

Public Bodies and Omissive Conduct: The Mysterious Veil of Liability Shielded from the Public Gaze?

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Abstract

The near immunity enjoyed by public bodies has come under scrutiny in recent years. The question of whether the exclusion of liability of such bodies exists wholly or merely operates in small pockets looms large and the answer is one that tends to be obfuscated in judicial decisions. The courts often refrain from holding public bodies to account and endorse a defensive practice argument to do so. Elusive concepts of proximity cloud judgements and highlight how a defence premised on anecdote and assumption has taken prevalence in the minds of the highest courts of the land. The current liability regime which potentially imposes liability on Ambulance Trusts, but exempts the Police and Fire Services from any similar duty of professional rescue is unjust and makes little practical or doctrinal sense. Various attempts to address this apparent lacuna in the law have been made in order to unveil what is usually shielded from the public gaze in averments of negligence against public bodies but the law on omissive conduct remains a maze of barely compatible decisions.

Keywords

Public Bodies, Liability, Immunity, Exclusionary Principle

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I. Introduction

The concept of a public body, once thought to be ‘State-Funded Organisations’, including, *inter alia*, ‘Local Councils, Educational Authorities and the Emergency Services’¹, remains elusive. Indeed, it is not a singular entity as such², nor is it the intrinsic nature of the body which brings it within the remit of the term, but it is the nature of the functions which it performs that is determinative³. Public authorities engage in a distinct role in society⁴ which carries the common perception that they will respond in ‘urgent situations’⁵. It then begs the question as to whether a general exclusionary principle can apply equally and uniformly to a set of bodies which, inherently, are not coupled with a coherent definition⁶. In which case, and as this paper will discuss, is it merely a question of ‘implication and analogous reference’⁷?

II. Public Bodies and their Standard of Care: The Elusive Concept of ‘Proximity’

Where public authorities fail to exercise reasonable care in situations outside of their statutory duties⁸, considerations must be had as to whether such a duty would be imposed in a private action⁹ and whether the body is acting pursuant to the public interest¹⁰. In allegations of poor performance, questions of resources loom large and the courts tend to obfuscate the judicial process of determining the liability of the relevant body¹¹.

Lord Dyson elucidates that the entire system of law predicates on the fundamental notion of addressing wrongful behaviour¹²; indeed it takes ‘no cognisance of carelessness in the

¹ Kirsty Horsey and Erika Rackley, *Tort Law* (4th edn, Oxford University Press 2015)

² *X (minors) v Bedfordshire County Council* [1995] 3 WLR 152

³ House of Lords & Commons Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (HL 2003-04, 382)

⁴ Human Rights Act 1998, s6(3)(b)

⁵ It encompasses many agencies which have great potential to cause harm, in terms of both volume and severity. See *Michael v Chief Constable of South Wales* [2015] UKSC 2

⁶ Kirsty Horsey and Erika Rackley, *Tort Law* (4th edn, Oxford University Press 2015)

⁷ Lord Hoffmann, ‘Reforming the Law of Public Authority Negligence’ (2009)

<http://www.barcouncil.org.uk/media/100362/lord_hoffmann_s_transcript_171109.pdf> accessed September 2017

⁸ Hanna Wilberg, ‘Defensive Practice or Conflict of Duties? Policy Concerns in Public Authority Negligence claims’ (2010) 126 *LQR* 420

⁹ A statutory duty cannot confer a common law duty of rescue, see *Capital and Counties Plc v Hampshire County Council* [1997] 3 WLR 331

¹⁰ Donal Nolan, ‘Revisiting the liability of public authorities for omissions’ (2014) 130 *LQR* 21

¹¹ Jason Young, ‘Omissions and the Mysterious Public Veil: Consideration of the “Immunity” of Public Authorities in Negligence Claims’ (2016) 4 *LIJ* 129

¹² *Jones v Kaney* [2011] UKSC 13

abstract’¹³. Whilst the ideology of *alterum non laedere* is axiomatic within civilised legal systems, the concept of a duty of care has been shaped by the factual matrix of the ‘individual agent who carelessly causes loss to another’¹⁴. The moral basis has been the Aristotelian concept of corrective justice¹⁵; but this primitive template fits uncomfortably pertaining to *pro veritate* averments of negligence¹⁶ against public bodies.

