

RATIONALISING OMISSIONS LIABILITY IN NEGLIGENCE

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It is true that the categories of negligence are never closed...and it would be open to the court to create a new exception to the general rule about omissions...[The court looks] to see whether there is an argument by analogy for extending liability to a new situation, or whether an earlier limitation is no longer logically or socially justifiable. In doing so it pays regard to the need for overall coherence.¹

I. Introduction

The general rule in tort law, and in the tort of negligence in particular, is that there is no liability in respect of a pure omission – normally defined as a mere failure to act. Thus, a person is generally under no tortious duty to provide positive assistance to a stranger in peril.² Various exceptions to this rule are recognised, for instance, where a person has assumed a responsibility to act, is in a special relationship with the person injured, or has failed to alleviate a source of risk they have created.

The possible justifications for this general rule have been much examined.³ This article focuses on two questions that have received considerably less attention. The first is: how, precisely, ought the general rule in the law of negligence to be understood? The traditional formulation of the general rule is in terms of a distinction between ‘acts’ and ‘omissions’. It will be shown that this distinction is at best a rule of thumb. It argues that there are ‘acts’ which deserve the same legal treatment as ‘omissions’. It suggests a revised general rule which focuses upon whether the defendant’s conduct makes the claimant worse off relative to a particular baseline.

Second, the article examines the exceptions recognised to the rule as it is currently understood. Lord Toulson adverts in the quotation above to the need for overall coherence in the recognition of these exceptions. There does not yet appear to be a systematic analysis in the literature of whether the existing exceptions are coherent.⁴ This article contributes to this analysis by examining one major issue of ‘coherence’

*With thanks for helpful comments or discussion to Jane Stapleton, Jeffrey Hackney, the participants at the Edinburgh-Oxford Private Law Exchange, in particular John Blackie, the participants at the Private Law Workshop at Hong Kong University, and the anonymous reviewer. The usual disclaimer applies.

¹ *Michael v Chief Constable of South Wales* [2015] UKSC 2, [2015] A.C. 1732, at [102] per Lord Toulson.

² Subsequent references to ‘tortious duty’ or ‘duty’ should be read as references to duties of care in negligence, unless stated.

³ See, e.g., J. Kortmann, *Altruism in Private Law: Liability for Non-feasance and Negotiorum Gestio* (Oxford: Oxford University Press, 2005).

⁴ For some helpful analysis of this issue, see J. Kortmann, *Altruism in Private Law: Liability for Non-feasance and Negotiorum Gestio* (Oxford: Oxford University Press, 2005), ch 5; R. Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007), at pp.9-16; E. Quill, “Affirmative Duties of Care in the Common Law” (2011) 2 J.E.T.L. 151.

in this area, namely, whether each exception is consistent with the rationale for the general rule. The question it addresses is whether the law can consistently be committed to the general rule while also admitting exceptions in the situations it currently does. I show that the existing exceptions can be considered consistent with the general rule. The article pursues a third, subsidiary, aim: by examining the rationales of each exception, it resolves some doctrinal controversies as to their scope.

The article proceeds as follows. The first section focuses upon the question of how the general rule on ‘omissions’ should be understood. The second section moves on to consideration of the scope of the exceptions and their coherence with the general rule. The analysis of each exception is not comprehensive: it focuses on the central issue of whether the exception can be considered consistent with the general rule. A brief conclusion ensues.

II. The General Rule

The general rule is conventionally formulated in this way:⁵

General rule. A is not liable to B in the tort of negligence for a pure omission.

An omission is a failure to act. In *Robinson v Chief Constable of West Yorkshire Police*, Lord Reed described these as the “commonly given examples” of pure omissions: “someone who watches and does nothing as a blind man approaches the edge of a cliff, or a child drowns in a shallow pool”.⁶ The classic example of an *impure* omission, which is treated analogously to an act, is a failure to brake or to indicate while driving.⁷

The *General rule* is purely negative: it says that, generally, A is not liable in negligence to B for a pure omission. It does not logically entail, then, that A is generally liable to B for an act. However, this is typically held to be true in relation to reasonably foreseeable physical damage.⁸ Thus, we can formulate the following closely connected rule:

Acts. A is generally under a duty of care to B in the tort of negligence in respect of reasonably foreseeable physical damage caused by A’s actions.

In what follows, I will first consider a problem with the *General rule* which arises due to its interaction with *Acts*. This is the problem that some acts deserve the same duty of care treatment as pure omissions. Furthermore, they deserve this treatment for the same reason that there is generally no duty of care in respect of a pure omission. This

⁵ See, e.g., *Smith v Littlewoods Organisation* [1987] A.C. 241, at 270-271, [1987] 1 All E.R. 710; *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, at [69], [71]-[72]. M. Lunney, D. Nolan and K. Oliphant, *Tort Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2017), at pp.469-471. The rule also applies in other torts: see, e.g., *Iqbal v Prison Officers Association* [2009] EWCA Civ 1312, [2010] Q.B. 732, at [15]-[23] (false imprisonment).

⁶ [2018] UKSC 4, at [72].

⁷ *Mitchell v Glasgow City Council* [2009] 1 A.C. 874, [2009] 3 All E.R. 205 at [76] per Baroness Hale; J. Steele, *Tort Law: Text Cases and Materials*, 4th edn. (Oxford: Oxford University Press), at p.170.

⁸ N J McBride and R Bagshaw, *Tort Law*, 6th edn, at X.

problem entails that the *General rule* needs revision in some way to accommodate cases where an act causes foreseeable physical injury but should generate no duty of care: some such cases ought to fall within the protection of the *General rule*. In light of this, the article defends an alternative account of the conduct that ought to fall within the *General rule*. It argues that A should generally not be liable to B in the tort of negligence if A's conduct is such that it does not cause B to suffer a damage which B would not have suffered had A's body or resources not been present at the time of the careless conduct. It then considers an alternative formulation based upon creating a risk and not alleviating a risk. It shows that this formulation either adds nothing to the account proposed or should be rejected.

Beyond acts and omissions

The function of the general rule is to identify a category of conduct in respect of which a special reason is needed for the imposition of a duty in virtue of the nature of the conduct. But the distinction between acts and omissions is at best itself only a rule of thumb for identifying situations where the defendant's conduct is such that there must be special reasons for the imposition of a legal duty.

This is because there are situations where careless *acts* which foreseeably lead to physical harm are not ones in respect of which a duty of care is owed and are akin to cases of pure omission. Suppose that I set up a direct debit which provides funds to an exceptionally talented brain surgeon, who uses those funds to perform operations that are unavailable through the National Health Service. Having carelessly misread a newspaper article as saying that the surgeon had negligently performed certain operations, I instruct my bank to cancel the payment. Suppose that had that payment been made, the surgeon would have been able to save one life. Here I have done a careless *act* – instructing my bank to cancel a payment – which foreseeably led to another's death. Call this case *Cancellation*.⁹ It seems highly unlikely that I am under a duty of care with respect to the death in *Cancellation*.¹⁰

This intuitive verdict can be strengthened by appeal to the basis of the general rule. Suppose, plausibly, that the underlying basis of the general rule is primarily a concern of freedom.¹¹ Some types of duty are more invasive of a person's freedom than others because they require that person to give up a wider range of (valuable) options or to focus upon a specific end. This explains the intuitive classification of *Cancellation* as a no duty situation: requiring the defendant to continue to make the charity payment requires a very specific action on the part of the defendant and requires the defendant to make its resources available for the use of another person.

a. *Making worse and failing to make better*

⁹ This case is modelled on one given in S. Kagan, *The Limits of Morality* (Oxford: Oxford University Press, 1989), at p.108. See further J. McMahan, "Killing, Letting Die, and Withdrawal of Aid" (1993) 103 *Ethics* 250.

¹⁰ At least on the assumption that my giving did not lead to the recipient refusing an alternative source of aid. See below, X.

¹¹ See further below, X.

An alternative formulation of the general rule, which has some judicial and academic support, is as follows:¹²

No benefit: A is not generally liable to B in negligence for failing to confer a benefit upon B, but only for making B worse off.

This formulation is appealing in that it tracks an intuitively important moral difference between affecting the world for the worse and failing to improve the world; it thus seems to make the general rule morally intelligible.¹³

The central difficulty with this formulation is how to specify the baseline relative to which one judges that a person is made worse off or merely not benefitted.¹⁴ Consider *Cancellation*. It might be said that my instruction makes the victim worse off than they would have been had I not given the instruction: had I not given the instruction, they would have lived. Alternatively, it could be said that my act merely causes the victim not to be benefitted because, had I not given to charity at all, they would still have died. As yet, the formulation provides no guidance on which baseline to use.¹⁵

Here, then, is one way of defining the baseline:

No Benefit 1: A is not generally liable to B in tort for failing to make B better off than had A not existed.

