Open Doors and How to Shut Them: Omissions Liability for Public Authorities

Stephanie Bruce-Smith*

Abstract—The culmination of case law on public authority omissions, and, most recently, Lord Reed's judgment in *N v Poole Borough Council*,[1] may open the door to the extension of negligence for failures by public authorities to confer benefits. This article argues that an expansion of negligence to include omissions of public authorities would be by no means an incremental shift and proposes a refocus of attention on the functional distinction between negligence law and public law. Unless and until specific remedies or torts are created, it suggests that courts should look to this distinction to keep negligence within its proper bounds.

* Merton College, Oxford. I am grateful to Professor Roderick Bagshaw and the OUULJ editorial board for their comments on earlier drafts. I am also grateful for the generous support from Merton College as part of their Summer Projects scheme. All errors remain my own.

[1] [2019] UKSC 25, [2019] 2 WLR 1478

Introduction

Recent judicial developments have clarified to a large extent the nature of negligence liability for public authorities. In *Michael v Chief Constable of South Wales Police*,[2] Lord Toulson held that the absence of liability for a police force which misclassified a 999 call was due to reasons of legal principle,[3] rather than transcendental policy reasons. Furthermore, in *Robinson v Chief Constable of West Yorkshire Police*,[4] the idea that the common law supported immunity for police services was put to rest. Likewise, in *N v Poole Borough Council*,[5] the Supreme Court confirmed the approach taken in *Robinson* that ordinary common law principles ought to be applied to public authorities.

Nevertheless, both *Michael* and *N*, coupled with *Robinson*, leave a number of open doors with respect to public authority liability for omissions. Both Lord Toulson's application of the omissions principle[6] and the assumption of responsibility reasoning in *N*[7] increase the chance of further development of liability for public authorities' failures to act, despite no duty of care arising in either case. However, an expansion of negligence to capture failures such as those in *Michael* is not desirable if one is to maintain a valuable distinction between public law and private law. The justification for rejecting such an extension of liability is best articulated by reference to the principled distinction between public law and private law. It is by reference to what the law intends to protect or achieve through negligence liability or judicial review and not by reference in the abstract to

[2] [2015] UKSC 2, [2015] AC 1732
[3] *ibid* [114], [116] (Lord Toulson)
[4] [2018] UKSC 4, [2018] AC 736
[5] *N* (n 2)
[6] *Michael* (n 3) [47] (Lord Toulson).
[7] *N* (n 2) [64] (Lord Reed).

the 'omissions principle' or to an 'assumption of responsibility', that we find the firmest ground for the *status quo*.

This article does not intend to suggest that the distinction between public and private law is hitherto unknown to the highest members of the UK judiciary. Nor does it deny that a concern for the coherence of private law may have been behind judgments in cases such as *N*, *Robinson* and *Michael*. Rather, the argument is that greater articulation of and focus on this functional distinction would be beneficial and serves as a concrete rebuttal to arguments present both in the literature and in minority judgments that favour an extension of liability in this area.

This article will be structured in three parts. First, it will discuss how despite bringing much clarity to the law of omissions for public authorities, the law as it stands is potentially opening the door to liability for omissions of public authorities. Second, it will explore reasons as to why such a development might be undesirable. Third, it will identify the functional distinction between public and private law as providing the firmest foundation for the *status quo*, concluding that greater emphasis on this aspect would be beneficial in future judgments, in order to prevent inadvertent extension of omissions liability to public authorities.

1. Recent judicial developments: Opening the door to omissions liability for public authorities

This first part explores recent judicial developments in public authority liability in negligence, arguing that the Supreme Court cases of *Michael, N* and *DSD v Commissioner of the Police of the*

Metropolis[8] have the side effect of opening the door to the development of omissions liability for public authorities. It will be argued that: (A) the *basis* for the omissions principle in English law does not apply in the context of public authority liability; (B) the case of *DSD* prevents a return to 'policy reasons' to prevent such extensions; and (C) the assumption of responsibility 'exception'[9] to omissions liability is capable of significant expansion following Lord Reed's judgment in *N*.

A. The inapplicability of the omissions principle to public bodies

In English law, the 'omissions principle' maintains that there is in general no duty to act for the benefit of others or to prevent a third party from causing harm to a third party.[10] For liability to arise where D has failed to act, D must have had some control over the danger (for example, by creating it) or assumed a responsibility to the other.[11] In *Michael*, Lord Toulson's majority judgment seemed to rely on this principle of common law to find against the claimant.[12]

Yet, this principle is on tricky ground in the context of public authorities. In *Michael*, Lord Toulson acknowledged that the principle and its exceptions 'have been worked out for the most part in cases involving private litigants' yet are 'equally

---

[8] *Michael* (n 3); *N* (n 2); [2018] UKSC 11, [2019] AC 196

[9] *Michael* (n 3) [100] (Lord Toulson)

[10] *Smith v Littlewoods Organisation Ltd* [1987] AC 241 (HL), 270 (Lord Goff); *Michael* (n 3) [97] (Lord Toulson); *Robinson* (n 5) [35] (Lord Reed); W.E Peel and James Goudkamp (eds), *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) para 5-039

[11] *Michael* (n 3) [99]-[100] ; W.E Peel and James Goudkamp (eds), *Winfield and Jolowicz on Tort* (19th edn, Sweet & Maxwell 2014) para 5-039

[12] *Michael* (n 3) [97], [114] (Lord Toulson).

