Omissions in Tort Law by Sandy Steel (Oxford University Press, 2024)

On 7 February 2025, at Wadham College Oxford, Lord Burrows was one of a panel of four discussing, in front of a live and online audience, this new book by Professor Sandy Steel. Here are his comments.

I would like to start by saying how much I have enjoyed reading this book. It is extremely clearly written and structured and, on any basis, is a very important addition to the literature on tort. I therefore congratulate Sandy on his achievement.

As you may be aware, I have been involved, as the joint or sole writer, in the three most recent Supreme Court or Privy Council judgments on omissions in the tort of negligence. They are *HXA v Surrey County Council*; *YXA v Wolverhampton City Council* [2024] 1 WLR 335, [2023] UKSC 52 ("*HXA and YXA*") concerned with child abuse by parents; *Great Lakes Reinsurance (UK) plc v RAV Bahamas Ltd* [2024] UKPC 11 ("*RAV Bahamas*") on theft of a boat; and most importantly *Tindall v Chief Constable of Thames Valley Police* [2024] 3 WLR 822, [2024] UKSC 33 ("*Tindall*") concerned with a fatal accident on black ice. It follows that I am very interested in the issue of omissions in tort law, in particular in the tort of negligence.

This book was written before those three decisions; and it follows that we did not have the benefit of this book in writing our judgments. Having said that, we did refer to earlier work in this area by Sandy Steel, namely his joint article with Stelios Tofaris ("Negligence liability for omissions and the police" (2016) 75 C.L.J. 128-157) on the liability of the police in the light of *Michael v The Chief Constable of South Wales Police* [2015] AC 1732, [2015] UKSC 2, the opening paragraph of which has been cited in no fewer than six cases of the highest courts; and his article on "Rationalising Omissions Liability in Negligence" (2019) 135 LQR 484 - 507.

What we have said in those cases is very much in line with the central themes of Sandy's book. In this respect, I would make the following four points.

First, we have cemented the idea that, rather than talking about acts and omissions, the crucial distinction is between not making the claimant worse off and failing to confer a benefit on the claimant. This was a distinction first judicially made by Lord Reed in *Robinson v Chief Constable of West Yorkshire Police* [2018] AC 736, [2018] UKSC 4 ("*Robinson*"). As Sandy points out in his Introduction (at pp xxii-xxiii) that makes the title of his book problematic but I agree with him that lawyers, and it may be philosophers too, have traditionally seen the whole area as falling within the label, of omissions so that it is counterproductive not to start off with that idea even if one almost immediately points out its defects. It will also be clear from what we said in *Tindall* (see paras 43(iii) and 45), although one might say that this is implicit and obvious, that the base line for assessing what constitutes a worsening or a failure to benefit is to consider what the position would have been if the defendant had not embarked on the activity at all. This

is in line with what Sandy has said at various points in his book, eg in chapter 1 and in his restatement chapter 12 about the base line being non-presence of the defendant at the scene. So in *Tindall*, in applying the making worse/ failing to benefit distinction, we were considering what the position would have been had the police never been involved with the incident at all ie what would the position have been if the police had not gone to the scene of the accident. We were not considering eg the position before and after they had removed the warning sign.

Secondly, in our judgments we have recognised that, in contrast to worsening a claimant's position, there is in general no duty of care to confer a benefit on a claimant. The situations in which the tort of negligence (and Sandy expands this to cover tort generally) recognises a duty of care to confer a benefit are exceptional. Sandy explains this by saying that one is looking for "special facts". In *Tindall,* the submissions of counsel for the police, the appellant, required us to consider three of those exceptions ie assumption of responsibility, control and status. None were made out. Assumption of responsibility was the exception being urged on us in *HXA and YXA* and also in *RAV Bahamas* but again that exception was not made out on the facts. One of the themes of Sandy's book is that assumption of responsibility needs to be unpacked (see chapter 4) because it contains within it several distinct principles. I firmly agree with that. In particular assumption of responsibility is a catch-all phrase that appears to embrace at one end of the spectrum a promise that has been relied on and at the other end of the spectrum the carrying out of a role designed to protect the public from harm (as eg with doctors and teachers).