This reaches the intuitively correct answer in *Cancellation*: the cancellation of the payment does not make the victim worse off than had I never existed. But *No Benefit 1* survives only the least scrutiny. Suppose that I saved your life in circumstances where no one else would have. Then I carelessly run you over in my car. My carelessly running you over does not, or need not, make you worse off than if I had never existed. But it is clearly conduct which should give rise to liability without special reason needing to be shown (in virtue of the kind of conduct that it is).

A different suggestion is as follows:¹⁶

¹² See *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, at [69] per Lord Reed; D. Nolan, “The Liability of Public Authorities for Failing to Confer Benefits” (2011) 127 L.Q.R. 260, at 260, claiming that it is normally more straightforward to ask if “the defendant has made things worse for the claimant or simply failed to confer a benefit on him or her”. See, similarly, R. Stevens, *Torts and Rights* (Oxford: Oxford University Press) at p.9.

¹³ See, articulating the idea that acts are more morally problematic because they involve interventions on the status quo, T. Honore, “Are Omissions Less Culpable?” in P. Cane and J. Stapleton, *Essays for Patrick Atiyah* (Oxford: Oxford University Press, 1991) 31, 41-42.

¹⁴ This crucial issue is often given little attention in the tort literature. See, e.g., R. Stevens, *Torts and Rights* (Oxford: Oxford University Press) at p.9.

¹⁵ Moore makes this criticism: M. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law*, at p.28

¹⁶ This suggestion and the next are discussed in K. Draper, “Rights and the Doctrine of Doing and Allowing” (2005) 33 *Philosophy and Public Affairs* 253, 260-262.

No Benefit 2: A is not generally liable to B in tort for failing to make B better off. A's conduct makes B worse off if and only if there is a time such that, had A not existed at that time, B would have been better off.

This deals with the careless car collision example. There is a time (the collision with B) when, had A not existed at that time, B would have been better off. But this formulation reaches the incorrect result in *Cancellation*: there is a time, namely, when I order the cancellation, at which, had I not existed then, B would have been better off: thus, *Cancellation* is incorrectly treated as a case of making worse.

A third suggestion:

No Benefit 3: A is not generally liable to B in tort for failing to make B better off. A's conduct makes B worse off if and only if it makes B worse off than the position B is entitled to be in with respect to A.

This suggestion is uninformative. This proposal says: a person is entitled to be made no worse off than they are entitled to be with respect to another person. A failure to benefit is a failure to improve a person's situation beyond the situation they are entitled to be in. This then raises the question of what entitlements people have against each other, which is precisely the issue at stake. The *General rule* is supposed to tell us what position people are generally entitled to be in relation to each other's careless conduct. No progress has been made on this question with *No Benefit 3*.

Consider, then:

No Benefit 4: A is generally only liable in negligence to B if A's conduct makes B worse off than B would be independently of the presence of A's body or resources at the time of the careless conduct.

This formulation is appealing. It deals with *Cancellation*. In this case, the defendant's act does not make the victim worse off with respect to what they had or would have had independently of the presence of the defendant's body or resources. Had the payment not been made, the victim would have died in any event. This formulation also deals with the careless collision example: A's carelessly colliding with B makes B worse off than B would have been had A's body or resources not been present at that time, even if, at an earlier time A's body or resources benefitted B.

Unfortunately, however, *No Benefit 4* faces two problems. These are the problems of (i) overinclusiveness and (ii) underinclusiveness. It will be argued that *No Benefit 4* can meet these problems with a minor revision.

The problem of overinclusiveness

Consider *OLL Ltd v Secretary of State for Transport*.¹⁷ In this case May J held that no duty of care arose on the part of the defendant coastguard when it misdirected other rescue services in the coordination of a rescue attempt. Thus, although the defendant did something which made the victim worse off than they would have been had the defendant not been present, they were under no duty of care. Rather, a duty only arose not to "inflict direct physical injury" and misdirecting "other rescuers" could not be so

¹⁷ [1997] 3 All E.R. 897.

classified.¹⁸ The objection, then, is that *No Benefit 4*, in combination with a revised version of the *Acts* principle – which focuses upon whether the presence of A’s body or resources made B worse off – would entail that a duty should have been owed in *OLL*.

It may, however, be argued that *OLL* is consistent with the general principle that one is under a duty of care not to render persons foreseeably physically worse off than if one had not intervened. The argument is that the defendant coastguard did not render the victims worse off than if they had not intervened because all public rescue services should be treated as one single legal entity.¹⁹ The defendant’s act did not render the claimant worse off than if no public rescuer had intervened. This is a somewhat strained interpretation of *OLL*, however, as May J does not distinguish between public and private rescuers and one private rescuer was alleged to have been misdirected in the case.²⁰ Moreover, there seems to be no normative justification for grouping together all public rescue services in so far as they are distinct legal persons.

The better view is that *OLL* is incorrect. A further reason may be given. It is arbitrary to distinguish between cases where a person prevents an object from preventing a risk materialising and cases where a person prevents a person from preventing a risk materialising. It is clear that there can be a duty of care in the former type of case. If the fire brigade turn off a sprinkler system with the result that damage occurs which would not have occurred if they had not intervened at all, then they can be liable in respect of that damage.²¹ It is not clear why one should distinguish between turning off a sprinkler and misdirecting a person.

The problem of underinclusiveness (1): harming and benefitting

Let us now consider a set of examples which appear to show that *No Benefit 4* is underinclusive in what it treats as a making worse. Consider, first:

No rescue. A walks past B, an unconscious stranger, who is drowning. B dies.

No Benefit 4 would classify this as a case where there is generally no duty of care in negligence. Clearly, this is correct. Now consider:

Aborted rescue. A sees B, an unconscious stranger, who is drowning. A begins to wade in to the water to assist, but failing to see an obvious sharp object, cuts A’s foot. A consequently aborts the rescue. B dies.

No Benefit 4 would again correctly classify this case as one where there is generally no duty of care in negligence. Now consider:

¹⁸ [1997] 3 All E.R. 897, 908. Compare, also, *Darnley v Croydon Health Services NHS Trust* [2017] EWCA Civ 151, [2018] Q.B. 783, where a receptionist gave misleading information as to waiting times to the claimant visitor to an Accident and Emergency ward, with the result that the claimant did not wait to see a triage nurse. By a majority, the Court of Appeal held that no duty of care arose.

¹⁹ R. Bagshaw, “The Duties of Care of Emergency Service Providers” [1999] L.M.C.L.Q 71, 83

²⁰ [1997] 3 All E.R. 897, 908.

²¹ *Capital & Counties v Hampshire County Council* [1997] Q.B. 1004, [1997] 3 W.L.R. 331.

Damaging rescue. A sees B, a lightweight, drowning, unconscious, stranger. A decides to rescue B. A is able to do this by leaning across a dock and pulling B out of the water. A notices that a sharp pipe protrudes from the dock, near B's head. In order to obtain a dramatic video of the rescue for A's social media account, A throws B in the air, unintentionally striking B's head against the pipe, causing a severe brain injury. Had A not intervened, B would have died shortly after the brain injury was inflicted.

Carelessly striking a person's head against a sharp pipe is conduct which would attract a duty of care without special reason needing to be shown. The difficulty here is that *No Benefit 4* does not reach this result. If A's body or property had not been present at the time of the careless conduct, we may suppose that B would be dead. A's causing B's head to be damaged does not therefore make B worse off compared to A's body or property being absent. This suggests the following modification of *No Benefit 4*:

No Benefit 5. A is generally only liable in negligence to B if A's conduct causes B damage that B would not have suffered but for the presence of A's body or resources at the time of the careless conduct.

This formulation reaches the correct result in *Damaging rescue* because to suffer 'damage' is to be caused to be in a particular negative state. It does not require that the negative state one is in be worse than the state one would have been in had the careless conduct not occurred.²² Thus A causes B to be in a particular negative state – the state of having a brain injury – that B would not have been in but for the presence of A's body or property. It is irrelevant, so far as the issue of whether B suffers a damage is concerned, that B would have been in an even worse state (death) if A had not intervened at all.

The problem of underinclusiveness (2): overdetermination

Suppose that A and C negligently fire in B's direction and each bullet strikes B's head at the same time (*Fire*). This is a situation where B's damage is overdetermined: there are multiple sufficient causal conditions for its occurrence.²³ According to *No Benefit 5*, this appears to be a situation where A and C would not generally be liable to B in negligence. This is because, if A had not been present, B's damage would still have occurred, because of C's firing. Similarly, if C had not been present, B's damage would still have occurred, because of A's firing. Clearly, however, whatever objection there is to holding A and C liable here, it should not stem from the general rule. It therefore seems that *No Benefit 5* is underinclusive: it fails to find that A and C would be generally liable in overdetermination situations such as *Fire*.

This problem is surmountable. It is possible to argue that, in almost all cases, A and C will have inflicted different 'damage' upon B. Even if the bullets

²² See D. Nolan, "Rights, Damage, and Loss" (2017) 37 O.J.L.S. 255, 270-274. It only follows that A wrongs B here, not that A is liable to pay substantial compensation to B.