applicable where D is a public body'.[13] Lord Toulson did not provide any reasons as to *why* this ought to be the case, but cited as an example the case of *Mitchell v Glasgow City Council*.[14] Here, the court did not distinguish Glasgow City Council by virtue of being a public landlord: there still needed to be something on which to hang liability for a failure to warn a tenant of a potentially violent neighbour. However, there are good reasons why straightforward application of the omissions principle to public authorities might be questioned. For one, the rationale behind the principle seems firmly rooted in the private sphere, with the fear of onerous or moralising liability being imposed on individuals. In *Mitchell,* Lord Hope stressed the undesirability of imposing a duty on an individual for a failure to warn:

> Otherwise [...] there would be liability in negligence on the part of one who sees another about to walk over a cliff with his head in the air, and forebears to shout a warning.[15]

Similarly, reference is frequently made to the parable of the Good Samaritan to demonstrate that such liability would be akin to imposing legal liability for a breach of 'no more than a moral obligation'.[16] Thus, at least one justification (and arguably the central justification) for the omissions principle is that legal liability would be unduly onerous and would amount to the legalisation of morality. In Lord Hoffmann's words, 'it is less of an invasion of an individual's freedom for the law to require him to consider the safety of others in his actions than to impose on

---

[13] *ibid* [101] (Lord Toulson).
[14] [2009] UKHL 11, [2009] AC 874
[15] *ibid* [15] (Lord Hope).
[16] *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004 (HL) [1060] (Lord Diplock); *Smith* (n 11), 271 (Lord Goff, citing Lord Diplock in *Dorset*)); *Mitchell* (n 15) [39] (Lord Scott).

him a duty to rescue or protect'.[17] Yet, as noted by Tofaris and Steel,[18] and argued by Lord Kerr in his dissenting judgment in *Michael*,[19] this rationale should be questioned in the context of public bodies. In contrast to individuals, public authorities do not have freedom which is *intrinsically* valuable. Rather, the value of freedom for a public body is purely instrumental – it is valuable only insofar as it contributes to the fulfilment of its proper functions.[20] This is not to say that entities cannot enjoy rights of any sort, but rather that the right (or liberty) of an individual to live the life he or she chooses is distinguishable in terms of its intrinsic value from the right (or liberty) of a public body which is set up for the purpose of achieving certain goals.

A second justification of the omissions principle is that any potential duty to act would generally apply to a large and indeterminate class, and a person's moral bad luck of being in the wrong place at the wrong time should not determine his or her legal liability.[21] Yet, in *Stovin v Wise*, Lord Hoffmann rightly acknowledged that this 'why pick on me' rationale does not always apply in the context of public authorities,[22] as there is often only one legal person who has failed to provide assistance. While the 'why pick on me' argument might still apply in cases where there are multiple public authorities who have omitted to fulfil their duties in casually relevant ways, it clearly fails as a general justification for not extending liability to public bodies generally. Moreover, another counter to the 'why pick on me' justification is that there may be special reason to single out a public authority

---

[17] *Stovin v Wise* [1996] AC 923 (HL), 943 (Lord Hoffmann).
[18] Stelios Tofaris and Sandy Steel, 'Negligence Liability for Omissions and the Police' (2016) 75(1) CLJ 128
[19] *Michael* (n 3) [177] (Lord Kerr),
[20] Tofaris and Steel (n 19), 130
[21] *Stovin* (n 18), 944 (Lord Hoffmann).
[22] *ibid* 946 (Lord Hoffmann). In that case Lord Hoffmann was specifically referring to the Highway Authority.

in relation to some injury where the public authority has been tasked by statute or otherwise with taking steps to prevent that injury.[23] Indeed, one might legitimately find that a public body with a public duty to prevent specific kinds of injury is morally distinct from a mere passer-by envisaged in the 'why pick on me' scenario. Therefore, this too seems to fail as a general justification for the omissions principle in the context of public authorities.[24]

B. 'Policy arguments' unlikely to prevent expansion

This would seem to leave us with policy reasons as the only bulwark against development of liability in this area, unless the principle can be otherwise justified.[25] Indeed, that policy reasons might be required to prevent expansion of liability in this area was acknowledged by Lord Hughes in *Robinson*, decided three years after *Michael*. While Lord Hughes accepted that the omissions principle was 'another reason' why the police do not owe a duty of care to individuals who are victims of crime, witnesses or suspects, he held (albeit obiter) that analysis in terms of omissions 'cannot be the only, or *sufficient*, reason why such duties of care are not imposed, nor why there is very clearly no duty owed to individuals in the manner in which investigations are conducted'.[26] Thus, for Lord Hughes, the ultimate reason for the lack of a duty of care imposed on police officers engaged in the

[23] Tofaris and Steel (n 19), 132-33

[24] Tofaris and Steel (n 19) also provide a third reason for rejecting the omissions principle. It should not be the case that the more a claimant is a victim of a wrong (due to a high number of wrongdoers), the worse off she becomes.

[25] This is because policy reasons appear to be the only or main justifications relied on in case law for the principle. For an overview of other justifications for the omissions principle found in literature and their pitfalls, see Tofaris and Steel (n 19) 129-133.

