"Is the distinction between acts and omissions in the law of negligence a useful one?"

The distinction between acts and omissions is of general usefulness to ordinary people who do not wish to constantly interrupt their own lives to assist in another's. The law says that, usually, they do not have to. Moreover, the distinction was certainly useful to Lord Reed when justifying – without needing to refer to policy arguments – why the police do not owe a general duty of care to the public.[1] Outside of these instances, however, the distinction between acts and omissions largely sits as an unnecessary appendix to the fundamental elements of negligence. Thus, this piece argues that the law would be better off abandoning the distinction so to continue pursuing the Supreme Court's 'corrective re-emphasis of principled orthodoxy'[2] in this area.

The two exceptions to the omissions principle reveal the artificiality of the distinction. First, a person might be liable for an omission where they have created, or have particular control over, the source of danger.[3] In such cases, the law imposes on defendants a duty to reasonably prevent harm. Second, a defendant might be liable for omissions where they have assumed a duty of care towards the claimant.[4]

Put simply, a defendant will only be liable for an omission if the law says that they owe a duty to the harmed party. However, a defendant can only be liable for causing harm via a positive act if, equally, they owe a duty. On this basis, the courts must be giving undue gravity to the omissions principle since, clearly, liability depends on the duty, and not a distinction between an act and a failure to act.

Thus, questions of liability (for both acts and omissions) depend on the existence of a duty, its scope, and the nexus between it and the harm. This concept is already succinctly summarised by the six-fold test in *Manchester Building Society v Grant Thornton LLP*[5], and it is submitted that negligence claims can sufficiently, and more simply, be dealt with by deferring to this test, rather than the omissions principle.

A case which (unintentionally) supports this proposition is *Burgess v Lejonvarn*[6]. There, an architect supplied her services to her friends free of charge. The architect first engaged a contractor to begin initial works to landscape the claimants' garden, and agreed to afterwards undertake secondary works using her own designs. The secondary works, however, never occurred as the claimants were disappointed with the architect's negligent supervision of the initial work.

The Court of Appeal found that, despite there being no contract between the parties, the architect had *assumed a duty of care* by voluntarily tendering a professional service which the claimants reasonably relied on.[7] Thus, the claimants wanted to recover their economic losses following the negligently supervised initial works (an act), and the failure to complete the secondary works (an omission).

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[1] *Robinson v CC West Yorkshire Police* [2018] UKSC 4, [40].
[2] *Tindall v Thames Valley Police* [2022] EWCA Civ 25, [60].
[3] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004.
[4] *Henderson v Merrett Syndicated Ltd* [1995] 2 AC 145.
[5] [2021] UKSC 21, [6].
[6] [2017] EWCA Civ 254.
[7] Ibid, [61].

Without reference to the omissions principle, the Court held that the scope of the architect's duty, and so the risk of harm which the duty was supposed to guard against, was 'reasonably clear'[8]; there was no positive duty to provide a complete service, but rather work which had actually been undertaken needed to be done with reasonable skill and care. Thus, it was the scope of the architect's duty, and not a distinction between misfeasance and non-feasance, which determined her liability.

Likewise, in *Woodcock v Chief Constable of Northamptonshire*[9], the Court's analysis could have been much simpler if it set aside 'the general rule that police owe no duty to victims … to prevent the actions of … third parties'[10] (the omissions principle) and applied the six-fold test.

In *Woodcock*, it would be more straightforward, and doctrinally sound, to say that, by providing the claimant with a specific safety plan regarding her ex-partner, the police had assumed a duty. The safety plan involved informing the claimant's neighbours of her ex-partner. Therefore, by failing to notify the claimant that a neighbour had reported a sighting of the ex-partner, the very risk the safety plan intended to protect the claimant from manifested. Thus, the analysis from [105] – [109] concerning reasonable foreseeability and proximity can fairly be described as an examination of the scope of that duty.

By discarding language surrounding the distinction between acts and omissions, and re-focussing the question on the existence of a duty and its scope, the law of negligence necessarily becomes clearer. Once a duty is established, a defendant can be liable for an act *or* omission, and so the duty is what matters.

Moreover, this framework means that the difficulties observed in cases relating to public authority liability can be more easily dealt with. Lord Reed's reliance on the omissions principle in *Robinson* takes away from the more nuanced issue concerning the threshold at which the police will be taken to have assumed a duty to another when compared to other professions. When providing medical services, a hospital's *receptionist* can be liable for giving misleading information as to wait times.[11] The police, however, might escape liability where a call operator wrongly under-prioritizes a victim's call leading to a delayed response from the police.[12] The courts could more freely deal with this disparity if the distinction between acts and omissions were disregarded.

The law of negligence would benefit from abandoning the artificial distinction between acts and omissions. Re-emphasising 'principled orthodoxy' is certainly the way forwards, but this must involve reliance on fundamental, clear, and useful principles concerning the duty of care and the scope of that duty. The law of negligence is rarely simple; however, it need not be overcomplicated with unnecessary distinctions.

(997 words)

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[8] Ibid, [74].
[9] [2023] EWHC 1062 (KB).
[10] Ibid, [27].
[11] *Darnley v Croydon NHS Trust* [2018] UKSC 50.
[12] *Michael v CC South Wales* [2015] UKSC 2.