²³ This is a somewhat loose definition of overdetermination. See further S. Steel, *Proof of Causation in Tort Law*, (Cambridge University Press, 2015), at X.

simultaneously strike at one particular part of B's body, there will most likely be a sub-part of B's body which is negatively affected only by each bullet, considered individually. It will, then, be possible to say under *No Benefit 5* that A's conduct caused a damage to exist to which would not otherwise exist.²⁴

The problem of underinclusiveness (3): removal of one's own property

Suppose B is drowning and succeeds in climbing into A's boat, which is the only nearby object B can employ to save himself. If A's boat had not been present, B would have died. Suppose there is a trap door on A's boat. According to *No Benefit 5*, there would be no duty of care on the part of A not to press the trap door button because doing so would not cause the person to suffer a damage they would not have suffered but for the presence of the boat owner's body or resources. Call this case *Boat*. It is difficult to defend the conclusion that there is no duty of care in *Boat*.²⁵ It seems clear that A would owe a duty of care not to dislodge B from A's property in such a way as to cause them reasonably foreseeably physical damage, even if this does not render them worse off than they would be had that that person and their property not been present.

The response to this apparent counterexample to *No Benefit 5* is that the conduct in this example should be recognised as an exceptional situation where a duty of care is owed despite it being a case that A has not rendered B worse off than B would have been had A's body and resources not been present. The duty to take care not to exclude a person from their current use of one's property when they are in dire need should indeed be considered normatively unusual.²⁶ This is because it in effect requires a person to bear costs to allow their resources to be used to benefit another person; part of the normative justification of the *General rule* is precisely this concern.²⁷ Thus, if the law were explicitly to adopt *No Benefit 5*, it ought to recognise a new exception to the *General rule* in situations where A's careless conduct causes B to be damaged by removing B from the active protection of B's property.²⁸

²⁴ A vaguer version of *No Benefit* which appeals to whether the conduct 'typically' increases the probability of damage that would not otherwise occur without the presence of A's body or resources would also offer a solution. A's conduct typically increases the probability of damage of that description even if it does not in the particular case.

²⁵ If the boat owner intentionally pressed the trap door button and the person died, this would be murder.

²⁶ Such a duty appears to be recognised by some US jurisdictions: e.g. *Ploof v Putnam* (1907) 83 Vt. 494. See also *Depue v Flatau* (1907) 100 Minn. 299.

²⁷ See below, X. The normatively exceptional nature of this duty is also evidenced by the fact that it would be permissible for A to eject B from A's boat if it were necessary to save A's life. This would not be so if A's conduct made B worse off than B would be independently of the presence of A's body and resources.

²⁸ It is a further question, not addressed here, whether this novel exception would itself be consistent with the general absence of a duty of easy rescue. For some doubts, see S. Steel, "Saving Private Wrongs" (2016) 14 *Jerusalem Review of Legal Studies* 1, 16.

In summary, *No Benefit 5* provides an appealing formulation of the general rule. This formulation leads to the correct results in simple case where a stranger fails to rescue a drowning child and in the more complex problem case of *Cancellation*.²⁹

Creation of risk

Another alternative formulation of the general rule is the distinction between creating a risk and failing to alleviate a risk that one did not create.³⁰ Consider:

Creation of risk: A is not generally liable to B in negligence in respect of a risk which A did not create.

On the face of it, *Creation of risk* generates the correct result in the paradigm pure omission case where A fails to rescue B, a drowning child. If A were held liable in this case, then A would be held liable in respect of a risk – the risk of death by drowning – which A did not create.

However, to assess this formulation rigorously, one needs a clearer idea of what it is to create a risk. A risk is a probability of a negative outcome, for our purposes, a probability of damage. To create a risk, on a simple view, is to be a cause of a risk. An immediate difficulty is that one may be said, by walking past the drowning child, to be a cause of a risk of damage to the child: had one rescued instead of walking past, the risk of the child's drowning would be lower. Similarly, *Cancellation*, I act in such a way that increases the probability of a negative outcome, compared to the situation where I did not do that act. Therefore, if risk creation is understood in this simple way – to engage in conduct which is a cause of an increased probability that a damage will occur – *Creation of risk* must be rejected.

Once the simple model of risk creation is set aside, a defender of *Creation of risk* seems to have two possible options. A first option is to insist that, in determining whether A's conduct creates a risk, one compares A's actual conduct, not with the counterfactual where A gave assistance, but with some other counterfactual. For instance, one could compare the risk of damage to the victim given A's actual conduct compared to the situation where A was absent.³¹ The risk to the drowning child is the same regardless of whether A is present and walking away or absent entirely. However, once this counterfactual route is taken, the problems raised in the section on

²⁹ A further advantage is that *No Benefit 5* leads to the correct result in cases of impure omissions, such as a failure to brake (see above X) without the difficulty of applying the somewhat unclear concept of an 'impure' omission.

³⁰ Ripstein invokes the idea of creation of danger to explain some apparent cases of liability for omission: see A. Ripstein, *Private Wrongs* (Cambridge, Mass., Harvard University Press, 2016), at pp.94-95. See also his invocation of this idea in A. Ripstein, "Private Authority and the Role of Rights: A Reply" (2016) 14 *Jerusalem Review of Legal Studies* 64, 76. See also US Restatement Third of Torts, §7(a): "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm"; §37.

³¹ Stapleton analyses the notion of 'creation of risk' in the US Restatement Third of Torts as employing a similar counterfactual: J. Stapleton, "The Risk Architecture of the *Restatement (Third) of Torts* (2009) 44 *Wake Forest Law Review* 1309, 1312.

making worse and failing to benefit re-emerge. This version of *Creation risk* faces the same difficulties as *No Benefit 5*, since it employs the same counterfactual question – what would have happened but for the presence of the defendant’s body and resources?

A second option for the defender of *Creation of risk* is to build into the idea of causing damage through creating a risk a special understanding of the sequence that must exist in order to be causally responsible for damage through creating a risk of it. Those who appeal to the idea of creation of risk have not presented a clearly worked out version of this account.³² Ripstein says that the relevant distinction here is between ‘doing something *to*’ someone and ‘failing to do something *for*’ someone.³³ Perhaps this could be understood as a further way of elaborating the idea of creation of risk: to create a risk of harm that materialises is to do something *to* a person.³⁴ Intuitively, it seems that I do not do something *to* the victim in *Cancellation*. So, albeit that the idea of doing something ‘*to*’ someone is extremely vague (how is it different from *negatively affecting* that person?), this account seems correct so far. But suppose that I negligently destroy a bridge on which you are standing. The bridge belongs to T. You fall and drown. This is obviously a case where I ought to be liable without special reason being shown.³⁵ But do I do something ‘*to*’ you here, given that I do not touch your body or your property? Ripstein is obviously committed to saying ‘yes’, but it is not clear how the idea of doing something *to* someone as opposed to failing to do something *for* someone explains this result.

In summary, this section has shown that a bare appeal to the idea of creation of risk is not illuminating. This is because more analysis is required before the idea has any real content. This section considered two ways in which that content could be provided. The first was the proposal that one creates a risk if one increases the probability of damage compared to a situation where one is not present. This proposal adds little or nothing to *No Benefit 5*. The second was the suggestion that creating a risk involves a particular way of causally producing an outcome. This suggestion was found to be unhelpfully vague.

III. EXCEPTIONS TO THE GENERAL RULE

This part moves to consideration of recognised exceptions to the general rule, as the general rule is currently formulated.³⁶ The primary aim of the discussion is to assess whether the exceptions are consistent with the general rule. However, the analysis

³² See, e.g., A. Ripstein, *Private Wrongs*, at pp.55-58.

³³ A. Ripstein, *Private Wrongs*, at p.55.

³⁴ A. Ripstein, *Private Wrongs*, at pp.55-58.

³⁵ This is also a problem for the account offered in P. Benson, “Misfeasance as an Organizing Idea in Private Law” (2010) 60 U.T.L.J. 731, 743-744. Benson argues that the act-omissions distinction is a proxy for the normative distinction between exclusionary rights and non-exclusionary rights. One does not generally have non-exclusionary rights. But it is not clear in what sense you have an exclusionary right that I not destroy another person’s bridge: you do not have a (non-contractual) entitlement to exclude a person from another’s bridge.

³⁶ Not all of the exceptions would be ‘exceptions’ under the proposed revised rule; here I follow the law’s classification.

will also consider some of the central uncertainties surrounding the scope of each exception and how they ought to be resolved.

Each of these aims will be served in some measure by having an account of the rationale of the general rule. It will not be possible to provide a complete defence of the rule here. Instead, I will set out the most powerful considerations in favour of the rule. Those who disagree with these considerations may still find the question of how far the exceptions can be rationalised, consistently with commitment to the general rule, of some interest.

