Omissions in the Tort of Negligence: *HXA, YXA* and *Tindall*

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There are two relatively recent Supreme Court cases on the question of liability for omissions in the tort of negligence that I want to focus on. They are first, the combined cases of *HXA v Surrey County Council* and *YXA v Wolverhampton City Council* [2023] UKSC 52, [2024] 1 WLR 335, and, secondly, *Tindall v Chief Constable of Thames Valley Police* [2024] UKSC 33, [2024] 3 WLR 822.

As you will probably know, omissions liability in the tort of negligence has been a problematic area for decades. It is one of those general areas, alongside for example, pure economic loss or psychiatric illness, where it is clear that the tort of negligence does not simply impose liability because it was reasonably foreseeable that harm would be caused by the defendant's conduct. Rather liability, through the finding of a duty of care, is much more restricted if it exists at all.

Indeed, it is now recognised, although this was lost from view when *Anns v Merton London Borough Council* [1978] AC 728 ruled the roost between 1978 and until the tide began to turn in about 1995, that the tort of negligence draws a fundamental distinction between liability for acts and omissions or, put another way in what is now regarded as more illuminating terminology, between the defendant negligently making matters worse for the claimant and negligently failing to confer a benefit on the claimant. In general, there is no duty of care, and hence no liability in negligence, in respect of failing to confer a benefit, which includes failing to protect a person from harm by a third party or natural event, as opposed to making matters worse.

Although more recent, I am going to start with the *Tindall* case because in some respects it is more wide-ranging than *HXA and YXA*.

The issues in this tragic case raised in an acute form where the boundary lies between making matters worse and failing to protect a person from injury.

At approximately 4.30 am on 4 March 2014, Martin Kendall lost control of his car on an area of black ice while travelling on the A413 in the direction of High Wycombe. He skidded off the road and rolled into a ditch. He phoned the emergency services and the police came to the scene as did an ambulance. Mr Kendall was taken to hospital. The police removed the debris of the accident from the road and then left having removed the 'police slow' sign that they had put up. They did not do anything about the black ice. So they left the scene as it had been before they arrived.

Some 20 or so minutes after the police left, Carl Bird was driving in the other direction on the A413. He lost control of his car on the same area of black ice and crossed into the path of a car driven by Malcolm Tindall, which was travelling in the opposite direction. There was a head-on collision in which both Mr Tindall and Mr Bird were killed.

The widow of Mr Tindall, Valerie Tindall, brought a claim against the police, that is the Chief Constable of Thames Valley Police, alleging that the police were liable in the tort of negligence for her husband's death. The police applied to have her claim struck out as disclosing no valid claim in law or alternatively for summary judgment on the ground that her claim had no real prospect of success.

The Supreme Court, upholding the Court of Appeal, unanimously found that the police had no liability to Mrs Tindall. The judgment was given by myself and Lord Leggatt with whom Lord Hodge, Lord Briggs and Lady Simler agreed.

The judgment looked first at whether there could be liability in the tort of negligence on the basis that the police made matters worse. In other words, that this was not an omissions or failure to benefit case at all. The primary contention of the claimant was that the police were liable for having made matters worse because, on the facts, Mr Kendall, after his accident, had been warning other drivers of the danger and would have continued to do so had the police not arrived. In an important development, the Supreme Court accepted for the first time that there can be liability in the tort of negligence under what McBride and Bagshaw in their Tort textbook labelled the interference principle. According to this, there can be liability in the tort of negligence, on the making matters worse side of the line, where a person intervenes provided that that person knows or ought reasonably to have known that that intervention might have the effect of stopping another person's warning or rescue attempts. In so deciding, we drew on some of the alternative reasoning in the earlier case of *Kent v Griffiths* [2001] QB 36 which was concerned with the late arrival of an ambulance leading to the death of the patient where the false assurances of the 999 call handler that an ambulance was on its way meant that alternative transport to the hospital that could have been taken was not taken.

But on the agreed or alleged facts of this case the interference principle could not be made out. This was because the police did not know, nor could reasonably have known, that Mr Kendall had been warning other drivers of the black ice danger and would have continued to do so had the police not arrived. Put another way, the police could not reasonably have foreseen that their arrival would interfere with Mr Kendall's warnings to other drivers. As far as the police were concerned, he was a victim and was not seeking to protect others.

The judgment then moved on from the allegations that the police had made matters worse to the allegations that they had failed to benefit other drivers by failing to protect them from the black ice danger. In other words, the judgment moved on from liability for acts squarely into the territory of liability for omissions. From making matters worse to failing to benefit the claimant. The judgment asked whether there was any possible liability in the tort of negligence under any of the relevant exceptions to the general rule of there being no liability for failure to protect a person from injury.

The main exceptions urged upon the court by the claimant were assumption of responsibility and control. But neither of these exceptions could be made out in this case. There was no assumption of responsibility by the police to other drivers to protect them from the black ice danger because there was no communication or interaction between the police and Mr Tindall; and the police did not have control of the danger in the sense required by law, in particular there was no analogy with the famous case of *Dorset Yacht v Home Office* [1970] AC 1004 where the defendant had control of the borstal boys who had caused damage to property.

As no exception could be made out, no duty of care was therefore owed to protect other drivers from the black ice and Mrs Tindall's appeal was dismissed.

The second combined case, although chronologically before Tindall, was HXA and YXA. This was squarely an omissions or failure to benefit case where the allegation was that the local authority had negligently failed to benefit the claimants by failing to protect them from harm by others. HXA and YXA were children when they suffered sexual or physical abuse by a parent or

parent's partner and both brought claims against local authorities in relation to their social services departments.