[26] *Robinson* (n 5) [114] (Lord Hughes) (emphasis added).

investigation and prevention of crime lies in policy reasons, such as avoiding defensive policing and in promoting the greater public good, which requires the absence of any duty of care. [27]

Nevertheless, the case of *DSD*, albeit concerning the application of the Human Rights Act 1998 ('HRA'), has made a return to policy arguments next to impossible for a duty of care in tort – and arguably for good reason. In *DSD*, the question was whether a series of operational and systematic police failings could constitute a violation of the victims' human rights. All judges agreed that the police were liable, although Lord Hughes disagreed with the other judges on the question of whether operational duties alone sufficed to create liability. Lord Hughes reiterated the concerns found in earlier case law, including that such liability would inhibit the robust operation of police work by encouraging defensive action,[28] and divert resources from current inquiries.[29] For Lord Hughes, these policy concerns were 'powerful, repeated and carefully considered'[30] and apply as much in negligence to liability under human rights law for operational failings of the police.[31] In response, Lord Kerr, giving one of the majority judgments, remarked that such fears were unsupported by evidence.[32] There was no reason to suppose that the opposite effect might occur: liability might instead act as a deterrence to poor policing.[33] Similarly, Lord Neuberger agreed that in the absence of evidence to the contrary, the imposition of an investigative duty could serve to enhance the effectiveness of

---

[27] *ibid* [112], [118].
[28] *DSD* (n 9) [132] (Lord Hughes) approving the reasons given by Lord Philips CJ in *Smith v Chief Constable of Sussex Police* [2009] 1 AC 225, cited at [131].
[29] *DSD* (n 9) [132] (Lord Hughes).
[30] *ibid.*
[31] *ibid.*
[32] *ibid* [71] (Lord Kerr).
[33] *ibid.*

police operations.[34] It is suggested, therefore, that the validity of previous 'policy reasons' (namely defensiveness and the diverting of resources) against holding police liable for their investigative failings, or other omissions, are now in doubt.

There are, however, two potential objections to the claim that the validity of policy reasons are now in doubt. First, while such policy concerns might prevent liability in human rights law, they might fail to act as a bar to liability in tort: policy reasons might operate differently in different contexts.[35] However, whilst courts acknowledge doctrinal differences between tort law and human rights,[36] *D v East Berkshire Community Health NHS Trust*[37] demonstrates that the courts recognise the common application of policy reasons in both areas. In *D*, the court held that the common law policy reasons for denying liability in the context of a public authority duty of care decision, including *inter alia* the fear of defensive action and costly litigation,[38] ceased to apply since the HRA imposed a potential liability on local authorities to compensate children where there was a failure to protect them from ill-treatment and neglect.[39] This is clearly correct. Policy reasons by their very nature are based on the potential *consequences* of the imposition of liability. If the feared consequences of imposing liability are identical – potential liability for care or

[34] *ibid* [97] (Lord Neuberger).
[35] See for example Lord Kerr's argument to this effect in *DSD* (n 8) at [69]: 'no assumption should be made that the policy reasons which underlay the conclusion that an exemption of police from liability at common law apply *mutatis mutandi* to liability for breach of Convention rights'.
[36] *Van Colle v Chief Constable of the Hertfordshire Police* [2009] 1 AC 225 [138] (Lord Brown)
[37] *D v East Berkshire Community Health NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558
[38] *X(Minors) v Bedfordshire County Council* [1995] 2 AC 633 (HL) 749-751 (Lord Browne-Wilkinson).
[39] *D* (n 38) [81], [84]. Approved in *N* (n 2) at [74].

policing decisions – then the differing *sources* of such liability is irrelevant.

Second, as *DSD* concerned the duty to *conduct an adequate investigation* into inhuman and degrading treatment, rather than a duty to *protect* a victim or his or her interests, it could be said that *DSD* cannot undermine the validity of 'policy reasons' for the imposition of positive obligations *generally*. Thus, cases factually analogous to *Michael*, which concerned a failure to protect the victim from harm, might still fail on policy grounds. However, the rebuttal of the policy arguments in *DSD* was *not* 'in the context of investigative duties' where, 'given their importance in a human rights context, it is worth risking that this might have a negative effect on police investigations'. Instead, the reasoning was that defensive action or 'diversion of resources' arguments have little evidential basis and that the imposition of liability could equally result in better investigations.[40] It is therefore difficult to see how such arguments would not equally apply in the context of (i) duties to protect in human rights law (and not merely investigative duties) or (ii) duties of care in tort.

It is thus difficult, if not impossible, to see how, going forward, such reasons could *prevent* any extension of liability for the police for failing to protect from harm in tort. This is arguably a beneficial development, given that a decision to extend liability ought not depend on judicial assertions of the negative (or positive) effects their judgments would have on institutional behaviour. Not only are courts ill-equipped to determine such questions,[41] but even if this were seen as an appropriate role for

[40] *DSD* (n 9) [97] (Lord Neuberger)
[41] As in *Michael* (n 3) at [121] (Lord Toulson).

the courts, it appears that if anything, evidence points in favour of imposing liability, and not against it.[42]

C. Expansion of assumption of responsibility

Lastly, even if the omissions principle in the context of public authorities is to remain good law, the recent judgment in *N* has arguably opened the door to expansion of the 'assumption of responsibility' concept.

First, *N* has clarified that the finding of an assumption of responsibility is not limited to express undertakings.[43] Lord Reed's acceptance of implied undertakings in *N* contrasts with the majority judgment in *Michael*, for whom nothing less than an explicit assurance would give rise to such liability.[44] The recognition in *N* that such an assumption is 'more commonly implied'[45] in the context of public authorities is significant. Instead of needing to find an express undertaking (which an individually may equally give), courts may look at all the circumstances, including the authorities' tasks or functions, to find a responsibility. It follows that *N* has confirmed the wider interpretation of an assumption of responsibility, thus rendering it more expansive than the version adopted in *Michael*.

Secondly, Lord Reed's judgment goes a step further in noting that the *functions* of a body or organisation – public or private – may be sufficient to establish an assumption of responsibility. While seemingly innocuous, this finding is potentially very expansive in practice, since it would permit courts to determine from the basis of the authority's *functions* (which in

[42] *Hill v Hamilton-Wentworth Regional Police Services Board* [2007] 3 SCR 129 [57]
[43] *N* (n 2) [68], [80] (Lord Reed)
[44] *Michael* (n 3) [100], [138] (Lord Toulson). Lord Kerr (dissenting) criticises this approach in his judgment: [164]-[167].
[45] *N* (n 2) [80] (Lord Reed)

turn, may be determined by statute) whether a duty of care should be imposed, absent any specific undertaking to an individual.

