-life example serves to illustrate the issue. In *McQueen v Glasgow Garden Festival* (1988) Limited [1995] CLY 6162 a spectator at a firework display was injured when she was struck by part of a steel launching tube which fragmented when a firework exploded inside it. It was agreed that the explosion had been caused by a defect within the firework which had caused it to explode on the ground rather than whilst airborne; it was further agreed that the defect had either been a flaw in, or absence of, the fuse to the lifting device within the firework, or a flaw in, or absence of, the delay device which ought to have prevented the explosion of the main bursting charge before activation of the lifting device. The pursuer sought to establish liability against the display organiser on three grounds:

a) the company were occupiers of the display area, and as such were responsible for the consequences of detonation of dangerous articles such as fireworks in that area;

b) fault on the part of the company was established by the doctrine of res ipsa loquitur, the explosion of the firework under the management of the company being in itself demonstrative of fault; and

c) the firework was inherently dangerous and the company had failed to take reasonable care to check its safety and control its detonation.

The claim failed. The court held that the pursuer could only succeed if she were to prove fault on the part of the organiser, and she had not been able to do so; the defect was known to be a latent one, and accordingly the fact of the explosion was not indicative of a fault or omission on the part of the company – rather, it was indicative of fault on the part of the manufacturer, which was not a party to the proceedings.

By contrast, in *Bottomley v Todmorton Cricket Club* [2004] PIQR P18 the claim succeeded because the claimant was able to show fault on the part of the organiser in failing to take ordinary precautions in organising a potentially hazardous event. It is notable though that in that case there was no suggestion that the pyrotechnics themselves were defective; and there was ample evidence of fault on the part of the defendant.

The starting point in relation to any claim arising from the provision of latently defective fireworks is the Consumer Protection Act 1987, which (crucially) imposes strict liability.

Any claim against the producer of a defective product, or someone who holds himself out as the producer, or any entity importing a defective product into the UK in order to supply it to another as part of its business, is governed by s.2 of the Act, which states:

"Liability for defective products

(1) Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage.

(2) This subsection applies to—

(a) the producer of the product;

(b) any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product;

(c) any person who has imported the product into [the United Kingdom]1 in order, in the course of any business of his, to supply it to another."

The importance of this provision was underlined by the Court of Appeal in *Abouzaid v Mothercare (UK) Limited* [2000] All ER (D) 246, in which the court stated:

"...A product would be defective under the Consumer Protection Act 1987 irrespective of whether or not the relevant hazard had come to the producer's attention before damage had been caused. When deciding whether a manufacturer had been negligent, however, the absence of comparable accidents could be taken into account...."

As a result, the claimant in *McQueen*, had she been able to sue under the Act, would have succeeded in any claim against the producer, any entity holding itself out as the producer, or the importer or the fireworks into the jurisdiction. She would not have been required to prove negligence on the part of any of these potential defendants.

The impact this has cannot be underestimated. In *AG v Sandling Fireworks UK (2013)* the Claimant was awarded £50,411 (£78,307 uplifted to today's value) as a result of being struck by a firework at a display in November 2011. She stood behind the barrier provided, but unfortunately around 5-10 minutes into the display, a firework failed to explode properly, and it struck her, setting her alight. She suffered 3-4% flame burns to her neck and 1-1.5% deep burns to her chest. The scarring was permanent and visible at a conversational distance. How did she bring her claim? Through the Consumer Protection Act s.3 as the firework was defective, and not adequately inspected nor controlled. This case further demonstrates the utility of the Act to the Claimant, in that the Defendant fireworks company initially had denied liability on the basis that the event host, who had ignited the fireworks and whose land the display was held at, was liable. Instead of the Claimant needing to pursue both Defendants, the fireworks company simply reserved the right to seek a contribution from the host.

What is also of assistance concerning these claims is that they also apply if there has been inadequate warning or instructions on the fireworks notwithstanding any lay person understanding of an actual "defect" (s.3(2)(a) of the Act). Therefore, a defendant cannot point to the instructions given as a defence, should those instructions be inadequate.

How the Claimants may bring a Claim in the UK and/or under English Law

The Consumer Protection Act features another important provision which acts in favour of consumers. Pursuant to s.2(3):

"Subject as aforesaid, where any damage is

caused wholly or partly by a defect in a product, any person who supplied the product (whether to the person who suffered the damage, to the producer of any product in which the product in question is comprised or to any other person) shall be liable for the damage if—

(a) the person who suffered the damage requests the supplier to identify one or more of the persons (whether still in existence or not) to whom subsection (2) above applies in relation to the product;

(b) that request is made within a reasonable period after the damage occurs and at a time when it is not reasonably practicable for the person making the request to identify all those persons; and

(c) the supplier fails, within a reasonable period after receiving the request, either to comply with the request or to identify the person who supplied the product to him."