Thirdly, we have applied the approach of treating the principles applicable to public authorities as being the same as those applicable to private individuals. This was made clear in *HXA and YXA* having been reemphasised as being the correct approach in *Robinson* and *Poole Borough Council v GN* [2020] AC 780, [2019] UKSC 25 (although I think this goes back, in the recent past, to a superb article by Bowman and Bailey, "Negligence in the Realms of Public Law: A Positive Obligation to Rescue?" (1984) PL 277). Sandy calls this the "equality principle" in chapter 10 although, as I understand him, he would suggest some departure from the negative aspect of that equality principle ie that one might impose a duty of care on public authorities even though that goes beyond what the position would be for private individuals. It is not entirely clear to me what he is suggesting in terms of modifying negative equality in the context of the tort of negligence although he points out that a departure from negative equality is already present in respect of other torts, for example, the tort of misfeasance in public office and, in so far as one views this as within tort, liability of a public authority under the Human Rights Act 1998.

Fourthly, and in my view, most importantly, we accepted in *Tindall* the interference principle – negligently stopping the conferral of a benefit on the claimant by a third party

eg a rescue that would have been carried out by a third party - as being an aspect of making the claimant worse off. Sandy deals with this in his chapter 3. As he acknowledges, interference is the label given by McBride and Bagshaw in their tort textbook. *Tindall* was the first case authoritatively to recognise this although in doing so we drew on the alternative reasoning in *Kent v Griffiths (No 3)* [2001] QB 36 (concerned with the late arrival of an ambulance despite assurances from the 999 call-handler).

In the light of those four points, I conclude that our judgments are very much ad idem with most of Sandy's thinking. Of course, he is rationalising the law by a combination of looking at what the law lays down and deeper philosophical reasoning. And there are some departures/developments he would make from the present law. Eg he favours a duty of care of easy rescue and an extended application for assumption of responsibility where a defendant is performing a particular role. But in general terms, there is close alignment between Sandy's description of the present law and the law he advocates from his philosophical reasoning.

That leads me to say something about his methodology. I regard what he is doing as very much to be applauded and as falling within what I have described as "practical legal scholarship" and Jane Stapleton has called "reflexive scholarship" in her Clarendon Lectures *Three Essays on Torts*. It is not particularly helpful to judges to be told that vast swathes of the law are flawed as clashing with a particular normative philosophical theory. What we need and find useful are scholars who know the details of the law and test that against their preferred philosophical theory. Indeed it may be that there is a synergy between the two because paying close attention to the law should affect one's thinking as a philosopher. A theory that is so far away from the present law that it cannot realistically ever take hold is not of much interest to judges and lawyers who know that the common law – I put to one side legislation – inevitably develops incrementally in small steps. As Lord Bingham put it, by the accretion of singles and not the hitting of boundaries and never sixes.

Having said that, I suspect that the philosophical style of Sandy's book will be a challenge to most practising lawyers with his shorthand references to P-duties and N-duties, and his heavy use and labelling of hypothetical examples, such as at pp 68-70, 'Slow Speedboat', 'Speedboat and Dog', 'Speedboat and Chair', 'Speedboat and Road'.

I have to say that I like the use of hypothetical examples. I used them a lot in my teaching and to some extent in my legal writing. I think they are important to achieving coherent reasoning and treating like cases alike (see, eg, Susan Hurley, "Coherence, Hypothetical Cases, and Precedent" (1990) 10 OJLS 221, 232-235). But I have noticed some antipathy to them by some practicing lawyers and some judges. Sometimes in a case, I feel the submission made cries out for a hypothetical example so as to bring it to life in a way that can only serve to enhance understanding. But some counsel appear very reluctant to do so. That strikes me as very odd when one is talking about law as a

practical discipline. One might have thought that lawyers would be particularly concerned to pin down with an example the submission being made. The stumbling block may be that lawyers are very concerned about, and pay very close attention to, the actual facts of a case. They therefore baulk at departing from the actual facts of a case. And as soon as one talks about a hypothetical, a common response is "but those are not the facts of this case and may therefore be different". I remember being very disappointed as an academic when Lord Walker, for whom I had enormous respect, in discussing mistake in the law of unjust enrichment in *Pitt v Holt* [2013] 2 AC 108, [2013] UKSC 26, referred to the hypothetical examples I had put forward in my *A Restatement of the English Law of Unjust Enrichment* at p 66 but then proceeded to say that he could not make any useful attempt to answer them because to do so he would need to know more facts. He was not willing to answer the hypothetical examples just on the bare facts given.

Using standard philosophical techniques, Sandy's work is replete with what I consider to be useful and often ingenious hypothetical examples; but I suspect that many practising lawyers may, unfortunately and irrationally, be somewhat put off by that technique.

To conclude, this is a great book. Its conclusions are largely in line with the existing law and, where not (eg the duty of easy rescue and going beyond negative equality for public authorities) it provides real food for thought.