Positive duties are more difficult to justify because they are more invasive of a person's freedom.³⁷ There are different ways of arguing for this claim. First, it is sometimes said that positive obligations close off more alternative options than negative obligations: a person's being obligated to do a particular thing removes their freedom to do everything but that thing, while a person's being obligated not to do a particular thing leaves them free to do everything except that thing.³⁸ This version of the freedom argument has some force, though it can be overstated. Requirements not to impose harm can also remove a large number of alternative options. Being required to take care not to harm others while driving requires levels of attention that rule out various courses of conduct. Or suppose someone is arranged such that when they stop breathing, another person suffers harm. Imposing an obligation on that person to continue breathing may remove very few options. Nonetheless, this seems to be a relatively general distinction between the two kinds of obligation.

Second, Kantian theorists tend to draw attention to the idea that positive obligations require a person to serve another's ends. Ripstein writes that a person is "not entitled to determine the purposes for which the defendant's means are used".³⁹ But in what sense do positive obligations give such an entitlement when negative obligations do not? Could it not be said that a negative obligation gives a person an entitlement to demand that a person not use their body in injurious ways? In my view, there is a real distinction here. It is this. A positive obligation requires a person to act with a specific intention – typically, to assist another. A negative obligation does not. Consider the obligation not to apply force to another person without their consent. I can go about my life, complying with this obligation, without having any specific intention. There is thus a sense in which a positive obligation imposes upon a person in a way which a negative obligation does not. This framing of the point focuses upon the defendant's freedom. But the point can be put in claimant-centred terms, too. When a person acts upon another, they *impose* upon them in a way they do not when they do not assist them. They become implicated in the other's life in a way they do not when they fail to assist them.

Third, it has been argued that, if we do not recognise something like the general rule, we cannot truly own our bodies or external objects.⁴⁰ To own these things, morally, is to have a right to exclude others from them in accordance with one's desires. If our duties to benefit were as stringent as our duties not to harm, we would

³⁷ For a well-known judicial statement of this point, see *Stovin v Wise* [1996] A.C. 923, at 943, [1996] 3 W.L.R. 388, per Lord Hoffmann.

³⁸ P.J. Fitzgerald, "Acting and Refraining" (1967) 27 *Analysis* 133, 139.

³⁹ A. Ripstein, *Private Wrongs*, at p.56.

⁴⁰ See F. Woollard, *Doing and Allowing* (Oxford: Oxford University Press, 2015). For a rejection of most other explanations of the objection to liability embedded in the general rule, see S. Tofaris and S. Steel, "Negligence Liability for Omissions and the Police" (2016) 75 *C.L.J.* 128, 129-133.

have a duty to give away our resources to the extent that would make the world better overall. Whenever ‘our’ resource could be better used elsewhere, then we would be obligated to allow it to be used in that way. This would mean that I would have to allow my body to be used whenever the costs to me are less than the benefits to others. But this, it is argued, is to deny that I have a special connection with my body which means that, within limits, my say-so is what counts, rather than the overall tally of costs and benefits. If my body or property can permissibly be used whenever benefits are greater than the costs, then my say-so has, as such, no normative force at all. But this veto based on one’s say-so is the hallmark of owning in morality. If this argument is right, then we need some moral protection from the needs of others, if we are to own our bodies.⁴¹

Fourth, and importantly, it is generally more difficult to justify making a person worse off than failing to benefit them. Other things being equal, it is worse harmfully to intervene upon the world, rather than merely to fail to improve it.⁴² This argument is not based upon a concern for individual freedom.

These considerations support the idea that it is more difficult to justify positive than negative obligations. In my view, they do not support the law’s position that there is no private duty of easy rescue. Sometimes considerations of extreme need trump considerations of freedom. It is consistent with one having ownership of one’s body that someone’s one must accept minor incursions in order to prevent great suffering (just as the existence of some planning regulations is consistent with meaningful ownership of land).⁴³ It might seem, then, that the law’s exceptions to the general rule will, on my view, obviously be consistent with its rationale. Given that I believe that a duty of easy rescue would be consistent with the general rule, is it not clear that the existing exceptions, which are usually thought to be less onerous, in some sense, than a duty of easy rescue, will be consistent with it? Even if this is true, however, there is still a question of whether the law’s own understanding of the general rule is consistent with the exceptions made to it. We can ask: given that the law takes a duty of easy rescue between strangers not to meet the justificatory burden for positive duties, are the situations where it recognises positive duties consistent with this stance? We can now turn to these situations.

1. Assumption of Responsibility

It is well established that an ‘assumption of responsibility’ can generate a duty to take care in relation to a pure omission.⁴⁴ The conditions under which an assumption of

⁴¹ The liberty argument does not entail that there are no positive rights between strangers, as some authors claim. This depends on making out the further argument that having a special authority over one’s own body is *never* consistent with having a stringent obligation to aid another. Compare A. Ripstein, *Private Wrongs*, ch. 3.

⁴² See T. Honore, “Are Omissions Less Culpable?” in P. Cane and J. Stapleton, *Essays for Patrick Atiyah* (Oxford: Oxford University Press, 1991) 31, 41-42.

⁴³ Ripstein accepts the justifiability of a public law duty of rescue, however: A Ripstein, “Three Duties to Rescue: Moral, Civil, Criminal” (2000) 19 *Law and Philosophy* 751.

⁴⁴ See, e.g., *Robinson v Chief Constable of West Yorkshire*, at [69] per Lord Reed, at [115] per Lord Hughes.

responsibility will be held to arise are not entirely clear.⁴⁵ The authorities, however, support the following principle:

Reliance. If A knows or ought to know that A's conduct has led B reasonably to rely upon A to do an act and that this reliance may result in detriment to B, and B has in fact relied upon A's conduct, A will be under a duty of care to protect B from suffering detriment in reliance upon A's conduct.

Welsh v Chief Constable of Yorkshire Police is illustrative.⁴⁶ A Crown Prosecution Service (CPS) solicitor agreed to inform the Magistrates' Court that the claimant's charges had earlier been considered in sentencing in the Crown Court. In reliance upon this, the claimant did not attend his bail hearing for those offences in the Magistrates' Court and was consequently arrested. The CPS was held to have assumed responsibility to inform the Magistrates' Court.⁴⁷ This was on the basis that the claimant had relied upon the assurance that the information would be passed on.⁴⁸ Similarly, if the police assure a person – an informant – that they will take care of the informant's physical safety in return for that person providing information, the police will be held to have assumed responsibility to protect that person.⁴⁹ The assurance induces the person to rely. The reliance is constituted by the provision of information that endangers their safety.

It is not necessary that A cause B to rely by *promising* B that A will do an act, although this is clearly one way in which B may be induced to rely. *Mercer v South Eastern & Chatham Railway Companies' Management Committee* illustrates this.⁵⁰ The defendant railway company had, independently of any legal obligation to do so, continued a practice of locking railway gates when trains were passing. The claimant was injured on one occasion when the defendant omitted to lock a gate. Lush J stated that the defendant "ought to have contemplated that if a self-imposed duty is ordinarily performed, those who knew of it will draw an inference if on a given occasion it is not performed".⁵¹ Here, then, the company made no promise that it would continue to lock the gates, but it was held liable on the ground that it induced a reasonable belief that the gate would be locked if a train were coming.

Reliance is consistent with the underpinning rationale of the general rule. This is for three reasons. First, in most cases, the defendant has a reasonable opportunity to avoid coming under a duty by virtue of *Reliance*. The defendant needs only to take steps to avoid inducing reliance upon their conduct. For instance, in *Mercer*, the defendant could have given notice that railway gate would not always be locked when trains come. Second, by inducing reliance in circumstances where this may lead to

⁴⁵ See generally K. Barker, "Unreliable Assumptions in the Modern Law of Negligence" (1993) 109 L.Q.R. 461; A. Robertson and J. Wang, "The Assumption of Responsibility" in K. Barker, R. Grantham, W. Swain (eds) *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford: Hart Publishing, 2015).

⁴⁶ [1993] 1 All ER 692.

⁴⁷ [1993] 1 All ER 692, 703.

⁴⁸ [1993] 1 All ER 692, 703.

⁴⁹ *Swinney v Chief Constable of Northumbria Police* [1997] QB 464; *An Informer v A Chief Constable* [2013] QB 579.

⁵⁰ [1922] 2 K.B. 549.

⁵¹ [1922] 2 K.B. 549, 554.

detriment, the defendant creates a risk of harm to the claimant by their action which the defendant fails to alleviate by protecting the claimant from the ensuing detriment. Third, the defendant makes the claimant worse off than they would be independently of the defendant in cases of *Reliance*.