That an authority's functions alone may give rise to liability can be demonstrated through examination of several key areas of the judgment. First, Lord Reed states that an assumption of responsibility, in the sense of an undertaking that care will be taken, can be implied from the reasonable foreseeability of reliance on the exercise of such care.[46] He then explains a public or private hospital's undertaking to exercise reasonable care towards its patients, and an education authority's acceptance of pupils into its schools, on this basis.[47] Moreover, in explaining why, on the facts of *N,* no liability arose, Lord Reed's first point is that 'the council's investigating and monitoring of the claimants' position 'did not involve the provision of a service to them on which they or their mother could be expected to rely'.[48] Lord Reed concludes:

> In short, the nature of the statutory functions relied on in the particulars of the claim did not in itself entail that the council assumed or undertook a responsibility towards the claimants to perform those duties with reasonable care.[49]

It appears, therefore, that Lord Reed's main objection to liability in *N* is that the statutory functions (the assignment of social works to the claimants and the assessments of their needs and meetings)[50] were not of the requisite kind such that reliance

---

[46] *ibid*; Lord Reed describing foreseeability of reliance as the 'usual' way in which an undertaking of responsibility will be implied.
[47] *ibid.*
[48] *ibid* [81] (Lord Reed).
[49] *ibid.*
[50] *ibid* [78] (Lord Reed): 'in relation to investigation and monitoring by the council's social services department, ['the sequence of events'

would be foreseeable. Contrary to the claimants' argument, the council's functions were not of a kind on which a claimant could reasonably rely to protect their safety.[51] Thus, while schools (through their educational functions) assume a duty for meeting the educational needs of pupils to whom it provides an education,[52] and local authorities (through their care functions) assume responsibility for the welfare of children in care,[53] a council, in exercising its *social services functions*, does not assume a responsibility for the claimants' safety.[54] It follows that, for Lord Reed, the *functions* of these bodies (public or private) are what renders foreseeable the requisite reliance.[55] Thus, this article takes the first line of [81] of Lord Reed's judgment to read:

> The council's investigating and monitoring of the claimants' position [*as part of the council's housing functions*] did not involve the provision of a [*protective*] service to them on which they or their mother could be expected to rely.

One objection to this reading is obvious – it is not what Lord Reed *says*. Yet, this reading seems to fit best with the context

---

referred to in the particulars of claim] refers to the assignment of social workers to the claimants, to the various assessments of their needs, and to the meetings at which the appropriate response to Graham's behaviour was discussed.'

[51] *ibid.* Lord Reed is citing the particulars of the claim.

[52] *ibid* [69] (Lord Reed).

[53] *ibid.*

[54] *ibid* [81] (Lord Reed).

[55] *ibid* [69]. For *Barrett v Enfield LBC* [1999] 3 All ER 193 (also referred to), Lord Reed was content to state that the local authority 'assumed responsibility for the welfare child when it took him into its care'. It is submitted that Lord Reed interprets this as a clear example of a case where such reliance is clear, given that it is listed as reflecting the approach in *Spring v Guardian Assurance* [1995] 2 AC 269, and cites a paragraph from that case emphasising the need for reliance at [68].

in which Lord Reed makes his conclusion at [81], having made detailed references to the particulars of the claim and the functions of the council. Moreover, this reading of Lord Reed's judgment also accords with the headnote of the Weekly Law Reports:

> In the present case, the particulars of claim did not provide a basis for concluding that the defendant had assumed a responsibility to protect the claimants from harm, since neither *the defendant's functions under the Children's Act 1989* nor the alleged behaviour of the defendant entailed such an assumption of responsibility.[56]

If this reading is correct, a future court could find an assumption of responsibility where the nature of a statutory function – as set out in statute or otherwise – *would* entail that the public authority assumed a responsibility to an individual to perform its duties with reasonable care. For example, a police force in exercising its investigative or protective duties where an individual has reported a threat.

This is not to say that Lord Reed's judgment renders foreseeability of reliance the *only* test for an assumption of responsibility – it is clear that he also accepts that entrusting of a task plus acceptance would lead to such a finding, while noting that such entrusting and acceptance did not exist on the facts.[57] Yet by focusing on the defendant's functions, Lord Reed invites courts to make an assessment, which, in the context of public authorities, in *practice* comes very close to imposing a duty of care *because of* a statutory duty. While Lord Reed echoes the orthodox

[56] *N v Poole* [2019] 2 WLR 1478 (headnote, emphasis added)
[57] *ibid* [81] (Lord Reed)

position that a statutory duty cannot give rise to a duty of care,[58] he nevertheless invites the court to look at the *functions* of a public authority set out by statute to determine whether there has been an assumption of responsibility. This effectively allows a duty of care to be founded upon the failure to provide some benefit that a public authority has a duty to provide – at least where, in the eyes of the court, an individual can reasonably and foreseeably rely on such provision.

Thirdly, and relatedly, there is no mention made in Lord Reed's judgment of the idea that a 'duty to the public at large' may serve to negate the existence of proximity or an assumption of responsibility by a public authority. In *Capital and Counties plc v Hampshsire County Council*,[59] after reviewing and approving case law firmly establishing an assumption of responsibility between a hospital and a patient,[60] the Court of Appeal held that such an assumption did not arise between an individual and the fire brigade. This was because 'the fire brigade's duty is owed to the public at large to prevent the spread of fire and [...] this may involve a conflict between the interests of various owners of premises'.[61] This idea has been cited in some leading textbooks as a justification for the difference in treatment between public healthcare services, where an assumption of responsibility frequently arises, and the police services and fire brigade, where such a finding has been rejected.[62] Nevertheless, the absence of any mention that an assumption will not be found where the duty is to 'the public at large' from recent case law on public authority liability suggests that this idea may not operate to guide the court as much as academics suggest.