This provision places the burden of identifying a potential defendant squarely on the supplier of the fireworks; it is for them to provide the information sought to the consumer, and if they do not, they themselves become liable to the claimant.

Note that it is irrelevant for the purposes of the Act that the claimant himself might not be a party to the supply contract.

In these ways the Act ensures that people injured by defective fireworks, whether the defect is detectable or not, can identify an entity within the jurisdiction against whom to bring a claim. Only if a consumer imports a defective item him- or herself from outside the jurisdiction, or purchases the fireworks whilst abroad, will (s)he be unable readily to identify a potential defendant capable of being sued within England and Wales. Even in those circumstances, however, the consumer is protected to some extent. The Civil Jurisdiction and Judgments Act 1982, s.15B (2) provides that a consumer may bring proceedings against the other party to the consumer contract:

"(a) where the other party to the consumer contract is domiciled in the United Kingdom, in the courts of the part of the United Kingdom in which the other party to the consumer contract is domiciled, or

(b) in the courts for the place where the consumer is domiciled (regardless of the domicile of the other party to the consumer contract)."

Therefore, a claim can be brought in respect of defective products within the home jurisdiction of the UK based claimant. Though this is of course dependent on there being a contract between the consumer and the defendant. Imagine, for example, a Claimant mass-purchases fireworks online from a foreign company for a 5th November display. Or, a Claimant travels abroad and purchases fireworks to partake in San Juan on the beach in Barcelona in June, which results in an accident. Albeit, in the latter scenario, the Claimant may face a strong up-hill battle concerning *forum non conveniens* given the majority of the connecting factors occurred abroad.

The consumer is protected, even where the seller seeks to protect itself by providing in the consumer contract for the application of the law of its domicile. Pursuant to s.6 of the Rome I Regulation ((EC) No.593/2008):

"1. ...a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1."

Therefore, the consumer can sue an extra-jurisdictional defendant within the UK, and (s)he will continue to be protected by the strict liability provisions of the Consumer Protection Act 1987 even where the applicable law of the contract is not that of England and Wales.

Comment

The law on product liability strongly favours consumers; the development between *McQueen* and *AG* is a real-life demonstration of how the Act now provides for a claim, where previously the Claimant may have been unsuccessful. *McQueen* could have succeeded in an action against the suppliers, notwithstanding the location of the ultimate manufacturers. Further, if someone had imported the fireworks, she would also have had a potential claim. By reason of the strict liability provisions of the Act, it is a powerful tool in consumers' armoury when an accident occurs as a result of any defect in a product, whether latent or not. This, in combination with the provisions of the Civil Jurisdiction and Judgments Act 1982, and Rome 1, provides potential recovery for the domestic consumer from existence of the claim, jurisdiction of the claim and applicable law, amounting to a strong package of protection for the consumer.

TINDALL V CHIEF CONSTABLE OF THAMES VALLEY: PURE OMISSIONS & PUTTING OUT THE FIRES OF *CAPITAL & COUNTIES PLC V HAMPSIHRE CC*

John Schmitt

Public Authorities' Liability: the Protection of Pure Omissions

Public services, such as those responsible for putting out fires or effecting rescues, are frequently acting in high pressure, high stakes and rapidly evolving environments across the country on a daily basis. Mistakes and misjudgements will, unfortunately, happen as part of the human experience. However, there is legal protection for public services with the fundamental principle that the common law does not impose liability for what are called pure omissions.

This "omissions principle" has been helpfully summarised by Tofaris and Steel, "Negligence Liability for Omissions and the Police" (2016) 75 CLJ 128:"

> "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."

The rule means that there will need to be an assessment of whether any given careless conduct can be fairly categorised as act or omission.

Lord Diplock in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 gave the famous biblical example that there is no general duty to be a Good Samaritan [at 1060]:

> "The parable of the good Samaritan… illustrates, in the conduct of the priest and Levite who passed by on the other side, an omission which was likely to have as its reasonable and probable consequence damage to the health of the victim of the thieves, but for which the priest and Levite would have incurred no civil liability in English Law."

In the absence of either an express or an implied right to a private law action, the statutory duties and powers of a public service do not themselves justify an exception to the omission rule (see *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15).

Acts v Omissions

The difference between an act and an omission might appear simple. In fact, the distinction has sometimes been difficult to apply and been given a gloss: Lord Reed, for example, in *Poole BC v GN* [2019] UKSC 25 expressed it as "a distinction between causing harm (making things worse) and failing to confer a benefit (not making things better)", considering this helped to capture the rationale for the rule's operation.

