

The present essay argues that the duty of care is necessary in the modern law of negligence, for it is the heartland of policy reasoning.

After a brief definition, the essay is divided in two parts.

Part One highlights the issues surrounding the duty of care that would call for modification or abolition.

Part Two demonstrates that this element is paramount to the framework of negligence since it guides judges in reaching a desirable solution that takes wider social, economic, and distributive considerations into account

#### Brief definition

The duty of care may be defined as the element which ‘define[s] the boundaries of liability ... by reference to ... “policy considerations” ... for causing damage by negligence in that situation.’<sup>1</sup>

It is part of the enquiry to establish the tort of negligence, albeit there has been substantial disagreement as to its role and utility. Whereas some claim that it ‘... adds nothing to the tort of negligence’<sup>2</sup> and even accords judges the power to rationalise a decision which has been reached arbitrarily<sup>3</sup>, others wish to retain it as an element that

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<sup>1</sup> Cane, *Atiyah’s Accidents, Compensation and the Law* (7<sup>th</sup> edn CUP 2006) 69

<sup>2</sup> Jones, *Textbook on Torts* (8th edn OUP 2002) 41.

<sup>3</sup> J A Weir, ‘Suicide in Custody’ (1998) 57 CLJ 241, 242–43

enhances positive regulatory developments and provides guidance and therefore can regulate society's behaviour in subsequent cases.<sup>4</sup>

#### Part One - Duty of care as problematic

Stapleton is not alone in arguing that it is an element that leads to confusion and masks the rationale behind a particular decision.<sup>5</sup> Hedley went as far as to conclude that it is a 'fiction that has 'no legal consequences until it is broken ...'<sup>6</sup> while Hepple laments the 'formal incoherence' of negligence law.<sup>7</sup> He condemns the requirement and suggests its abandonment in light of the other elements of the law of negligence that could serve the same purpose without incurring into uncertainty.<sup>8</sup> Furthermore, by abolishing it we would induce courts to be '... more upfront and straightforward ...'<sup>9</sup> where the duty '... cloaks the arbitrary nature' of the decisions<sup>10</sup> and '... profoundly affects the way in which judges decide negligence cases ...'<sup>11</sup> where the law of negligence should limit itself to a corrective role.

#### Part Two - Duty of care as necessary and desirable

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<sup>4</sup> J Goldberg and B Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54 Vanderbilt LR 657, 742–43.

<sup>5</sup> 'Duty of Care and Economic Loss: A Wider Agenda' (1991) 107 LQR 249, 295.

<sup>6</sup> S. Hedley, Tort (3rd edn, 2002) 1, 28.

<sup>7</sup> 'Negligence: The Search for Coherence' (1997) 50(1) Current Legal Problems 69, 81.

<sup>8</sup> Ibid 93.

<sup>9</sup> N. McBride, 'Duties of Care-Do they really exist?' (2004) 24 OJLS 417, 424.

<sup>10</sup> Gibson, 'A New Alphabet of Negligence' in A Linden (ed), *Studies in Canadian Tort Law* (1<sup>st</sup> edn Butterworths 1968).

<sup>11</sup> Nolan, 'Deconstructing the Duty of Care' (2013) 129 Law Quarterly Review 559, 588

I find the analysis to be correct in principle but misguided since it relies on formalism and principle. It arguably does not appreciate the role duty of care plays in shaping the law according to policy and wider considerations. Duty seems necessary since the policy that pervades it may help judges reach a sensible decision. Bereft of the duty of care, the enquiry would be rather static and normative.

The force of the common law is precisely its flexibility.<sup>12</sup> I also do not necessarily agree with the proposition that policy should be only considered at certain stages of the inquiry. It pervades the case as a whole and may be beneficial for judges not to get caught in formalism since ‘... the main function of the concept of duty of care is to define the boundaries of liability for damage caused by negligent conduct by reference to what are commonly called ‘policy considerations’ while we need to distinguish formal coherence from coherence of purpose.’<sup>13</sup> While I can see why formalities are praised as giving us a framework to work with, it is argued that coherence of purpose is more desirable and arguably ‘... the supreme policy of the law of obligations.’<sup>14</sup> The common law system I praise precisely for this reason. Unlike in civil law systems, while I am studying here in the UK law system, I do not necessarily bring all my attention to formalities. I have learnt that the outcome of the

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<sup>12</sup> Fleming, “Remoteness and Duty: The Control Devices in Liability for Negligence” (1953) 31 Can.Bar Rev. 471.

<sup>13</sup> Cane, *Atiyah's Accidents, Compensation and the Law* (7th edn Cambridge University Press 2006) 1, 69.

<sup>14</sup> Weinrib, ‘The disintegration of duty’ in Madden (ed), *Exploring Tort Law* (1<sup>st</sup> edn CUP 2005) 186.

case ought to be shaped by considerations that may go beyond the façade of legal formalities. The life of the common law is, famously, experience not logic.<sup>15</sup>

Although duty of care is arguably a ‘conceptual straitjacket’<sup>16</sup> it is necessary in reaching a balanced and conscious solution to a problem. As Cardozo reminds us of the absence of prophetic

Vision is justified by the complexity of life.<sup>17</sup> tort law is not limited to the parties in the case but also aims to achieve certain kinds of moral goals, such as the maximisation of welfare or the promotion of economic efficiency<sup>18</sup>.

### Conclusion

The present essay has sought to demonstrate that although the case for abolition is correct in principle, the duty of care is still necessary if we wish to retain the positive character of the law of negligence and the considerations which underly policy reasoning. After all, Lord’s Denning has famously described policy as an ‘unruly horse’ that can be ‘kept under control’.<sup>19</sup>

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<sup>15</sup> Harlow, *Understanding Tort Law* (3rd ed Sweet and Maxwell 2005) 65

<sup>16</sup> Cane (n 13) 72.

<sup>17</sup> *Nature of the Judicial Process* (1<sup>st</sup> edn New Haven 1921) 143

<sup>18</sup> *The Goals of Private Law*, edited by Andrew Robertson, and Hang Wu Tang, (Bloomsbury Publishing Plc 2009)

<sup>19</sup> *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch 591, 606 (Lord Denning)