There is support, however, in the authorities for the proposition that a duty of care can arise in virtue of an assumption of responsibility even if *Reliance* is not satisfied. Consider *Morcom v Biddick's Estate*.⁵² Biddick (B), an 80 year old man, said to Morcom (M) that B that would keep the latch to the loft hatch in B's house in the closed position by holding it in place with a pole while M was carrying out work on the hatch from inside the loft. B stopped doing this for a few minutes to answer his phone. M fell through the hatch and suffered injuries. B was held liable on the ground that he assumed responsibility to M.⁵³

There are two features to note. First, B's assumption of responsibility was said to be constituted by his "undertaking to ensure that the latch remained closed".⁵⁴ Second, the Court of Appeal found that M did not *rely* upon B's undertaking:⁵⁵

Once Mr Biddick took upon himself the task of ensuring that the latch remained closed it seems to me that he assumed a duty to perform that task carefully, even if Mr Morcom did not see Mr Biddick's role as an element in his own safety.

Furthermore, Lord Justice McCombe interpreted other authorities as suggesting that "specific reliance upon the care exercised by the defendant is not a necessary element of liability [in relation to assumption of responsibility]".⁵⁶ Thus, *Morcom* supports the proposition that an assumption of responsibility can exist independently of *Reliance*: the duty in this case arose in virtue of a promise to do an act, a careless failure to perform the promise, and independently of any reliance upon the promise.

A second argument supports the claim that an assumption of responsibility may generate a duty of care in relation to a pure omission beyond the *Reliance* principle. The argument is that a duty to provide positive assistance may arise in virtue of an assumption of responsibility where there is no possibility of reliance, because the beneficiary of the duty is unconscious.⁵⁷ In *Barrett v Ministry of Defence*, an officer, A, was held to have assumed responsibility to B, a fellow officer, after B became unconscious due to intoxication, when A took B to B's bunk and placed him in the recovery position.⁵⁸ The defendant was held liable for the subsequent careless failure to attend to B, resulting in B's death. There was no possibility, then, that B could have altered B's conduct as a result of A's assurance or conduct. The same is true in any case where a hospital doctor accepts an unconscious person as a patient,

⁵² [2014] EWCA Civ 182.

⁵³ *Ibid* [42] *per* McCombe LJ.

⁵⁴ *Ibid* [42].

⁵⁵ *Ibid* [53] *per* McCombe LJ.

⁵⁶ *Ibid* [50].

⁵⁷ R. Bagshaw, "The Duties of Care of Emergency Service Providers" [1999] L.M.C.L.Q 71, 78.

⁵⁸ [1995] 1 W.L.R. 1217, [1995] 3 All E.R. 87; the finding of an assumption of responsibility was not challenged on appeal.

and yet the doctor's duty to take care to improve the patient's position arises in virtue of an assumption of responsibility.⁵⁹

A possible response to these examples is that reliance can indeed be found in each case.⁶⁰ The person who brings an unconscious patient to hospital relies upon the hospital's undertaking to treat accepted patients with reasonable care. Had this undertaking not been given, the patient would have been taken to another hospital. In *Barrett*, had B not placed the A in his bunk, others would have attended to him.⁶¹ The difficulty with this response is that, as Bagshaw observes, the issue of reliance is never investigated in cases against hospital doctors.⁶² Furthermore, if the law were operating a presumption of reliance in these cases, one would expect it to be articulated as such.

A third argument is that there are House of Lords authorities on the assumption of responsibility concept beyond the context of liability for pure omissions which are irreconcilable with a requirement of reliance.⁶³ For example, in *White v Jones*, a solicitor was held to have assumed responsibility to the intended claimant beneficiaries of a will, despite it being the case that they had not taken steps they would otherwise not have taken as a result of an assurance given to them.⁶⁴

However, there is also support for the proposition that reliance is a necessary condition for a duty of care to arise in virtue of an assumption of responsibility. In *M v Commissioner of Police for the Metropolis*, the claimant's case that police officers had assumed responsibility to her in relation to a decision not to continue an investigation was struck out on the ground that there was no reliance.⁶⁵ Lord Justice Jacobs described reliance as a 'vital' part of a claim based on an assumption of responsibility.⁶⁶ The Supreme Court decision in *Michael v South Wales Police* might also be taken to support a reliance requirement.⁶⁷ In this case, an emergency call operator carelessly failed to communicate a threat to the victim's life to the relevant police authority with the result that, the police failing to arrive in time, the victim was murdered. The call operator had indicated to the victim that police would want to call her back, but made no explicit communication that the police would arrive timeously. The Supreme Court held that the police had not assumed responsibility to the victim

⁵⁹ *Capital & Counties v Hampshire County Council* [1997] Q.B. 1004, 1034-1035.

⁶⁰ Reliance by a third party with detrimental affect to the victim is considered sufficient 'reliance' for the purposes of an assumption of responsibility: see *Sherratt v Chief Constable of Manchester Police* [2018] EWHC 1746, at [80]. Such cases could simply be considered ones where the defendant must take care in order to prevent the claimant being rendered worse off as a result of their action.

⁶¹ For this reconciliation of *Barrett* with a reliance requirement, see A. Robertson and J. Wang, "The Assumption of Responsibility" in K. Barker, R. Grantham, W. Swain (eds) *The Law of Misstatements: 50 Years on from Hedley Byrne v Heller* (Oxford: Hart Publishing, 2015), X.

⁶² R. Bagshaw, "The Duties of Care of Emergency Service Providers" [1999] L.M.C.L.Q 71, 83.

⁶³ These are not pure omissions cases because in both the defendant likely made the claimants worse off than they would be had they not acted at all.

⁶⁴ *White v Jones* [1995] 2 A.C. 272, [1995] 1 All E.R. 691. See also *Spring v Guardian Assurance* [1995] 2 A.C. 296, [1994] 3 All E.R. 129.

⁶⁵ [2007] EWCA Civ 1361.

⁶⁶ [2007] EWCA Civ 1361, at [27].

⁶⁷ [2015] UKSC 2.

through the call operator. Lord Toulson's discussion of assumption of responsibility implies that an assumption of responsibility coupled with reliance is necessary for a duty of care to arise: "The underlying principle rested on an assumption of responsibility by the defendant towards the plaintiff, coupled with reliance by the plaintiff on the exercise by the defendant of due skill and care".⁶⁸

We cannot, however, definitively conclude from *Michael* that reliance is now a requirement. The central focus of Lord Toulson's analysis was that there was no 'assurance' sufficient to give rise to an assumption of responsibility on the facts.⁶⁹ He differentiates *Kent v Griffiths*,⁷⁰ where an ambulance service was held to owe a positive duty of care upon accepting an emergency call and the call operator's assurance made the victim's position worse than it otherwise would have been, because "the call handler gave misleading assurances that an ambulance would be arriving shortly".⁷¹ This differentiating feature focuses upon the *content* of the communications between the parties and not the presence of reliance in *Kent*.⁷² A requirement of reliance is not part of the *ratio*, then, of *Michael*.

The upshot of the analysis is that there are conflicting views in the authorities as to the requirement of reliance. It is clear that the duties of care of medical professionals who accept patients for treatment do not depend upon the existence of reliance. But, beyond this, reliance is sometimes insisted upon (*M, obiter* in *Michael*) and sometimes not (*Barrett, Morcom*). A future Supreme Court will need to decide whether, and the extent to which, duties of care for pure omissions on the basis of an assumption of responsibility extend beyond *Reliance*.

Here are some candidate non-reliance-based principles:

Promise. If A promises B that A will do an act, A will be under a tortious duty of care to do that act.

Taking on a task. If A takes on a task for B the careful performance of which A knows or ought to know will affect whether physical harm to B is prevented, A will be under a duty of care to perform that task carefully.

Role or Relationship duty. If A accepts a socially recognised role or enters into a socially recognised relationship to which positive obligations to take care to improve B's physical safety are conventionally attached, then A will be under a positive duty of care in the performance of that role or relationship.

Promise is supported by *Morcom*: D promised to hold the pole in place and was held to be under a duty to take care to hold the pole in place. It may also explain the duties of care of hospital doctors: in accepting a patient, or in operating in a hospital at all, they implicitly promise to take reasonable care of the patient's health. It is also

⁶⁸ *Michael v Chief Constable of South Wales* [2015] UKSC 2, at [67], see generally [66]-[69].

⁶⁹ *Michael v Chief Constable of South Wales* [2015] UKSC 2, at [138].

⁷⁰ *Kent v Griffiths* [2001] Q.B. 36.

⁷¹ *Michael v Chief Constable of South Wales* [2015] UKSC 2, at [138].