---

[58] *ibid* [31]-[33] (Lord Reed)
[59] [1997] QB 1004 (CA)
[60] *ibid* [1035] [A] (Stuart-Smith LJ).
[61] *ibid* [1036] [A]-[B] (Stuart-Smith LJ).
[62] Rachel Mulheron, *Principles of Tort Law*, CUP (2016) 656

The lack of any mention of *Capital and Counties* in *N v Poole* is, on the one hand, unsurprising, given that *N v Poole* involved a local council rather than a police force or fire brigade. However, in surveying the case law on public authority liability and on assumption of responsibility, *if* the 'duty to the public at large' element in *Capital and Counties* were central to finding or failing to find an assumption of responsibility on the part of *some* public authorities, one would have expected some mention in either Lord Reed's summary of public authority liability or his summary of the law on assumption of responsibility – for example, as a factor to consider in determining whether such a duty can be said to arise. Instead, the only guidance to finding an assumption of responsibility or proximity in the context of public authorities is that such an assumption must not be 'inconsistent with, and therefore excluded by, the legislation from which their powers or duties are derived'. [63]

Moreover, in *Michael*, a case which did concern an omission by the emergency services (a 999 call to the police), the only reference to *Capital and Counties plc* by Lord Toulson was as authority for the principle that emergency services generally owe *no* duty of care unless they make matters worse (i.e. restating the omissions principle).[64] The court did *not* cite *Capital and Counties* as authority that an assumption of responsibility is inapt in the context of a duty owed to the public at large. This absence, coupled with the current trend of the case law against any distinction in the application of negligence principles to public authorities,[65] could mean hesitation by future courts to use this distinction to prevent any finding of an assumption of responsibility for a failure to protect by one of the emergency services such as the police.

---

[63] *N* (n 2) [65] (Lord Reed).
[64] *Michael* (n 3) [71]-[80] (Lord Toulson).
[65] *Michael* (n 3) [101] (Lord Toulson); *Robinson* (n 5) [33] (Lord Reed).

Therefore, while legislation may exclude an assumption of responsibility from arising, the effective starting point is now that an assumption of responsibility can be implied from statutory functions alone, notwithstanding Lord Reed's restatement of the rule that a failure to fulfil statutory functions will not give rise to liability in negligence.[66] Lord Reed has therefore created a curious paradox: A *duty of care* at common law *cannot* be found 'merely because they have statutory power or duties' – unless it had assumed responsibility to protect claimant the claimant from harm or created a source of danger.[67] This is orthodox. However, in determining whether a defendant had assumed such a responsibility, the court must ask *whether the nature of a defendant's (statutory) functions* entailed such an assumption of responsibility'.[68] The effect of Lord Reed's judgment is therefore a weakening of the protection afforded by the common law rule that liability should not be imposed on the basis of a failure to perform statutory functions. Lord Reed's judgment may consequently result in an expansion of liability to failures on the part of a public authority to protect an individual from danger or the actions of a third party where the public authority was required to afford such protection as part of its statutory functions.

In summary, this section has argued that the weak basis for the omissions principle, the rejection of policy reasons and the potentially expansive scope of the assumption of responsibility exception all represent 'open doors' for the development of public liability. The door is open for a development of the law to find liability where there has been a failure to protect arising from the *functions* of a public body, rather

[66] *N* (n 2) [32]-[34] (Lord Reed), [60] (Lord Reed), [65] (Lord Reed), and see *Gorringe v Calderdale Metropolitan Borough Council* [2004] UKHL 15 (HL) [32] (Lord Hoffmann).
[67] *ibid* [65].
[68] *ibid* [81]-[82].

than from a particular undertaking from which an assumption might reasonably be inferred.[69]

2. Reasons why such an expansion is problematic

This development begs the question whether such an expansion is problematic. Lord Kerr, for one, thinks it would not:

> 'In all manner of fields if [a] professional fails to act with due care and skill, he or she will be liable for any damage caused by their negligence [...] Other emergency services can be liable for their negligence, provided there is sufficient foreseeability and proximity. Why should the police be an exception?' [70]

This section explores three potential reasons why such an expansion would be a negative development in the law: (A) the consequences would be unduly burdensome; (B) such a development is unnecessary given liability under the HRA; and (C) such an expansion would essentially amount to imposing liability in negligence for failures to take care when undertaking a purely statutory duty, thus removing a principled distinction between public law and private law. It will be demonstrated that reasons (A) and (B) ought not to prevent the court from developing liability in this area, but that (C) provides a strong justification against an expansion of the law of negligence to failures of public authorities to confer a benefit.

---

[69] cf *Swinney v Chief Constable of Northumbria* [1997] QB 464 (CA).
[70] *Michael* (n 3) [179] (Lord Kerr).