The rationale stems from how duties to provide benefits are, in general, voluntarily undertaken rather than being imposed by the common law, and are typically within the domain of contract, promises and trusts rather than tort. It follows from that basic characteristic of the law of negligence that liability is generally imposed for causing harm rather than for failing to prevent harm caused by other people or by natural causes[1].

Fire and Rescue Services

Hence a fire and rescue authority does not

owe a duty of care to the owner of a building merely by virtue of its firefighters attending at the fire ground and fighting the fire, and a bare response by the service to an emergency call will not give rise to an assumption of responsibility sufficient to found a duty; however, where by its own actions they create or increase the risk of the danger which causes damage, the authority is liable in negligence in respect of that damage, unless that damage would have occurred in any event: so found Stuart-Smith LJ in *Capital & Counties Plc*.

In this case, there was no duty on the fire service to put out a fire: that would be the same result as if it had failed to attend the fire entirely (say they get lost on the way to the fire or suffer a crash), and as such would be a pure omission.

However, the fire service was held under a duty in respect of its decision to switch off the sprinkler unit at the site of one fire because that directly added to the damage. To put that another way, the fire spread more than it would have done if the fire service had never attended and taken the positive act of switching off the sprinkler system.

It is notable that Stuart-Smith LJ also made clear that taking control of the fire-fighting operation did not carry with it a duty of care to put out the fire.

Rushbond Plc v The JS Design Partnership LOLP [2021] EWCA Civ 1889

Distinguished judiciary continue to disagree on the operation of the rule. In another case involving a fire, see, quite recently, *Rushbond Plc*. An architect was working on an empty cinema in Leeds; he visited the property alone, having been given the keys and the deactivation code for the alarm by the marketing agent. The architect attended but failed to lock the door to the property. This allowed an intruder to enter through the unlocked door which was ultimately causative of property damage through a fire starting.

The claim was struck out at first instance: Mrs Justice O'Farrell held this was a "pure omissions" case: the architect's failure to lock the door was merely the *occasion* for the intruder to gain access to the building and it was not the *means* by which the intruder could start a fire.

However, the Court of Appeal disagreed: it was not correct to say the architect had done nothing at all; he had rendered a secure building insecure, at least for the duration of his visit. The failure to lock the property was a central part of the activity (it was termed "critical involvement") that allowed the intruder into the property. In contrast, 'pure omissions' cases are ones where the "defendant did nothing, or certainly nothing of any legal relevance to the claim". Here, though there was an "actionable wrong".

Smith v Littlewoods [1987] 1 AC 241

Another well-known case where fire was referenced as the starting point is *Smith v Littlewoods*. In that case, which was also concerned with an empty cinema, the defendant owners had done little work to the cinema and nothing to secure its safety. A fire was deliberately started by children or teenagers and the cinema burnt down. The fire also caused serious damage to adjacent property. The owners of the adjacent property sued the defender for damages in negligence.

On the facts, the House of Lords concluded that the owners did not owe a duty of care to adjoining occupiers. They said that such a duty would be rare; and that because the owners did not know about the previous acts of vandalism and the cinema was not obviously a fire risk, they were not required to take positive steps to prevent the entry of vandals. The property owners had done nothing. They simply owned a property to which an intruder had gained access.

Lord Goff, in explaining why there was no duty, postulates the example of a vandal entering a flat and damaging the plumbing,

resulting in a water leak which caused damage to the shop below. He did not think that the flat owners owed a duty to the shop owners, even if it was well-known that vandalism was prevalent in the neighbourhood.

"Semantic Bickering"

Interestingly, in *Rushbon Plc*, Lord Justice Coulson referenced discussions about whether the architect's conduct was a positive act (i.e. deactivating the alarm and leaving the door unguarded") or only an omission ("not locking the door") amounted to "semantic bickering" and is "not what the rule in relation to 'pure omissions' is all about"!

However, borderline cases have featured in this line of authority, and often turn on semantic decisions.

For example, in *East Suffolk Rivers Catchment Board v Kent* [1941] AC 1974, the Board, which had a statutory power to repair a sea wall, undertook repairs so negligently that the claimant's land remained flooded for much longer than would have been the case had the work been done with care. Had the Board acted positively? The majority held there was no liability for inefficient action. Lord Atkin powerfully dissented: the commencement of the work created a common law duty to complete it with reasonable dispatch.

