

Some legal distinctions are useful in one context but not in another. The act/omission distinction is, I submit, a member of this category. Specifically, the act/omission distinction is useful in the context of private defendants but not in the context of public authority defendants. The main problem with the distinction is that, as recently affirmed by *Michael* and *Poole BC*, it applies equally in both contexts. This position ought to be rethought.

1. The act/omission distinction

According to the law of negligence, a person is generally not liable for harm caused to another by their omissions. Rather, their tortious liability is generally limited to harm negligently caused by their positive acts. Thus, as Lord Keith vividly pointed out in *Yuen Kun Yeu*, the hypothetical beachgoer who, seeing another about to fall off a cliff, forbears to shout a warning will not be liable in negligence. Crucially, this principle applies as much to public authority defendants like the police as it does to private defendants (*Michael* [101]).

2. Private defendants

The act/omission distinction *is* useful in the context of private defendants like Lord Keith's beachgoer: it furnishes the common law with a normatively justified default position of 'no liability' for omissions.

Why is this default position normatively justified? Really, it all comes down to individual freedom and autonomy. The common law, as Giliker (2021) argues, has a 'libertarian slant' to it: it seeks to, within limits, preserve and privilege the individual's right to self-determination. This 'slant' is apparent beyond the law of tort. For example, the qualified ability of contractual parties to 'contract out' of default rules on damages (*Cavendish Square Holdings v Makdessi*) reflects the common law's privileging of parties right to *choose* the terms of their dealing.

Within the law of negligence, the act/omission distinction is one device the law can use to protect and promote individual freedom, and to that extent is 'useful'. As Lord Hoffmann observed in *Stovin v Wise*, a positive obligation to rescue another (like the man on the cliff) is more of an imposition on one's freedom than a negative obligation to not negligently cause harm to another by one's actions.

As Steel (2019) notes, various reasons as to *why* this is can be advanced. One persuasive explanation is in terms of intentions. A positive obligation to help requires that a person adopts a particular intention (to assist) towards another. In contrast, a negative obligation to not negligently cause harm requires no such thing. In Steel's words, one can 'go about life' without adopting any particular intention towards anybody else. Equally plausible is Stevens' (2007) framing of the problem in terms of the freedom to spend one's resources. A positive obligation to assist threatens to interfere more substantially with one's resources than does a negative obligation.

Of course, one could object to the libertarian framework of the common law itself, as some do. However, at least *within* that (very well) established framework, the distinction is of real value.

3. Public authority defendants

The act/omission distinction applies as much to public authority defendants as it does to private defendants (*Michael*). In this context, however, the distinction is not 'useful'. Rather, it obscures the unique position occupied by public authorities and undermines the normative coherence of the law of negligence.

There are two main reasons why the act/omission distinction should not apply with such force in the context of public authority defendants. First, a negative reason: the justifications for the act/omission distinction in the private context (where, as noted in *Michael*, the principles were

largely developed) do not readily apply in the public authority context. Above, it was outlined that a principal justification for the act/omission distinction is its role in preserving individual freedom and autonomy. This justification does not apply in the context of public authorities since, as Tofaris and Steel (2016) notes, there is nothing intrinsically valuable about institutional (unlike individual) freedom to *not* assist others. Similarly, Lord Hoffmann's 'why pick on me?' argument in *Stovin v Wise* does not apply in the public authority context, since public authorities are specifically tasked with helping those in need of assistance.

This leads to a second, positive reason not to apply the distinction with such force in the public authority context: public authorities are uniquely positioned within society. For one thing, public authorities are tasked specifically with assisting those in need. Relatedly, they are endowed with a wide variety of powers to perform this function, powers which individual citizens rarely (if ever) possess.

Recognising this provides a positive reason to impose limited liability upon public authorities for failing to confer benefits upon those in need by omitting to act, since the omission goes to the very heart of what the authority is there to do. In *Michael*, for example, the 'omission' represented a failure on the police's part to perform what was precisely their function. In such circumstances, it is arguable that the law of negligence ought to impose liability.

Of course, it is true that in some *other* senses of the word, the act/omission distinction is 'useful' as it applies to public authorities. As Deakin (2019) points out, for example, the limited liability imposed on public authorities is economically efficient. However, insofar as 'useful' is understood to reference normative coherence and justifiability, the act/omission distinction is *not* useful in the public authority context.

4. Conclusion: limit the distinction's scope

In view of the above, the current law ought to be reformed such that the act/omission distinction does not apply equally to public authority and private defendants. Statutory intervention could achieve this, as Morgan (2022) notes, referencing the Law Commission's 2008 consultation on the matter.

I do not deny that the path to reform could be difficult. For one thing, distinguishing between public authorities and private defendants is not always easy. However, as Giliker (2021) notes, the current law has 'human consequences' which should not be ignored. Reform of this area has the capacity to enhance the normative coherence of the law, and consequently its legitimacy.