A. Unduly burdensome?

The first reason why such an extension of liability for public authorities might be problematic is that it would result in an increased financial burden for these authorities, and in consequence, the taxpayer. This was emphasised by Lord Toulson in *Michael*:

> 'The only consequence of which one can be sure is that the imposition of liability on the police to compensate victims of violence on the basis that the police should have prevented it would have potentially significant financial implications. The payment of compensation and the costs of dealing with claims, whether successful or unsuccessful, would have to come either from the police budget, with a corresponding reduction of spending on other services, or from an increased burden on the public or from a combination of the two.' [71]

Lord Toulson also noted that if liability for failures to protect individuals is permitted, it may be difficult to exclude liability for failures to protect property, with such liability leading to significant sums due by public authorities.[72] Thus, in addition, to the problem of a diversion of resources (addressed previously), liability may increase the burden on the taxpayer. Moreover, an expansion of liability may be burdensome in a second sense, in opening the floodgates to a large and uncertain number of potential claimants.[73]

However, these arguments surrounding the unduly burdensome consequences, either in financial terms or in the

---

[71] *Michael* (n 3) [122] (Lord Toulson).
[72] *ibid* [119].
[73] *ibid* [120].

number and uncertainty of potential claimants, that would arise from allowing liability for public authorities' failure to confer a benefit do not provide an adequate brake on a court contemplating the extension of liability on the principles developed in Part I. First, the financial burden on the state could be rebutted by point that such an argument equally applies to claims against the NHS for doctor-patient relationships which currently give rise to liability.[74] Secondly, concerns over the best way to distribute public resources is not necessarily an appropriate question for the courts, but rather one for Parliament. Thirdly, if the court's decision results in expensive claims, which either cripple the judicial system or the public purse, it is within Parliament's power to pass a statute either limiting awards or prohibiting liability in certain types of cases or towards certain victims. At best, the argument reduces to the claim that due to such consequences, it ought to be left to Parliament to extend liability in this area. This is not a principled reason to reject such expansion.

B. Unnecessary?

A second argument is that such a development is unnecessary because liability under the HRA either adequately fills any potential gap in liability with respect to public authorities or can be expanded to do so. For example, the decision in *DSD* has been welcomed by at least two scholars precisely because it fills the 'lacuna of liability' left by *Robinson*. They argue that this foreclosed the imposition of common law duties of care from statutory powers: [75]

[74] Tofaris and Steel (n 19) at 135.

[75] Maya Sikand and Laura Profumo, 'Minding the gap: where does tortious liability for public authorities end and human rights liability begin?' [2019] 1 JPI Law 44

> Whilst *Robinson* reaffirms the absence of a duty of care [on police to investigate] towards victims of crime, *DSD*, promulgated a short time later, effectively provides an alternative route forward under the HRA 1998. Victims of crime seriously failed by the police now have a means of seeking domestic remedies. [The police must now] ensure operational efficiency in individual investigations into serious allegations.[76]

However, there are four reasons why this 'gap-filling' does not render a development of tortious liability to cover omissions of public authorities in the sense argued in Part I 'unnecessary'. First, liability under the HRA is clearly narrower than liability for omissions in negligence. On the one hand, it applies only where there is a failure on the part of a State to fulfil its positive obligations under the treaty, such as those under Article 2 (right to life) and Article 3 (right to be protected from inhuman and degrading treatment).[77] As is made clear in the *DSD* judgment, the scope of a State's positive obligations is relatively narrow – in that case it was held to apply only to 'obvious and significant'[78] shortcomings or 'seriously defective'[79] investigations. Thus, the potential scope of omissions liability for public authorities in negligence is clearly wider than the scope of liability under the HRA.

Second, the inclusion of operational duties under the scope of the investigative duty in Article 3 of the Convention might yet be considered a step too far by the European Court of Human Rights. Levy has argued that the Strasbourg jurisprudence on this point is 'at best, not clear, and at worst, points in the other

---

[76] *ibid* 48.
[77] European Convention on Human Rights, Article 2 and 3.
[78] *DSD* (n 9) [29]-[30] (Lord Kerr), [72] (Lord Kerr).
[79] *ibid* [92] (Lord Neuberger).

direction [...] operational failures are normally not sufficient'.[80] Thus, even within English law, *DSD* might not be safe.

Thirdly, even if Strasbourg approves *DSD*, an expansion of the common law to mirror any human rights protection might nevertheless be valuable, given the potential of the common law to entrench rights and duties.[81] This is particularly relevant in the current political climate where there has in recent years been calls to 'scrap' the HRA.[82]

Fourth, there remain several procedural reasons why a claim in tort offers superior protection to claimants, not least due to the automatic right to damages (which are generally higher) and the longer limitation period.[83]

It follows that even if protection under the HRA is or develops to be equivalent in scope to a potential omissions liability in tort for public authorities, this is not an argument that such a common law development would be rendered nugatory.

C. Weakening of the 'public-private divide'

A third argument why an expansion of negligence to omissions of public authorities should be rejected is that to expand tort law to cover omissions of public bodies for mere failures to fulfil their statutory functions would weaken a valuable distinction between

---

[80] Raphael Levy, 'Commissioner of Police of the Metropolis v DSD: the protection afforded under art.3 of the European Convention on Human Rights' [2019] PL 251

[81] Jane Wright, *Tort Law and Human Rights* (2nd edn, Hart Publishing 2017) 187-232

[82] The Conservative Party Manifesto 2015, available at <http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf> (30 May 2020)

[83] See summary in Donal Nolan, 'Negligence and Human Rights Law: The Case for Separate Development' (2013) MLR 76 286, 296-97; *Van Colle* (n 37) [138] (Lord Brown); Tofaris and Steel (n 19), 139-140.

public and private law. This is because finding liability for public authority omissions, either through a rejection of the omissions principle where the defendant is a public body or by inferring an assumption of responsibility where a claimant could have reasonably relied on a public authority to provide a service, would result in a *special liability* for public authorities which has no corollary between private individuals. This point to some extent echoes Lord Toulson's claim in *Michael* that such a development would be an 'exception' to 'the ordinary application of common law principles'.[84] However, here the argument is that such common law principles *cannot be* ordinarily applied to public bodies and that they instead impose a special liability on public authorities, and that such special liability is not the proper realm of negligence or tort.

