Introduction

When the parties in *Rushbond v JS Design* battled over whether the defendant's conduct ought to be understood as an act or omission, Coulson LJ dismissed this as "semantic bickering".[1] In doing so, he was questioning the utility of the distinction between acts and omissions in the tort of negligence - the purpose of which is to identify where a duty of care may be owed. Indeed, the Supreme Court has recently acknowledged that this distinction has been "found difficult to apply."[2] This essay first identifies the rationale behind the distinction. Second, it highlights the difficulties in applying it. Finally, it suggests a refined formulation.

Rationale

The general rule is that there is no liability for what are called pure omissions. In *Smith v Littlewoods,* Lord Goff cited the parable of the Good Samaritan to illustrate.[3] The Levite who failed to assist the injured man would face no liability in English law, even though his conduct would foreseeably lead to harm. This classic example of a pure omission is to be contrasted with an impure omission where liability will be imposed - the driver who fails to apply the brakes when approaching a red light. Thus, the distinction can be used to identify when a duty of care should be owed.

Why does the law not impose liability for a pure omission? In *Stovin v Wise,* Lord Hoffman offered three justifications: political, moral and economic.[4] The strongest is the political, essentially derived from the political philosophy of Mill.[5] The idea is that the law should only impose a negative duty on a person not to harm another. Anything more is too great a burden and an unacceptable interference with an individual's autonomy. For this reason, the law has declined to impose a general duty to rescue, or to protect someone from harm by a third-party.

The reason why this justification is the most compelling is because it best explains the exceptions to the general rule. These are recognised as being where there is a voluntary assumption of responsibility,[6] where a special relationship exists,[7] and where a person creates a danger.[8] The first two of these involve some voluntary feature which means it cannot be said

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[1] *Rushbond PLC v JS Design Partnership LLP* [2021] EWCA Civ 1889 [53].

[2] *N v Poole Borough Council* [2019] UKSC 25 [28] ("*Poole*").

[3] *Smith v Littlewoods* [1987] AC 241, 271.

[4] *Stovin v Wise* [1996] AC 923, 943 ("*Stovin*").

[5] John Stuart Mill, *On Liberty* (first published 1859).

[6] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.

[7] *Carmarthenshire CC v Lewis* [1955] AC 549.

[8] *Hayes v Harwood* [1935] 1 KB 146.

that imposing a duty is an unjustified interference with their autonomy. In the first exception, this is inherently so. As to the second, almost all special relationships are voluntary. Recent analysis has convincingly argued that the third category is not really an exception at all; the law already imposes a duty on a person where their positive act creates a foreseeable risk of harm to another.[9]

Difficulty

The problem is that it can be difficult to distinguish between an act and an omission. Indeed, most conduct can be framed as either. As Lord Hoffman observed in *Stovin*, "the conditions necessary to bring about an event always consist of a combination of acts and omissions."[10] There the Lords reversed the lower courts' decision that the highway authority's positive act of recognising a road hazard gave rise to a duty of care. There are other notable examples. In *Robinson v Chief Constable of West Yorkshire Police*, the Court of Appeal found that the police's failure to protect a member of public during an arrest was an omission. In reversing the decision, Lord Reed stated, "this case is concerned with a positive act, not an omission."[11] In *Rushbond,* an inspector visiting a derelict cinema deactivated the alarm and unlocked the door, allowing an intruder to enter and later start a fire which caused significant damage. At first instance the inspector's conduct was held to be a pure omission. On appeal, the conduct was framed as a positive act.

Alternative

Given this difficulty, what is the alternative? One is to abandon the duty-based distinction altogether and adopt the French approach centred around *faute* or fault. Their penal code, which also translates into private law duties, imposes liability for failing to assist someone in danger.[12] The problem with this is that it would be a radical departure from centuries of precedent and hold the Levite liable.

A better option is refinement. In *Poole*, Lord Reed preferred to distinguish between causing harm (making things worse) and failing to confer a benefit (not making things better).[13] A duty is owed for the former, but not the latter. This approach has two advantages. First, the language better reflects the underlying rationale; the political justification means the law will impose a duty not to harm others, but out of respect for individual autonomy, will not impose

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[9] Sandy Steel, "Rationalising omissions liability in negligence" (2019) 135 LQR 484.

[10] *Stovin* (n 4) 945.

[11] *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4 [73].

[12] Code pénal, Article 223-6.

[13] *Poole* (n 2) [28].

a duty to provide a benefit to others. Second, with the advantage of linguistic clarity, it ought to promote consistent judicial decision-making which better reflects the underlying aim. In other words, it should be easier to apply.

Conclusion

As with many concepts in tort law, the distinction between acts and omissions is imperfect. Its language does not accurately reflect its underlying rationale, and its application has been uneven. Yet it is unwise to dismiss it is as "semantic bickering". The importance of formulating a workable distinction which identifies circumstances in which a person's conduct gives rise to a duty of care should not be overlooked. Indeed, it is an essential part of respecting this jurisdiction's traditional regard for individual autonomy. That objective may be better fulfilled by adopting Lord Reed's preferred formulation. Refinement, rather than abolition, is advised.