In another example, *Bird v Pearce* [1979] RTR 369, a Highway Authority was held liable for negligently removing warning lines at a road junction. Was this an act or omission? The absence of warning lines contributed to the accident in which the claimant was injured. It seems here that by painting the lines in the first place, the Authority had created an expectation on the part of users that there would be lines to warn. A duty was therefore owed.

Tindall v Chief Constable of Thames Valley [2024] UKSC 33

This line of authority came before the Supreme Court in *Tindall*. Again there had been differing judgments on whether the facts on the case could amount to more than pure omissions as between the first instance and Court of Appeal decisions.

The appeal concerned whether police responding to an accident on black ice (and then leaving the scene) owed a duty to road users who later came upon the same patch of black ice.

It was contended that they did because they had made matters worse in that, by their attendance, they displaced a person, Mr Kendall, who had previously been trying to warn other vehicles and would have continued to do so but for the arrival of the police. The police had also put out a warning sign and swept away debris at the scene, before then removing the sign and leaving the scene. After the departure of the police there was a further fatal accident on the same stretch of black ice.

The Supreme Court held that no duty was owed to a victim of the second accident and that the claim on behalf of his widow and estate should be struck out.

The Supreme Court accepted that when faced with a question about precisely where the dividing line falls between failing to protect a person from harm and making matters worse, "drawing this distinction is not always straightforward".

The Supreme Court did not hold back in criticising the police conduct: "there can be no doubt on these facts that the failure of the police officers to take steps to protect road users from the danger posed by the ice hazard to which the officers had been alerted was a serious dereliction of their public duty owed to society at large." However, equally, the courts have consistently drawn the distinction between merely acting ineffectually and making matters worse.

The Supreme Court also explicitly endorsed the 'interference principle' advanced by McBride and Bagshaw in their book Tort Law, 6th ed (2018). That is that:

"[I]f A knows or ought to know that B is in need of help to avoid some harm, and A knows or ought to know that he has done something to put off or prevent someone else helping B, then A will owe B a duty to take reasonable steps to give B the help she needs."

The court held that this was again, simply a particular illustration of the duty of care not to make matters worse by acting in a way which creates an unreasonable and reasonably foreseeable risk of physical injury to the claimant.

However, it is not enough to show that the defendant's conduct has had the effect of putting off or preventing someone else from helping the claimant. It must be shown that the defendant knew or ought to have known, i.e. that it was reasonably foreseeable, that its conduct would have this effect. It was this crucial element which was missing from the Claimant's case in *Tindall*. There was nothing in the evidence to provide any support for the contention that the police knew or ought to have known that Mr Kendall was intending to make attempts to alert other motorists to the ice hazard on the road.

Conclusions

The Supreme Court stated confidently, "the applicable law is clear and not in a state of flux."

However, the detailed survey of the relevant law and the need for a rigorous factual enquiry into conduct suggests arguments over what constitutes acts and omissions will remain a staple of litigation in this area, notwithstanding this definitive judgment.

As such, the court left open the question of whether a duty of care could arise from control over a source of danger such as an artificial or natural hazard.

Interestingly, in the survey of authorities, *Capital & Counties Plc* was held to be "a more difficult example" of cases where a duty of care was held to be owed.

It was also accepted that a "difficulty in drawing the distinction (between making matters worse and failing to protect from harm) is how to identify the baseline relative to which one judges whether the defendant has made matters worse." The formulation given will be a helpful one to practitioners: "the relevant comparison is with what would have happened if the defendant had done nothing at all and had never embarked on the activity which has given rise to the claim".

On this basis, if the police had never attended the accident scene, the state of the road would have been the same at the point the fatality occurred. The Defendant cannot then have made matters worse. This ignores the police intervention of first putting out the warning sign, and then removing it, that seems to have founded a duty in *Bird v Pearce* above, which was not cited but was discussed as a "difficult case" in *Gorringe*.

Rushbond Plc was also not cited by the court. However, on the court's formulation, if the architect had done nothing at all, it would seem that the premises would have remained locked and alarmed – that would have prevented the damage.

This analysis would be consistent with the Supreme Court also encouraging a wider lens to be adopted in viewing a Defendant's activity as a whole in order to "dispel the objection that it can be difficult or even arbitrary to distinguish between acts and omissions". Hence failing to apply the handbrake of a car is, on a narrow focus, only an omission but, on a wider focus of the whole activity of driving, this is a case of making matters worse.

Given the myriad scenarios that can play out in the emergency services attending to unpredictable and unfolding dangers, there are likely to be endless new and awkward factual matrices to test further the

parameters of this area of law. “Semantic bickering” may continue to dominate the perception of whether a service has actively harmed or merely failed to protect from harm.

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[1]*Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4 at [69]

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