One of the functions¹⁷ that tort law performs is to hold such bodies accountable¹⁸ for any actions¹⁹ or omissions²⁰ resulting in harm. Such an action forces the body to explain²¹ their conduct relating to the injury as part of the adversarial process²². There are other ways in which public bodies can be held accountable²³, but the effectiveness of these remedies remains questionable²⁴. Most complaints are dealt with internally²⁵, resulting in a lack of independence²⁶ that judicial scrutiny would otherwise have²⁷. The point of agreement is that the law on omissive conduct²⁸ in relation to public bodies is, as it stands, a ‘maze of barely compatible decisions’²⁹.

The preliminary hurdle is whether the claim is appropriate for judicial resolution³⁰. After reviewing the line of authority beginning with *Donoghue*³¹, passing through *Anns*³² and culminating in *Caparo*³³ the courts favoured the tripartite test of liability turning on sufficient

¹³ Lord Rodger, ‘Lord Macmillan’s Speech in *Donoghue v Stevenson*’ (1992) 108 *LQR* 236

¹⁴ Ter Kah Leng, ‘The Search for a single formulation for the duty of care: back to *Anns*’ (2007) 23 *PN* 218-227

¹⁵ Lord Hoffmann (n 7)

¹⁶ Lord Rodger (n 13)

¹⁷ Ernest Weinrib, *The Idea of Private Law* (Harvard University Press 1995)

¹⁸ Allen Linden, ‘Tort Law as Ombudsman’ (1973) 51 *CBR* 155

¹⁹ *Rigby v Chief Constable of Northamptonshire* [1985] 1 *WLR* 1242

²⁰ *Swinney v Chief Constable of Northumbria (No.1)* [1997] *QB* 464

²¹ Andrew Robertson and Hang Wu Tang, *The Goals of Private Law* (1st edn, Hart Publishing Ltd 2009) 283

²² Thus, providing a vindicatory role, Dan Priel, ‘A Public Role for the International Torts’ (2011) 22 *KLJ* 183, see also *Ashley v Chief Constable of Sussex Police* [2008] *UKHL* 25, per Lord Scott

²³ Such as the Independent Police Complaints Commission, see Peter Cane, *Atiyah’s Accidents, Compensation and the Law* (7th edn, Cambridge University Press 2012) 417

²⁴ Andrew Sanders and Richard Young, *Criminal Justice*, (4th edn, Oxford University Press 2010) 612

²⁵ Lord Dyson MR, ‘The Duty of Care of Public Authorities: Too Much, Too Little or About Right?’ (2012) <<https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/mr-speech-piba-lecture-27112012.pdf>> accessed September 2017

²⁶ Jason Yong, ‘Omissions and the Mysterious Public Veil: Consideration of the “Immunity” of Public Authorities in Negligence Claims’ (2016) 4 *LIJ* 129, see also Robert Stevens, *Torts and Rights* (1st edn, Oxford University Press 2007) 2

²⁷ James Spencer, ‘Suing the Police for Negligence: Orthodoxy Restored’ [2009] 68 *CLR* 25

²⁸ Jeroen Kortmann, *Alturism in Private Law* (1st edn, Oxford University Press 2005) 28

²⁹ Robyn Martin, ‘Categories of Negligence and Duties of Care: *Caparo* in the House of Lords’ (1990) 53 *MLR* 824

³⁰ *Connor v Surrey County Council* [2010] *EWCA Civ* 286

³¹ *Donoghue v Stevenson* [1932] *AC* 562

³² *Anns v Merton London Borough Council* [1978] *AC* 728

³³ *Caparo Industries plc v Dickman* [1990] 2 *AC* 605

proximity and notions of fairness and justice as to whether a duty was owed. Historically, the judiciary has relied on a controversial³⁴ line of reasoning when contemplating allegations of negligence³⁵ against public bodies³⁶. The vague public immunity justification invoked³⁷ by the courts stems from *Hill*³⁸ with two strands of reasoning enunciated as to why Lord Keith did not hold the police accountable for failing to save the deceased. First, there cannot be said to be sufficient legal proximity³⁹. Second and perhaps more importantly, as a matter of public policy⁴⁰, the police are immune from actions of negligence; it would adversely affect the body in ‘supressing crime’⁴¹.