⁷² For an example of a case where the content of the communications did amount to a sufficient assurance to generate an assumption of responsibility on the part of the police, see *Sherratt v Chief Constable of Manchester Police* [2018] EWHC 1746, at [80].

supported by *Kent*, where the assurance that the ambulance service would come itself created the duty of care.⁷³ But this analysis is artificial in the case of *Barrett*: putting the unconscious officer in bed is not an implicit promise of any kind: a reasonable person would not understand this conduct as communicating an intention to become obligated to take reasonable care. *Taking on a task*, which merely requires the actual undertaking of an act, rather than any promise to do the act, explains the result in *Morcom*, *Barrett*, and the duty of care of doctors accepting patients. In each case, the duty-bearer could be said to have taken on a task – holding a pole, caring for a person – careful performance of which will affect whether physical harm to another is prevented.⁷⁴ However, *Taking on a task* is inconsistent with other decisions. For instance, fire brigades who take on the task of putting out a fire at a particular person’s property are not under a duty of care to perform the task carefully in such a way as to prevent harm to the property.⁷⁵ *Role or relationship duty* differs from both principles: it is both broader than *Promise* and narrower than *Taking on a task*. It is broader than *Promise* because the duty of care that arises is one that is attached to the particular role or relationship by social convention, it need not be one promised by the defendant, albeit that by entering into the role, one will often be understood to be promising to comply with its associated obligations. It is narrower than *Taking on a task* because it only applies to a subset of ‘tasks’ – those which amount to socially recognised roles or relationships of care. *Role or relationship duty* would explain the duties of doctors, but not those in *Morcom* or *Barrett*.

It is submitted that *Promise* and *Role or relationship duty* are consistent with the underlying rationale of the general rule. Under both principles, the freedom-based objection underpinning the general rule lacks force. This is because, in both cases, the defendant chooses to engage in a specific act or activity which attracts liability. So long as these acts or activities are relatively narrow in scope the defendant has some choice whether to enter into the activity. This is not to say that the positive justification of the defendant’s liability is their choice to engage in the activity. It is rather that the defendant’s choice removes, or weakens, their freedom-based moral

⁷³ *Kent v Griffiths* [2001] Q.B. 36, at 54; [2000] 2 All E.R. 474: “The acceptance of the call in this case established the duty of care”.

⁷⁴ This principle, or a variant of it, has some support in the United States authorities and literature: “It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all”: *Glanzer v Shepherd* 135 N.E. 275, 276 (1922, New York) per Cardozo J. D. Waisman, “Negligence, Responsibility, and the Clumsy Samaritan: Is There a Fairness Rationale for Good Samaritan Immunity” (2013) 29 Georgia State University Law Review 609, n 140 cites *United States v. Lawter*, 219 F.2d 559, 562 n.1 (5th Cir. 1955), where the Coast Guard were held liable when a shipwrecked person fell to their death due to negligent operation of a helicopter cable during the rescue attempt when there were “no boats or vessels nearby to rescue”. See also Restatement (Second) of Torts § 323 comment e (1965): “Clear authority is lacking, but it is possible that a court may hold that one who has thrown rope to a drowning man, pulled him half way to shore, and then unreasonably abandoned the effort and left him to drown, is liable even though there were no other possible sources of aid, and the situation is made no worse than it was.”

⁷⁵ *Capital & Counties v Hampshire County Council* [1997] Q.B. 1004, 1035. See, similarly, *East Suffolk Rivers Catchment Board v Kent* [1941] A.C. 74, 102, [1940] 4 All E.R. 527; *Horsley v Maclaren (The Ogoopogo)* [1972] S.C.R. 441.

objection to being under a duty to protect the claimant's welfare. It is true that, under both principles, the defendant is held liable for failing to confer a benefit. Part of the justification of the general rule is simply that failing to confer a benefit is easier to justify than harming a person. But where one promises to take care to confer a benefit, or chooses to occupy a role which is conventionally understood to involve the incurring of obligations to confer benefits, this objection is substantially weakened. The defendant did not merely fail to improve the world; they failed to improve the world in breach of a promise or in contravention of an assumed role obligation. While *Taking on a task* meets the freedom-based objection, since the defendant chooses to undertake the activity to which the duty is attached, it is not clear why merely taking on the task, without any promissory undertaking, makes the failure to confer the benefit worse than it would otherwise be. It is not plausible to contend that, other things being equal, an unreasonable failure to complete a rescue is worse than an unreasonable failure to conduct a rescue at all. *Promise* and *Role or relationship duty* are consistent, then, with the general rule, but *Taking on a task* is only partially so. If, however, *Taking on a task* were limited to actual performance of a *promised* task, then it would fully meet the objection.

Since *Promise*, *Taking on a task*, and *Role or relationship duty* primarily meet the objections underpinning the general rule, the law could, in principle, adopt them while coherently adhering to the general rule. However, it does not follow that there is a positive case for their adoption. Should, then, any of these principles be endorsed? Since the primary aim of this article is to consider the consistency of exceptions to the law on omissions with the general rule, the analysis here is necessarily tentative.

Consider, first, *Promise*. This principle contradicts the rule that not all gratuitous promises are binding.⁷⁶ This counts against *Promise*: the fact that the law normally requires consideration, reliance, or a deed to enforce a promise is evidence of the need to restrict the category of legally enforceable promises.⁷⁷ This objection does not rule out, however, a narrower version of *Promise*. One possibility is that gratuitous promises to protect a person's physical safety ought *prima facie* to generate a tortious duty of care, or perhaps only promises to protect a person's physical safety which are made by employees of public authorities in the course of exercising their functions. However, it is not at all obvious why the enforceability of a gratuitous promise without reliance or a deed should cut across the divide between public and private persons in this way. The difficulty of carving out a coherent and clear exception to the general rule in relation to gratuitous promises, and the slender

⁷⁶ This objection is already found in *Coggs v Bernard* (1703) 2 Ld. Raym. 909, where Holt CJ, at [x](#), rejected the idea that a bare promise to do something founded a claim in damages: only the actual undertaking of the promised act imposed a duty to be careful in doing it. It may be responded that *Promise* only imposes a duty to take care to perform a promise, not a duty to perform the promise. It does not, therefore, strictly enforce a gratuitous promise. However, if a duty to take care to perform a promise requires one to perform a promise unless there is significant justification for not doing so, in substance it involves the enforcement of a gratuitous promise. Further, if the duty to take care to perform the promise is merely a logical implication of the duty to perform, then it could also be said to be a gratuitous promise.

⁷⁷ N.J. McBride and R. Bagshaw, *Tort Law*, 6th edn, (Harlow: Pearson Publishing, 2015), [x](#).

support in the authorities for such a principle, tends to suggest that *Promise* or a variant thereof should not be adopted.⁷⁸

Consider, now, *Taking on a task*. The main objection to *Taking on a task* is that its rationale is unclear. If one is under no duty to confer a benefit, why does taking on the task of conferring that benefit impose a duty to take care to confer it? The mere fact that a person indicates by action an intention to confer a benefit seems a weak reason to impose an obligation to take care to confer it. Two possible rationales may be considered.

First, in taking on a task, one *typically* increases the probability that others will be dissuaded from taking on the task. One's taking on the task may therefore increase the probability that the person assisted will be rendered worse off than had one not intervened. This justification fails, however, in cases where it is entirely clear that no one else would have intervened had the duty-bearer not taken on the task.

Second, it could be argued that by taking on the task of providing a benefit, one chooses to forego one's freedom-based objection to the imposition of a positive obligation. Generally, the law does not enforce a person's moral duty to provide assistance to a person at risk of imminent physical danger when they could provide this assistance at minimal cost. But, it may be argued, where a person chooses to go to another's assistance, they cannot say that a positive obligation is being foisted upon them. This justification has some merit, but it would support a much narrower version of *Taking on a task* – one which is limited to cases where a person is taking on a task which would be required by a moral duty of easy rescue. This is likely to be limited to cases involving persons at significant risk of imminent physical harm that can be avoided at minimal cost to the duty-bearer. However, other things being equal, it does seem unfair to impose a duty to take care upon careless rescuers (who are not otherwise under a duty to act) but not on those who deliberately fail to provide assistance that they could provide at minimal cost. This treats those who choose to aim to protect a person from harm unfairly.⁷⁹

Finally, consider *Role or relationship duty*. It is submitted that this is the better explanation for a doctor's positive duty towards an accepted patient. The role of doctor is a socially constructed package of duties, duties which can be modified by the law, and which include a positive duty of reasonable care.⁸⁰ By entering into the role, one undertakes to adhere to those duties. Upon acceptance of a patient, the role duty becomes focussed upon the particular individual patient.⁸¹

⁷⁸ For a recent re-iteration of the proposition that a bare promise does not generate a duty in negligence, absent the actual undertaking of the task itself: *Lejonvarn v Burgess* [2017] EWCA Civ 254, [2017] P.N.L.R. 25, at [67]-[68]. Furthermore, even *Morcom* can be rationalised as a case where the duty arose only because of the *performance* of the undertaking.

⁷⁹ N.J. McBride and R. Bagshaw, *Tort Law*, 6th edn, (Harlow: Pearson Publishing, 2015), x. Furthermore, the acceptance of *Taking on a task* could discourage persons from assisting others in need due to the threat of legal liability if they are careless in the course of doing so: D. Nolan "The Liability of Public Authorities for Failing to Confer Benefits" (2011) 127 L.Q.R. 260, 282.

⁸⁰ See further M. Hardimon, "Role Obligations" (1994) 91 *Journal of Philosophy* 333.