For example, if future courts were to reject the omissions principle as a bar to public authority liability (given its lack of principled basis when applied to public authorities),[85] this would result in liability for public authority omissions where such a duty would not be found on the part of an individual unless the individual assumed responsibility for another or created the danger. If, on the other hand, the courts continue to uphold Lord Toulson's omissions-principle-based reasoning (despite its shortcomings) and instead find an assumption of responsibility in the context of public authorities on the basis of their statutory functions, this too would result in a 'special liability' on public authorities: in focusing on an authority's statutory functions to determine whether responsibility is assumed, the authority would then be liable for their omissions to fulfil their normal duties and obligations. This too contrasts with how such liability arises in the context of private individuals, for whom there is no comparable statement of duties *qua* citizen. An expansion in either of these

[84] *Michael* (n 3) [116] (Lord Toulson).
[85] See above, text accompanying notes 12-25

two ways would thus create the possibility of finding a duty of care on public authorities to perform their functions with due care that could never be mirrored by obligations owed by an individual.

The argument in this section is that such a development would be problematic, given the functional distinction between public law and private law. Public law, as the law regulating public bodies, is distinct in principle from private law, which delimits the scope of the duties owed to us by other individuals. To borrow the language used by judges and academics distinguishing liability under the HRA and actions in negligence, 'the basis of liability is different':[86]

> While human rights law is a set of public law norms which gives citizens rights good against the state, negligence law is a set of private law norms which gives everyone rights good against all, and 'there is no a priori reason why the same rights, principles or values should govern both relationships between individuals and the state and relations among individuals.[87]

To the extent that public law protects and vindicates 'rights' of individuals against the state, this approach clearly applies equally to the distinction between negligence and public law generally, not just to human rights. By contrast, to the extent that public law concerns the regulation of public power in the public interest,[88] the distinction between the functions of

---

[86] *DSD* (n 9) [68] (Lord Kerr).
[87] Nolan (n 84) 294-95
[88] For a division of public law along these lines see Jason Varuhas, 'Taxonomy and Public Law' in Elliot, Varuhas and Wilson Stark (eds), *The Unity of Public Law: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018); cf Paul Craig, 'Taxonomy and Public Law: A Response' [2019] PL 218

negligence, as governing relationships *between individuals*, and public law is even more stark.

The removal of the omissions principle bar with respect to public authorities, or interpreting all public bodies to have assumed responsibility towards individuals who rely on them to provide public services, would not merely be an expansion of tort. It would instead mark a shift towards protecting a different kind of interest. Public authorities would become liable for their failure to provide the services citizens expect them to provide. Lord Kerr is wrong to minimise the significance of such a development, portraying it as a natural extension of the principles of private law to the unique factual circumstances of public authorities.[89] It is nothing short of creating a right against the state for failures in performing its statutory duties – the very development that the courts have in the past rejected and, in principle, continued to reject in *N*. It is to undo *Gorringe* by the back door.

This is not to advocate special treatment to public authorities who commit established torts. Where public authorities commit torts that could be committed by any other individual – such as the police carelessly knocking over a pedestrian in *Robinson* – then they deserve to fall under the same rules. Yet, where the 'wrong' identified is a failure to fulfil a statutory duty, a duty which can only be implied by what one might expect from the protective functions of the body in question, there is a strong case for a different treatment in law. At the very least, consideration of a specific tort, addressing the precise wrong in question (not unlike how misfeasance in public office tackles a specific wrong by a person in public office) would be warranted,[90] rather than an *ad hoc* development of negligence.

---

[89] *Michael* (n 3) [181] (Lord Kerr).

[90] See Bagshaw, 'Monetary Remedies in Public Law – Misdiagnosis and Misprescription' (2006) 26(1) LS 4; and below note 99 ff.

It follows that a retention of 'the omissions principle' in the context of public authorities, in the sense of refraining from imposing liability in tort for a failure to confer benefits, is desirable, and can be justified in principle, albeit not for the reasons found in the case law.[91]

3. The Way Forward

It is suggested that there are three steps that could be taken to remedy the potential for expansion of negligence identified in Part I.

A. Redefine 'assumption of responsibility' in terms of express undertakings

The first solution would be to limit an 'assumption of responsibility' to cases where there is an express undertaking on the part of the defendant – not unlike the way Lord Toulson envisaged an assumption of responsibility in *Michael*.[92] The problem, however, with this solution would be that it becomes difficult to justify some of the existing assumption of responsibility relationships, such as that undertaken by an educational psychologist to a child[93] or the assumption of responsibility on the part of a council who takes a child into care.[94] In neither case can the assumption be truly seen as

[91] *ibid* Part A; cf Donal Nolan, 'The Liability of Public Authorities for Failing to Confer Benefits' (2011) 127 LQR 260 who also argues the omissions principle in the context of public authorities may be justified for reasons not articulated in case law, including that tort is concerned with secondary obligations generated from the breach of primary rights.

[92] *Michael* (n 3) [138] (Lord Toulson).

[93] *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619

[94] *Barrett* (n 56)

'express' to the extent envisaged by Lord Toulson, who looked at the precise words used by the operator to determine whether such an assumption existed.[95] Thus, these classic cases where an assumption of responsibility has been found must be rationalised on other grounds, such as their functions, leaving the door open to expansion in the same manner outlined above.