The police are singled out in pursuing the broader interests of society⁴² as the primary body that intervenes to protect citizens from criminal activity⁴³. The operation of the general exclusionary rule is based almost entirely on Lord Keith’s reasoning, providing the police with immunity where other bodies do not⁴⁴. These policy justifications have been relied on in numerous subsequent cases and similar reasoning resurfaced in *Brooks*⁴⁵ where the court was both unanimous and resolute⁴⁶ in finding that the police did not owe a duty⁴⁷. The Lords held that imposing such a duty would be ‘lead to an unduly defensive approach in combatting crime’⁴⁸. It is incorrect to attach judicial weight to a principle, and consequently deny any liability on the speculative basis that public bodies may drop efficiency in the future.

The concept of proximity pervades many judgements involving public authorities⁴⁹ yet it can be no more than the penultimate question. The courts should only be concerned with questions of circumscribed legal policy; indeed, proximity was said ‘not to be a definable

³⁴ *An informer v Chief Constable* [2012] EWCA Civ 197, however this immunity is qualified and only applies for cases regarding negligence.

³⁵ Andrew Simester, ‘Why Omissions Are Special’ (1995) 3 *LT* 311

³⁶ Lord Bridge, when considering the law of negligence, emphasised the principle that the law should develop incrementally. See *Caparo Industries plc v Dickman* [1990] 2 AC 605

³⁷ Jane Stapleton and Peter Cane, *The Law of Obligations* (1st edn, Oxford University Press 1998) 59-95

³⁸ *Hill v Chief Constable of West Yorkshire* [1989] AC 53

³⁹ *Home Office v Dorset Yacht Co.* [1970] 2 WLR 1004

⁴⁰ *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310

⁴¹ Lord Keith in *Hill v Chief Constable of West Yorkshire* [1989] AC 53

⁴² Stelios Tofaris and Sandy Steel, ‘Negligence Liability for Omissions and the Police’ (2016) 75 *CLJ* 128

⁴³ *Glamorgan Coal Co. Ltd v Glamorganshire Standing Joint Committee* [1916] 2 KB 206

⁴⁴ Robert Reiner, *The Politics of the Police* (4th edn, Oxford University Press 2010) 7

⁴⁵ *Brooks v Commissioner of the Police for the Metropolis* [2005] 1 WLR 1495

⁴⁶ Christian Witting, ‘The three stage test abandoned in Australia– or not’ (2002) 118 *LQR* 214

⁴⁷ Even where the actions of the police were extremely negligent, far more so that in *Hill v Chief Constable of West Yorkshire* [1989] AC 53

⁴⁸ Per Lord Steyn in *Brooks v Commissioner of the Police for the Metropolis* [2005] 1 WLR 1495

⁴⁹ Robyn Martin, ‘Categories of Negligence and Duties of Care: Caparo in the House of Lords’ (1990) 53 *MLR* 824

concept and merely a convenient label⁵⁰ and whilst once the crux of the duty question, is now a virtually meaningless requirement.

