Just as all students of science learn of apples falling onto famous physicists, so all students of law learn of snails crawling into ginger beer bottles. Since *Donoghue*,[1] duty has assumed a central role in the negligence enquiry. However, this essay will question whether duty is in fact necessary at all. Drawing on comparisons with French law, it argues duty has its place in the modern law of negligence but is conceptually bloated and must be slimmed down.

Duty has long been a target of criticism. Buckland called it "an unnecessary fifth wheel on the coach."[2] Hepple argued its functions could easily be reallocated to the fault, causation and remoteness stages of the negligence enquiry.[3] This is not merely a matter of conceptual tidiness. Nolan argues abandoning duty would eliminate the injustice resulting from the inability of citizens to predict how and on what basis cases will be resolved and regulate their behaviour accordingly.[4]

How might a duty-less negligence enquiry look? One answer is to look to France. French tort law "does not make use of a concept approaching our own [common law] duty of care."[5] Instead, liability for civil wrongs is imposed if "*faute*" [fault], harm and a causal link between them can be established.[6] Though some argue that this formula conceals an implied duty of care, French academic commentary generally analyses *faute* not in terms of relational duties but as "abnormal behaviour,"[7] traditionally defined as a derogation from the standard of the "*bon père de famille*" [good family father].[8] The *bon père* does not breach duties he owes, but the possible range of *fautes* extends far wider.

Accordingly, the duty enquiry is absent from French jurisprudence. For example, in *Galli-Atkinson v Seghal* the court's discussion focused on whether C, whose daughter died in a traffic accident, was owed a duty by D given the *Alcock* control mechanisms.[9] In contrast, when M. X was injured in a car crash, these relational questions were irrelevant to his children's ability to recovery for psychiatric distress. With *faute* and causation clearly present, the court's decision to impose liability centred solely on the nature of the harm suffered.[10]

This might be thought to make the range of recoverable loss impossibly broad. Removing the duty requirement means removing what Lord Denning noted is a key device for limiting the scope of potential liability.[11] However, in reality this exclusionary function can be performed by other stages of the enquiry. For example, in French law checks on liability for psychological harm are introduced not through duty but by the requirement that the harm be "direct and certain,"[12] and on occasions that it be "exceptional."[13] Therefore, though French law tends in fact to draw the boundaries of liability wider than English law, this need not be the case for every duty-less system.

A greater problem is that, in accommodating the functions of duty elsewhere, the negligence enquiry becomes unwieldy. Crucially, it cannot distinguish between situations where D behaved reasonably when obliged to do so and situations where they behaved unreasonably but were under no obligation

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[1] [1932] A.C. 562.
[2] WW Buckland, 'The Duty to Take Care' (1935) 51 LQR 637, 639.
[3] B Hepple, 'Negligence: The Search for Coherence' (1997) 50 CLP 69, 93-94.
[4] D Nolan, 'Deconstructing the Duty of Care' (2013) 129 LQR 559, 577-583.
[5] S Whittaker, 'Privity of Contract and the Law of Tort: the French Experience' (1995) 15 OJLS 327, 331.
[6] C. civ. arts. 1240-41.
[7] J Bell, S Boyron and S Whittaker, *Principles of French Law* (2nd edn, OUP 2008), 365.
[8] The preferred wording now speaks of the reasonable man.
[9] [2003] EWCA Civ 697.
[10] Cass. 2e civ., 1er juill. 2010, n°09-15.907.
[11] *Lamb v Camden LBC* [1981] Q.B. 625, 636E-637C.
[12] Bell and ors (n 7) 412.
[13] CA Aix-en-Provence, ct0023, 4 févr. 2009, n°07/13724

not to do so. This is illustrated by the *Lunus* case,[14] where a trainer recovered for psychological harm resulting from the negligently inflicted death of their horse. The case was controversial, but without the duty concept a future court could not easily exclude liability on similar facts. They would be forced to maintain either that D acted reasonably, despite clearly departing from the *bon père* standard, or that the damage was too remote, despite a direct and foreseeable causal link. In contrast, an English court would simply hold that, though D acted unreasonably, absence of a duty meant they had every right to do so. It is so this distinction can easily be drawn that duty is necessary.

However, English law's progressive assimilation of the other elements of negligence into the duty concept creates the same problem in reverse. For example, foreseeability's centrality to the factual duty enquiry means if foreseeable harm is suffered a duty is often owed by definition. This reduplicates work better done at the remoteness stage and obscures the many cases where it is more accurate to say D did owe a duty to C but is not liable because, on the facts, the damage was too remote. The same applies to the conflation of breach and duty.[15]

The leads to the conclusion that duty should be stripped of its unnecessary elements, leaving only the notional issue of whether broad categories of relationships and interests fall within the reach of negligence. This is ultimately a policy question which cannot be answered by reference to general tests. Weinrib criticises such a "heterogeneous" policy-centric approach as leading to duty's "disintegration [as] a coherent concept."[16] However the present approach is no less reliant on policy considerations, only this is concealed behind "vacuous" concepts such as proximity.[17] Bring policy questions out of the shadows at the duty stage not only encourages clearer and more focused reasoning better reflective of duty's role, but also gives the remaining stages space to function as more structured and principled parts of the negligence enquiry.

[14] Cass. 1re civ., 16 janv. 1962, N°33.
[15] D Howarth, 'Many Duties of Care' (2006) 26(3) OJLS 449, 466.
[16] EJ Weinrib, 'The Disintegration of Duty' (2008) 31 AQ 212, 246.
[17] Nolan (n 4), 584.