B. Interpret 'assumption of responsibility' as referring to taking on a task for an individual

A second solution would be to interpret an assumption of responsibility along the lines advocated by Nolan, applying to situations where *A* takes on a task or job for *B*.[96] Many of the tasks of public authorities (especially the police or fire brigades in emergency situations) are not for the benefit of an individual. Instead, they act for the benefit of the public at large – or to put it differently, their role is to secure public goods (lack of fire, public safety and security). It follows, Nolan suggests, that no assumption of responsibility would arise in such cases, since there is no undertaking of a task for another – rather, the task is taken for the public at large.[97]

However, while this distinction is sound, and overlaps considerably with the public-private distinction emphasised in Part II, it is nevertheless based on a rationalisation of 'assumption of responsibility' as meaning the undertaking of a task for an individual, which neither represents a consensus among academics[98] nor is consistent with case law in this area.[99] Future

[95] *Michael* (n 3) [138] (Lord Toulson).
[96] Donal Nolan, 'Assumption of Responsibility: Four Questions' (2019) 72 CLP 123, 129-132
[97] *ibid* 131-32. This is similar to the distinction adverted to by Stuart-Smith LJ in *Capital and Counties plc* (n 60)
[98] Nolan (n 97) 125-26
[99] *ibid* 132-133

courts might therefore question *why* a court must interpret 'assumption of responsibility' so narrowly – as applying only where a task was undertaken on behalf of or for an individual – especially when such a restriction was not mentioned in *N v Poole* and *Michael*.

C. Emphasise the public/private distinction and develop public law remedies as required

The third and preferred solution is for courts to place further emphasis on the public-private divide in future judgments, acknowledging that a development along the lines presented in Part I would be the development of a public law remedy, not a natural development of private law. This would have the advantage of permitting an assumption of responsibility to operate in negligence where an equivalent assumption may be found in private law without any express or voluntary undertaking – such as between a doctor and patient (where a similar implied undertaking might be found in private practice) or in the context of taking a child into care (where an analogy can be drawn between the implied undertaking of a parent).

Instead of automatically applying private law principles across the board, courts should ask whether a private individual *could* be similarly liable in that context. Where the 'assumption of responsibility' rests on functions that can only be, or are predominantly, derived from statute, this is a key indication that the duty is a public one. Where, however, an individual, could, should they choose, take on such a task for another – for example, by becoming responsible for curing another's illness, or looking after another's child – then private law principles should apply. In this way, a refocus on what may be considered the 'core' of negligence – the rights and duties individuals owe to and can expect from one another – may prevent an expansion of omissions liability to public authorities via the removal of the

omissions principle or through finding an assumption of responsibility based on statutory functions.

It follows that if cases such as *Michael* leave readers thinking there is a remedy 'gap' that needs to be filled, the urge should be resisted to leverage weak points in case law to expand the general law of negligence. Instead, consideration should be given to whether it is time for the UK to develop *public law* remedies (such as is currently the case with human rights obligations) for failings of public authorities – or, alternatively, whether it is time to develop more specific *torts* for public authorities. Public law alternatives would have the advantage of greater remedial flexibility and the built-in safeguards that have been deemed necessary to enable public bodies to perform their duties while also allowing redress for state failures – for example, shorter limitation periods, balancing exercises and unavailable damages as of right.[100] Private law alternatives, on the other hand, could isolate the precise 'wrong' (whether this is 'gross recklessness in the prevention of harm' or 'recklessness in the operation of a public law duty') and specify the precise standard below which a public authority should fall in order to be liable for such a breach. This would be better than effectively operating a higher standard of care in negligence for public authorities (as Nolan argues is currently the case)[101] since it would be more transparent and, moreover, would have the advantage of shielding .public authorities from claims arising from relatively minor breaches of their public duty (which this article has argued is not the role of private law), while ensuring the most egregious oversights still give rise to liability (which is arguably the reason for which an absence of liability seems wrong).

---

[100] See summary in Nolan (n 84) 296-97; *Van Colle* (n 34) [138] (Lord Brown).

[101] Donal Nolan, 'Varying the Standard of Care in Negligence' (2013) CLJ 72(3) 651, 660-663

Furthermore, remedies reflecting the nature of the wrong – being 'let down' by the state – may even be desired or expected by members of the public faced with a failure of a public authority to fulfil its duties, rather than redress through a claim for damages in ordinary negligence. To quote Wright on the remedy sought by the claimants in *Hill*:

> Mrs Hill, the mother of the last victim of the Yorkshire Ripper, did not want compensation; she considered that she had been let down by the public service charged with protecting her daughter.[102]

Although damages in tort may equally have a vindicatory function, the possibility of remedies in public law reflecting the nature of the failure (for example, a court's ability to mandate a public inquiry, an official apology or, where appropriate, some form of financial compensation) may better serve the needs of the public when let down by the state.

Thus, while the development of monetary and vindicatory remedies for areas where public authorities fall below their statutory duty may be warranted in some areas, it should be done through the creation of a new public law remedy, or a new private law tort specific to public authorities – not through a development of general negligence.

Conclusion

In conclusion, this article has sought to demonstrate that the state of case law on public authority omissions may lead to the extension of negligence to cover public authority failures. Nevertheless, it is suggested that such a development should be

[102] Wright (n 82) 230-31

resisted. The reason for resistance ought not to be based on the 'omissions principle' as currently formulated, given its problematic application to public authorities. Nor should it be because such liability has been hitherto rejected, unless the basis for such rejection or failure to find an 'assumption of responsibility' is better articulated. Rather, it ought to be rejected because the *type of duty* a public authority might 'assume' towards an individual who relies on it to perform a public service is *distinct*. To award for compensation for failures of a public authority to adhere to its public duties *is to establish a public law* right or remedy. It is *not* an extension of negligence, which is focused on the rights and obligations we owe to one another as neighbours or fellow citizens. Such a distinction should be stressed by future courts, if they wish to prevent any inadvertent extension of private law into an area for which it is currently ill-equipped.