The facts or assumed facts were shocking and disturbing. As a child, HXA was assaulted by her mother and sexually abused by her mother's partner. Her mother's partner was convicted of seven counts of raping HXA between the ages of 9 and 16 and he was sent to prison for 14 years. HXA's mother was convicted of indecently assaulting her and was sentenced to 9 months' imprisonment. In YXA's case, it was alleged that YXA, who had epilepsy, learning disabilities and autism spectrum disorder, was physically assaulted by his parents and given excessive medication by them to keep him quiet.

It was alleged that the local authorities in question should be held liable to pay damages to the claimants, who are now adults, for negligently failing to protect them, as children, from the abuse that they suffered.

It is important to stress that we were concerned with the tort of negligence. We were not concerned with the statutory duties that were owed by the local authorities in particular under the Children Act 1989 although it would appear that, in any event, they would not have given rise to any award of damages because these were not statutory duties triggering damages ie they did not trigger a tort of breach of statutory duty.

The local authorities sought to have the claims in negligence struck out, without going to a full trial, on the basis that it was not arguable that they owed a duty of care at common law. The Supreme Court unanimously agreed with the local authorities' submissions. The negligence claims of HXA and YXA were struck out because there was no relevant arguable common law duty of care owed by the local authorities to the children. The judgment was given by myself and Lord Stephens and was agreed with by Lord Reed, Lord Briggs and Lord Sales.

In general terms, the decisions in these cases turned on the application of the decision and reasoning in the leading 2019 Supreme Court case of *N v Poole Borough Council* [2019] UKSC 25, [2020] AC 780. In that case, it was held that the defendant local authorities did not owe a duty of care to protect children who had been subjected to verbal and physical abuse by their neighbours. It was made clear by the Supreme Court that in this type of case, where the issue was whether a local authority had a duty of care to confer a benefit on the claimant by protecting them from harm by a third party, it was necessary to establish that the local authority had assumed responsibility to protect the claimant from that harm. In other words, the only possible exception to the general rule of there being no liability because this was an omission or failure to benefit case was if the defendants had assumed responsibility to use reasonable care to protect the children from the abuse.

It was stressed that the principles applicable to liability in negligence of a public authority for a failure to benefit by preventing harm by a third party are the same as those which apply if the defendant is a private individual rather than a public authority. This is what McBride and Bagshaw have called the 'uniformity' principle and Professor Sandy Steel in his excellent new book, *Omissions in Tort Law* has called the 'equality' principle. It rests on the idea that, whatever public law may lay down through eg judicial review, or where a particular statute may impose liability, the private law comprising the tort of negligence should not essentially distinguish between whether the defendant is an individual or a public authority.

So did the assumption of responsibility exception apply? The answer was that it did not. On the alleged facts, there was no relevant assumption of responsibility in these two cases. In HXA's

case, the alleged internal decisions by the social workers to carry out keep safe work and assessments of the child's safety within the family, were merely initial steps to prepare the ground for a possible later application for a care order. They fell significantly short of being an assumption of responsibility to use reasonable care to protect HXA from the abuse by her mother and her mother's partner. In YXA's case, the local authority was providing respite care on a regular pattern whereby YXA spent roughly one night a fortnight and one weekend every two months in foster care. But again that did not constitute an assumption of responsibility, to use reasonable care, to protect YXA from the abuse by his parents.

This is not to say that there can never be an assumption of responsibility, and hence a duty of care owed at common law, by the social services department of a local authority to protect a child from harm. We gave two examples. The first is where a local authority has obtained a care order and therefore has parental responsibility for the child. That is exemplified by the House of Lords decision in *Barrett v Enfield London Borough Council* [2001] 2 AC 550. The second example is that, where respite care is arranged by the local authority with foster carers, there is an assumption of responsibility by the local authority to protect the child from harm *during the period of the foster care* including the mechanics of returning the child to its parents. But that assumption of responsibility does not extend to where the child is back with his or her parents.

So in these cases, applying *N v Poole,* there was no assumption of responsibility by the defendant local authorities to use reasonable care to protect HXA and YXA from abuse by a parent or parent's partner.

Stepping back from the detail, I think one has to see these two cases against the backdrop of a fear of the tort of negligence, on omissions and public authorities, descending into an unpredictable and unprincipled morass of individual decisions which is what happened after *Anns v Merton*. As a reaction against *Anns v Merton*, there has been a retrenchment of the tort of negligence back to basic and predictable principle with the focus on three elements:

(i) A clear line is drawn between making matters worse and failing to benefit: in general there is no duty of care in relation to the latter.

(ii) There are some limited exceptions to there being no duty of care in respect of failing to confer a benefit, in particular, assumption of responsibility. But it is for the claimant to establish that an exception is made out and the claimants failed to do so in these two cases.

(iii) For the purposes of the tort of negligence, an individual and a public authority are treated in a uniform or equal way.

There are, I think, some interesting underlying questions that as students you should be thinking about. I would mention three:

(i) Is the range of exceptions for failure to confer a benefit sufficiently wide or should new exceptions be developed?

(ii) What precisely is meant by assumption of responsibility? It appears to run from a full-blown contract through non-contractual promises and representations to taking on a task for the claimant with the implicit promise that the task will be performed using reasonable care; and how far is reliance a requirement?

(iii) Is the equality principle – treating individuals and public authorities in the same way – justified or should the latter have more extensive liability for omissions imposed on them?