Is the 'duty of care' an unnecessary element in the modern law of negligence?

A doctor owes a duty of care to their patient and a driver owes one to other road users. This we know. This we expect. It is thanks to a necessary and central of aspect of the law of negligence. Recently, the duty was extended when an elderly woman was injured by police officers arresting a suspect *(Robinson v Chief Constable of West Yorkshire)* but not where the defendant architect had entered a cinema to inspect it, during which time an intruder also entered and caused a fire (*Rushbond v JS Design*).

In these examples and others, the starting point for assessing liability has been by use of a concept of a duty of care. The tort of negligence imposes liability for damage caused by carelessness and a test of a duty of care is used to determine what amounts to carelessness and when a duty will and will not be imposed. Its great attribute is a duty not to harm another person which has a symbolism and value that cannot be easily replicated if the duty were abandoned.

Despite that, some commentators complain the test for a duty, recently refined and clarified in *Robinson,* – foreseeability, proximity and the imposition of liability being fair, just and reasonable – is too complicated. However, that is not surprising given the wide range of situations that negligence covers. A simple test is asking for the impossible. Lord Oliver noted as much in *Caparo v Dickman* that *"...to search for any single formula which will serve as a general test of liability is to pursue a will-o'-the wisp".* The test is multi-layered and there are specific types of harm, such as economic loss and psychiatric injury that the duty extends to address. Likewise, it deals with how the identity of the defendant has a bearing on the extent of liability, such as where it concerns the emergency services or local authority. In these specific cases, the law prevents a duty from arising or makes it more difficult to establish. Abolition of the duty in such a complex area in favour of a more simplistic approach may struggle to adequately address these issues.

Likewise, abolition may not address one of the duty's greatest assets: adaptability. As Lord Bridge in *Caparo* said, the duty of care test is simply a label and that case highlights the test was not intended to provide a concrete answer. As such, there is scope for the exercise of judicial discretion when the test is applied to a novel situation. However, novelty does not create uncertainty as to whether or not a duty will be imposed. This is because, although not revolutionary, a cautious, incremental approach is employed which means reference is made by analogy to decided cases. Therefore, the duty evolves in a controlled, predictable and consistent way. The court weighs the reasons and arguments for and against recognising a duty and uses its instinct with policy in mind but without becoming entangled in referring to empirical evidence.

Suppose the duty was abolished, what would remain? The result may be that a person would be liable if, in the absence of a defence, they acted unreasonably and caused damage or loss to another. Abolition of the duty could result in an undesirable cost-based approach where a person would think, "If I do wrong to you, I may have to pay you", rather than, "I owe you a duty of care". Such a change in perspective, whilst seemingly minor on its face, undermines the important ideal of not causing harm to others, the duty's ability to guide people's behaviour and its deterrent and educational effect. Abandoning the duty could also mean a loss of the body of established and

valuable case law that already tells us whether or not a duty exists. That would be unwise.

Thanks to this body of precedent application of the duty test does not repeatedly take up court time in parties arguing whether the duty exists. The starting point for any breach of duty case is by reference to established cases. It is only in novel situations not covered by precedent that the test is employed. As part of that process, the courts are mindful of when not to impose a duty based on policy such as in cases of 'crushing liability', a flood of claims, administrative costs, defensive mindsets, injustice and unfairness. It is not clear, absent the duty, how the law would deal with these. There is the possibility that these policy-based limitations would be ignored and a resulting unwarranted easing on which liability is founded will occur. Even if the policy-based decisions were to remain to the exclusion of the remainder of the duty, such as it does in the United States, that still has the consequence of removing the duty not to do harm. If a court were to simply find a person's conduct was unreasonable that might communicate that people should not behave in that way but it is based on the negative end result of the imposition of liability for wrongdoing rather than a starting point of a duty to take care and the positive, caring sense that creates.

Like many legal tests, the one for the duty of care is not perfect but a simpler alternative is unlikely to meet the demands of this complex area. The occasional times when the test is employed serves to further build the body of precedent which informs when a duty will and will not be imposed. Due to this expansive corpus, those calling for the duty's abolition are doing about a test that, by definition, will need to be used less and less. Attempts to construct some alternative, general principle in place of the duty will, as Lord Oliver also said in *Caparo,* not clarify the law *"...but merely to bedevil its development in a way which corresponds with practicality and common sense."* Judicial refining of the duty may be acceptable, but removing it entirely is not.

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