III. Public Bodies and the Exclusionary Principle: A Tale of Conflicting Decisions

The manner in which the exclusionary principle currently operates in relation to the conduct of public authorities generates results which are, *prima facie*, surprising⁵¹. Whilst this ‘immunity’ granted to public bodies can be said to be justified on the basis of the omissions principle⁵² and policy considerations,⁵³ the greatest problem lies within the way in which the Courts have applied it outside of the facts present in *Hill*. *Hill* was a ‘unique species’⁵⁴ within the law of negligence; the notion of incremental development as enunciated by Lord Bridge⁵⁵ was called into question and ultimately disparaged⁵⁶. Perhaps this same lack of judicial scrutiny was present in *X v Bedfordshire County Council*⁵⁷ when Lord Wilkinson extended this amorphous immunity to ‘all those charged by Parliament with the task of protecting others’, a judicial decision in contradiction to the approach advocated in *Caparo*. The ambit of this principle was expanded without considering the individual factual contexts and failing to provide cogent justification as to the reasoning⁵⁸.

A concept that has been endorsed by the courts is the defensive practice argument, yet this policy consideration has not been consistently applied through case law. In *Dorset Yacht*,⁵⁹ Lord Reid denied the existence of such fears of the ‘suppression of police efficiency in the presence of legal duties’⁶⁰, which was then confirmed again in *Phelps*⁶¹. The opposite was

⁵⁰ Lord Oliver in *Caparo Industries plc v Dickman* [1990] 2 AC 605

⁵¹ Stelios Tofaris and Sandy Steel, ‘Negligence Liability for Omissions and the Police’ (2016) 75 *CLJ* 128

⁵² The formulation of this principle was cited with approval in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2

⁵³ “The general sense of public duty which motivates police forces is unlikely to be appreciably reinforced by the imposition of such liability so far as concerns their function in the investigation and suppression of crime”, per Lord Keith, *Hill v Chief Constable of West Yorkshire* [1987] 1 ALL ER 1173, p 63

⁵⁴ Claire McIvor, ‘Getting defensive about the police negligence: the Hill principle, the Human Rights Act 1998 and the House of Lords’ [2010] *CLJ* 133

⁵⁵ *Caparo Industries plc v Dickman* [1990] 2 AC 605

⁵⁶ Christian Witting, ‘The three stage test abandoned in Australia- or not’ (2002) 118 *LQR* 214

⁵⁷ *X (minors) v Bedfordshire County Council* [1995] 3 WLR 152

⁵⁸ Jason Yong, ‘Omissions and the Mysterious Public Veil: Consideration of the “Immunity” of Public Authorities in Negligence Claims’ (2016) 4 *LIJ* 129

⁵⁹ *Home Office v Dorset Yacht Co.* [1970] AC 1004

⁶⁰ Jason Yong, ‘Omissions and the Mysterious Public Veil: Consideration of the “Immunity” of Public Authorities in Negligence Claims’ (2016) 4 *LIJ* 129

⁶¹ *Phelps v Hillingdon London Borough Council* [2002] 3 WLR 776

suggested in *Barrett*⁶² stating the defence is premised on ‘anecdote and assumption’⁶³. Deleterious consequences are commonly predicted by Judges that threats of liability may result in the courts finding themselves overburdened with vexatious or otherwise groundless claims⁶⁴ yet so seldom are these concerns supported by empirical data⁶⁵. The discernible unfairness to individual victims is mitigated only by the possibility that the *Human Rights Act 1998* may supply a remedy⁶⁶.

As adumbrated, various attempts to address this apparent lacuna in the law⁶⁷ concerning misfeasance⁶⁸ and nonfeasance of public bodies have been made⁶⁹, yet there are disparities between the liabilities of various authorities. Evident is the tension between supporting the reasonable expectations of the public⁷⁰ and the broader policy arguments in favour of permitting those entrusted with difficult decisions to make them without ‘concern for possible legal consequences’⁷¹.