⁸¹ Some positive duties to non-patients can also be coherently attached to the role if there is policy justification for doing so: see, e.g., *ABC v St George's Healthcare NHS Trust* [2017] EWCA Civ 336, [2017] P.I.Q.R. P15. Once imposed, this duty can be understood as chosen by virtue of acceptance of the role.

In summary, this section has demonstrated that each possible version of the assumption of responsibility version idea: *Reliance, Promise, Taking on a Task, Role or relationship duty* is consistent with normative rationale of the general rule. It has further shown that the law has not adopted a clear position on when reliance is a necessary condition for liability. It has tentatively rejected two non-reliance-based principles – *Promise* and *Taking on a task* – and endorsed one: *Role or relationship duty*. However, further analysis will be required as to precisely which roles or relationships merit legal enforcement of their positive obligations.

2. Creation of risk

In *Mitchell v Glasgow City Council*, Lord Scott explained that: “[i]f a defendant has played some causative part in the train of events that have led to the risk of injury, a duty to take reasonable steps to avert or lessen the risk may arise”.⁸² Lord Rodger gave this example: “If I negligently collide with a cyclist who is knocked unconscious, I must surely take reasonable care to move her from the path of oncoming vehicles”.⁸³ Two points may be made as to the scope of this principle. First, the defendant’s conduct must be an act: it is not possible to contribute to the risk of harm through a pure omission.⁸⁴ This is simply part of the meaning of ‘creation of risk’. Second, the principle extends to innocently creating a risk or causing damage, thereby increasing the risk of a person suffering further harm.⁸⁵ In Lord Rodger’s example, then, it is not essential that the collision is negligent. The principle can be formulated thus:

Creation of risk. If A creates a risk of physical harm to B, and A knows or ought to know of the existence of this risk, then A is under a duty of care to protect A from the consequences of that risk.

Is this principle consistent with the rationale of the general rule? In truth, *Creation of risk* is not an *exception* to the general rule at all: it is merely an instance of the type of conduct that, according to the general rule, normally attracts a duty of care without special reason being required. This is especially clear if *Creation of risk* is limited to risks which were reasonably foreseeable prior to their creation. If so, *Creation of risk* simply describes the basic situation in which a person will be under a duty of care in the tort of negligence: where they create the risk of foreseeable of physical harm by their act.

However, *Creation of risk* appears to extend to risks which were unforeseeable *ex ante*, of which the defendant later becomes aware or of which they ought later to be

⁸² [2009] 1 A.C. 874, 893. N.J. McBride and R. Bagshaw, *Tort Law*, 5th edn, (Harlow: Pearson Publishing, 2015) §7.3; see also Restatement Third of Torts, §39.

⁸³ [2009] 1 A.C. 874, 899.

⁸⁴ See the reference to ‘positive act’ in this context by Lord Hoffmann in *Gorringe v Calderdale* [2004] 1 WLR 1057, at [13].

⁸⁵ *Hobbs v Baxenden Chemicals* [1992] 1 Lloyd’s Rep. 54, 65: “a manufacturer’s duty of care does not end when the goods are sold. A manufacturer who realises that omitting to warn past customers about something which might result in injury to them must take reasonable steps to attempt to warn them, however lacking in negligence he may have been at the time the goods were sold”. See also *Mitchell v Glasgow City Council* [2009] 1 A.C. 874, 894.

aware. For instance, suppose that a manufacturer later becomes aware of a dangerous defect in a circulated product, but the defect was not reasonably foreseeable prior to distribution in the market. Here, *Creation of risk* generates a duty of care in relation to a risk which was unforeseeable at the time of its creation. However, it is doubtful whether a distinct ‘exception’ is needed to accommodate this. When a person is held to be under a duty of care under *Creation of risk*, their duty is to take care to prevent it being the case that the person is worse off as a result of their own conduct. That is merely an instantiation of the general rule.

3. Control

The fact that A has control over a person or object has been recognised to justify a duty upon A to take care to protect B from foreseeable risks of physical harm connected with the person or object. Thus in *Dorset Yacht v Home Office*, Borstal officers were held to be under a duty of care to surrounding property owners to take care to prevent the Borstal boys in their custody from escaping and causing damage to surrounding property.⁸⁶ Lord Morris emphasised the fact that the officers had “a right to exercise control over the boys” and Lord Pearson observed that “control imports responsibility”.⁸⁷

Is the recognition of a duty of care in such situations consistent with the underpinning of the general rule? A natural suggestion is that control justifies a duty of care because the fact of control indicates that A is well placed to prevent the harm risked by the person or object. The existence of control singles out the controller as particularly able to prevent or minimise the occurrence of harm. This explanation is difficult to reconcile, however, with the general rule. Even if a stranger is uniquely well placed to rescue a drowning child from a shallow pool of water, it is clear they are under no legal obligation to do so by virtue of the general rule.

Ripstein offers another explanation. He argues that the cases in which control is invoked can be explained simply as cases where one person imposes a foreseeable risk of physical harm upon another.⁸⁸ In essence, this collapses the ‘control’ category into the creation of risk category: the claim is that the defendant creates, or at least, imposes, a risk of physical harm, and this generates a duty of care. This idea can explain some of the cases. For instance, in *Lewis v Carmarthenshire*, a nursery school teacher was held to owe a duty of care to a driver not to allow a three year old child in her charge to escape unattended from the school onto a nearby road where the latter posed a danger to the driver, who was killed when swerving to avoid the child.⁸⁹ The House of Lords drew attention to the fact that the presence of children near a road posed significant risks of harm both to the child and drivers.⁹⁰ Running a school near such a road, then, could reasonably be considered to involve the imposition of a risk of physical harm on others.

This argument is convincing, but it needs refinement and supplementation in two respects. First, the current law draws a distinction in this context between risks over which one has control which one chose to create and those which one did not choose to create. Thus, in cases where a source of danger to B’s land arises on A’s land

⁸⁶ [1970] A.C. 1004, [1970] 2 All E.R. 294.

⁸⁷ [1970] A.C. 1004, at 1038 and 1055 respectively.

⁸⁸ A. Ripstein, *Private Wrongs*, p.94.

⁸⁹ *Carmarthenshire County Council v Lewis* [1955] A.C. 549, [1955] 1 All E.R. 565.

⁹⁰ *Carmarthenshire County Council v Lewis* [1955] A.C. 549, at 564 per Lord Reid.

without A's responsibility for the existence of that risk, and A knew or ought to have known of its existence, A comes under a duty of care, but that is a *measured duty of care*. That is to say: the duty imposed demands reasonable care, but the demands of reasonable care are tailored to the defendant's physical and mental capacities.⁹¹

Second, not all cases where a duty is justified on the basis of control are straightforwardly analysed as cases where A has created or imposed a risk. Consider *Goldman v Hargrave*, where the defendant was under a duty to take reasonable care in relation to a tree that caught fire on his land as a result of a lightning strike.⁹² It would be incorrect to say that the defendant created the risk of harm to the claimant in *Goldman*: the risk was created by the lightning strike. It is true that the defendant's property posed a risk to the claimant and this is indeed sufficient justification for imposing a duty of some kind upon the defendant. But the *Goldman v Hargrave* duty seems to arise even in relation to risks on one's land that one neither created nor which are posed by part of the land itself. For instance, B could be under a measured duty to take steps to eject trespassers who are using the land as a base from which to damage A's land.⁹³

A duty in such situations can sometimes be justified on the basis that the defendant's having a right in the land creates a risk that a failure to act will render the claimant worse off. The fact that one has a property right over a space itself gives people reasons not to enter that space without one's consent. So it might be argued that your having property in the land is likely to put people off from intervening if they become aware of a danger on the land. But the duty arises without the need to prove that any specific individual has been put off from intervening to quell the danger. This explanation is therefore insufficiently general.

Stevens argues that the duty is justified as an incident of the defendant's right to exclude.⁹⁴ In return for the benefit of the right to exclude from a space, one is legitimately burdened with an obligation to take care that objects on or parts of that space do not harm neighbouring land. This explanation is incomplete: *why* is this particular obligation the *quid pro quo* of the right to exclude? If the reason is because the existence of the right creates a risk that others will not intervene, this explanation faces the generality objection. A second problem with Stevens' explanation is that it generalises to bodily rights. Why not say that in return for legal protection of one's bodily rights through the criminal law and tortious regulation of one's rights, one has an enforceable obligation to assist others in peril? The answer cannot be that one freely chooses to occupy land: not occupying land is not a feasible alternative.

It is submitted that a duty of care to protect others from risks on one's land or other property can, nonetheless, be justified as consistent with the general rule. This is because the duty has limited scope: it only arises in relation to dangers imposed by one's land or which arise on one's land. By contrast, a duty to assist endangered people in general would apply across all aspects of a person's life. It thus raises a more significant liberty-based challenge than a limited property-based obligation.