The near immunity enjoyed by the police has in the past, somewhat illogically, been treated as being at the root of the decisions to excuse the emergency services from any private law duty to aid those they know to be in need of immediate help⁷². The conclusion in *Capital and Counties Plc*⁷³ (establishing the exemption of liability on the part of the fire service) was said to follow *Alexandrou v Oxford*⁷⁴ which, despite being concerned with the conduct of the police, was unconvincingly declared to be indistinguishable; although when the same argument was advanced in *East*⁷⁵ it was unequivocally rejected by the court. The decision to impose a duty, revolved around the elusive concept of proximity; demonstrating further judicial confusion

⁶² *Barrett v Enfield LBC* [2001] 2 AC 550

⁶³ Duncan Fairgrieve, ‘Suing the military: the justiciability of damages claims against the armed forces’ [2014] *CLJ* 18

⁶⁴ Kevin Williams, ‘Emergency Services to the rescue, or not, again’ [2008] *JPIL* 265

⁶⁵ *Perrett v Collins* [1999] PNLR 77; Richard Posner, ‘A Theory of Negligence’ (1972) 1 *JLS* 29; Jason Yong, ‘Omissions and the Mysterious Public Veil: Consideration of the “Immunity” of Public Authorities in Negligence Claims’ (2016) 4 *LIIJ* 129

⁶⁶ Peter Francis, Pamela Davies and Victor Jupp, *Policing Futures* (1st edn, Macmillan Press 1997) see also *Osman v United Kingdom* [1999] 1 FLR 193

⁶⁷ *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50

⁶⁸ Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 322, 2010)

⁶⁹ *R v Dytham* [1979] 3 WLR 467; *R v Commissioner of Police of the Metropolis, Ex p Blackburn* [1968] 2 QB 118

⁷⁰ Kirsty Horsey and Erika Rackley, *Tort Law* (4th edn, Oxford University Press 2015)

⁷¹ Ralph Lewis, ‘The liability of the emergency and rescue services’ (2000) 4 *JPIL* 198

⁷² *Ibid*

⁷³ *Capital and Counties Plc v Hampshire County Council* [1997] QB 1004

⁷⁴ *Alexandrou v Oxford* [1993] 4 All ER 328

⁷⁵ *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74

when extending an immunity principle, highlighting how the defensive practice mentality has taken prevalence in the minds of the highest courts.

Controversially, the same argument is not applied to the ambulance services. Two glaring examples suffice in the contrasting cases of *Michael*⁷⁶ and *Kent v Griffiths*⁷⁷ where the liability of the ambulance services⁷⁸ was considered and arbitrary distinctions were drawn as to when liability would result based upon reassurance⁷⁹, an unacceptable state of judicial reasoning. Once the ambulance service accepts a call, they have a duty to respond to that individual without carelessness and are seen as an extension of the National Health Service⁸⁰.

IV. Conclusion

The current liability regime which potentially imposes liability on Ambulance Trusts, but exempts the Police and Fire Services from any similar duty of professional rescue⁸¹, is unjust and makes little practical or doctrinal sense⁸².

The fact that public authorities have, for an uncomfortable period of time, been given blanket immunity from liability manifests great social injustice. The aforementioned cases are merely some of the many decisions which illustrate the awkward jurisprudence of the courts. By introducing a host of uncertain rules, in attempts to curtail the number of claims against public bodies, yet failing to provide a cogent definition raises pertinent questions of whether the logical underpinnings of such a defence is, in itself, reasonable. Whilst there are many exclusionary principles relating to public bodies it would be disingenuous to contend that a blanket veil of ‘general’ immunity principle exists to exclude them all from liability.

⁷⁶ *Michael v Chief Constable of South Wales* [2015] UKSC 2

⁷⁷ *Kent v Griffiths* [2001] QB 36

⁷⁸ *Ibid*

⁷⁹ The law only attaches liability when the authorities ‘reassures’ the caller; in other situations, they would not be found liable. Such an element of ‘reassurance’ was not present in *Michael*, thus allowing the Lords to distinguish the case, see *Michael v Chief Constable of South Wales* [2015] UKSC 2

⁸⁰ Joanne Conaghan and Wade Mansell, *The Wrongs of Tort* (2nd edn, Pluto Press 1999)

⁸¹ Fire and Rescue Services Act 2004

⁸² Kevin Williams, ‘Emergency Services to the rescue, or not, again’ [2008] *JPIL* 265

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