In summary, then, some cases of control are consistent with general rule on the basis that they are simply cases where one creates or imposes a risk through a person

⁹¹ *Goldman v Hargrave* [1967] 1 A.C. 645, at 662-663, [1966] 2 All E.R. 989. For a recent summary: *Vernon Knight Associates v Cornwall Council* [2013] EWCA Civ 950, [2014] Env. L.R. 6, at [49].

⁹² *Goldman v Hargrave* [1967] 1 A.C. 645.

⁹³ *Lippiatt v South Gloucestershire Council* [2000] Q.B. 51.

⁹⁴ R. Stevens, *Torts and Rights* (Oxford: Oxford University Press) at p.16.

or object. Other cases are justified on the basis that the positive obligation imposed is not a general one spanning all aspects of a person's life.

4. Special Relationships

The existence of a special relationship between the injured person and the duty-bearer is recognised as a source of positive tortious duties. A special relationship is a relationship which exists between people which does not obtain between all people. In *Michael*, Lord Toulson listed the following as “relationships in which a duty to take positive action typically arises: contract, fiduciary relationships, employer and employee, school and pupil, health professional and patient”.⁹⁵ Others typically listed in this category include: parent and child,⁹⁶ landlord and tenant, and occupier and visitor.⁹⁷ This section examines how, in principle, a relationship could justify the imposition of a positive duty of care and whether such a justification is consistent with the general rule.

We can distinguish, following John Gardner, two possible ways in which a relationship could justify a duty.⁹⁸ The first, let us call it the *reductive view*, holds that a relationship itself does not justify the duty, but rather the relationship is associated with other facts which justify the duty. The second, let us call it the *relational value view*, holds that the value of the relationship in which the duty-bearer and victim stand itself justifies the duty. Consider, for instance, the relationship between a school and a pupil. We have seen that a schoolteacher will owe a duty to a driver to take care not to allow a child onto a nearby road.⁹⁹ As we have also seen, this duty could be justified simply on the ground that having the child near a busy road creates a risk of harm to drivers. If a stranger in control of a child brings the child near a busy road, they too would have a duty of care to the road user.¹⁰⁰ This account of the schoolteacher's duty is consistent with the *reductive view*: the value of the schoolteacher and pupil relationship has no role in the justification of the duty.¹⁰¹ What justifies the duty is merely the fact that one person is imposing a significant risk upon another person through their activity. If all special relationship duties in negligence can be reduced to duties which arise in virtue of an assumption of responsibility, control, or creation of risk, then their consistency with the general rule follows from the analysis of these categories already given.¹⁰²

Are there any positive duties of care which arise because of the value of the relationship itself between the parties? One might think that parenthood is clear

⁹⁵ *Michael v Chief Constable of South Wales* [2015] UKSC 2, at [101].

⁹⁶ *AJ Allan (Blairnyle) Ltd v Strathclyde Fire Board* [2016] CSIH 3, [62].

⁹⁷ N.J. McBride and R. Bagshaw, *Tort Law*, 5th edn, (Harlow, Pearson Publishing, 2015), 245-248.

⁹⁸ J. Gardner, *From Personal Life to Private Law* (Oxford: Oxford University Press, 2018), at pp.25-26.

⁹⁹ Above, x.

¹⁰⁰ *McCallion v Dodd* [1966] 1 N.Z.L.R. 710, at 724 per Turner J, at 729 per McCarthy J.

¹⁰¹ This is consistent, however, with thinking that the value of the relationship affects other features of the duty, such as its stringency.

¹⁰² Lord Toulson in *Michael* treats special relationship as an instance of the assumption of responsibility category: [2015] UKSC 2, at [101].

example. Although there is a paucity of authority in English law, it is relatively clear that a parent may have positive obligations to their child in negligence.¹⁰³ It is unclear, however, whether the fact that a person is a parent has any independent justificatory significance in the law on omissions.¹⁰⁴ In many cases, the control exercised over the child by the parents (biological or otherwise) will justify a duty to the child in the following way. By exercising parental authority over the child, the parents have acted in such a way as to prevent the child being cared for by others: others will (to some extent) defer to their authority over the child. A failure to take care of the child will thus often render the child worse off than it otherwise would have been. Similarly, in any case where the parent brings the child near a source of physical danger that the child is ill equipped to take steps to avoid by exercising its own capacities, the parent could be said to have created a risk of physical harm to the child.¹⁰⁵

The issue of whether the relationship as such has justificatory significance has been addressed in other jurisdictions. In *Hahn v Conley*, the High Court of Australia considered whether a grandfather owed a duty of care to the claimant, his granddaughter. The child was staying at her grandparents' home for the weekend when she ran across the road to the grandfather after he called out to her from the other side of the road. She was injured by a vehicle when crossing. Barwick CJ, McTiernan J, Windeyer J, and Menzies J each agreed that the mere fact that a person is connected by a blood relationship to another person is insufficient to generate a positive duty to act.¹⁰⁶ A parental duty is triggered by facts, such as creation of risk, and taking the child into one's charge, that would also trigger a duty in a stranger: the mere fact of parenthood is not the source of tortious obligation.¹⁰⁷ Similarly, in *McCallion v Dodd*, McCarthy J and Turner J both explained parental duties of care as grounded in facts that would generate duties of care in similarly situated strangers to the child.¹⁰⁸ Both considered that it is either the creation of danger or an undertaking to care for the child – an undertaking that could be given by a stranger who takes care

¹⁰³ Consider the duty of care in supervising a child using a bouncy castle organised by the parent recognised in *Harris v Perry* [2008] EWCA Civ 907. The *obiter* doubt expressed in *XA v XY* [2011] P.I.Q.R. P1, at [143], as to whether there is a parental duty of care to protect a child from abuse by another parent was not based on the fact that the putative duty would be a *positive* one.

¹⁰⁴ It should be noted that whether parental positive duties can be justified by reference to other legal categories, such as control, is logically a separate question from whether the value of the relationship of parenthood is itself part of the legally recognised justification of these duties. The claim here is that both are unclear.

¹⁰⁵ This justifies the parental duty acknowledged (but held not to have been breached in the case of a foster parent) in *Surtees v Kingston upon Thames Royal Borough Council* [1992] P.I.Q.R. P101.

¹⁰⁶ *Hahn v Conley* (1971) 126 C.L.R. 276, at 284 per Barwick CJ, at 287 per McTiernan J, at 288 per Menzies J, and at 294 per Windeyer J. Barwick CJ, McTiernan and Windeyer J, the majority, held that no duty arose at all. Menzies J held that a duty arose but was not breached.

¹⁰⁷ *Hahn v Conley* (1971) 126 C.L.R. 276, at 284 per Barwick CJ: "parenthood is not itself the source of the duty".

¹⁰⁸ *McCallion v Dodd* [1966] 1 N.Z.L.R. 710, at 724 per Turner J, at 729 per McCarthy J.

of a lost child – that generates the duty.¹⁰⁹ Even, then, the duties attached to a parental relationship have been considered to be reducible to other sources of duty.

Would it be consistent with the general rule for the law to recognise that the value of a special relationship itself generates special duties? There are two reasons to answer in the affirmative. First, in almost all cases, special relationships are voluntary: one chooses to enter or remain in them.¹¹⁰ Of course, the freedom with which persons enter special relationships is not always symmetric. Parents typically choose to have children; children do not choose to be born. This asymmetry may justifiably affect the incidence of positive duties in these relationships. Second, special relationships are, by definition, limited in scope: one is only in a special relationship with a limited category of persons. This helps to meet the general freedom-based objection to positive duties.

CONCLUSION

The first part of the article demonstrated that the act-omissions distinction does not fully capture the distinction between situations where a duty of care generally arises in relation to physical damage simply upon the basis of reasonable foreseeability of that damage, and those where a duty of care in respect of physical damage does not generally arise, in virtue of the nature of the defendant's conduct. It proposed a revised principle that centres around whether the defendant's conduct makes the victim worse off than they would have been independently of the defendant's body or resources at the time of the careless conduct.

The second part of the article argued that the law enjoys a large measure of overall coherence in the sense that the currently recognised exceptions to the general rule – assumption of responsibility, control, creation of risk, and special relationships – can all be understood as consistent with the normative underpinnings of the general rule. The second part of the article also demonstrated, however, that the law on omissions is subject to criticism in four main respects. First, the concept of an assumption of responsibility refers to several importantly distinct ideas which are rarely disambiguated. Second, the law has adopted an inconsistent position on the requirement of reliance in relation to assumption of responsibility. The article argued against the acceptance of two non-reliance based principles, but tentatively endorsed one – the *Role or relationship duty* principle. Third, the creation of risk 'exception' is not truly to be classified as an exception. Fourth, the justificatory basis of the 'special relationship' exception is unclear: it is not clear whether special relationships can be reduced into the other exceptional categories.

¹⁰⁹ *Ibid.*

¹¹⁰ *Robinson v Chief Constable of West Yorkshire Police* [2018] UKSC 4, [69.4] per Lord Reed.