

Duties of Care – Do They Really Exist?

NICHOLAS J McBRIDE*

Abstract – It is popularly believed that if A owes B a duty of care in negligence, A will not actually have a legal duty to be careful: A will merely be required to pay damages to B if she suffers loss as a result of A's being careless. We can call this the *cynical* view of duties of care and those who adopt it, *cynics*. However, it is possible to take a different view of duties of care in negligence, according to which if A owes B a duty of care of some description, A will actually have a legal duty to be careful. We can call this the *idealistic* view of duties of care in negligence and those who adopt it, *idealists*. This article explains the importance of the debate between idealists and cynics over the nature of duties of care in negligence and goes on to argue that the cynical view of duties of care in negligence is, in fact, wrong and that the idealistic view of such duties should be preferred.

1. Introduction

Oliver Wendell Holmes famously suggested that someone who undertakes in a contract to do *x* does not actually have a legal duty to do *x*: she merely has a duty¹ to pay damages to the other party to the contract if she fails to do *x*.² This suggestion has been widely criticised³ and enjoys little popularity nowadays. Today, it is widely accepted that if A undertakes in a contract with B to do *x*, he will have a primary obligation to do *x* and if he fails to do *x* and B suffers loss as a result, he will usually incur a secondary obligation to pay damages to B.⁴

While Holmes's analysis of the duties incurred by a contracting party has been widely rejected, most tort scholars seem happy to endorse a very similar analysis of duties of care in negligence. According to this analysis, if A is *said* to owe B a duty to take care not to do *x* in a given situation, A will not *actually* have a duty to take care not to do *x*. A will simply incur a duty to pay damages to B if he carelessly does *x* and

* Fellow, Pembroke College, Cambridge. My thanks to Trevor Allan, John Bell, John Goldberg, Tom Hickman, David Ibbetson, Sudeep Malik, Tony Weir, Benjamin Zipursky and an anonymous OJLS referee for their comments on earlier drafts of this article. This article is dedicated to the memory of my fiancée, Jane Vaulks, who died on 16 October 2003. RIP.

¹ From now on, the word "duty" used on its own without qualification denotes a legal duty, not a moral duty or any other kind of duty. To say that someone has a legal duty to do *x* is a shorthand way of saying that the law tells, or requires, him or her to do *x*.

² O. W. Holmes, *The Common Law* (1968), 236.

³ For criticisms of Holmes's views, see De Wolfe Howe *The Pollock-Holmes Letters* (1942), Volume 1, 79-80, Volume 2, 233; W. Buckland, 'The Nature of Contractual Obligation' (1942-44) *CLJ* 247; D. Friedmann, 'The Efficient Breach Fallacy' (1989) 18 *J of Leg Stud* 1, 18-19.

⁴ See W.N. Hohfeld, *Fundamental Legal Conceptions* (1922), 202; also Lord Diplock's judgments in *Moschi v. Lep Air Services Ltd* [1973] 1 AC 331, at 350 and *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827, at 848-849.

thereby causes B to suffer some kind of loss.⁵ Let's call this, the *cynical view* of duties of care in negligence and those who adopt this view, *cynics*.

The vast majority of tort scholars working today seem to be cynics. So, for example, *Atiyah's Accidents, Compensation and the Law*, currently edited by Peter Cane, tells us that: 'To say that a person owes a duty of care in a particular situation means (*and means only*) that the person will be liable for causing damage by negligence in that situation.'⁶ Similar statements have been made in the past by Basil Markesinis and Simon Deakin, Michael Jones, Tony Weir, Steve Hedley and Tony Dugdale.⁷ However, not all tort scholars are cynics. For example, Benjamin Zipursky condemns the cynical view of duties of care in negligence as 'inaccurate and unworkable':

'The law frequently defines "duty" as *actual* "duty" or "obligation." Courts that deny liability in nonfeasance cases for lack of duty seem to be saying that, while it might have been commendable for the defendant to help the plaintiff, the defendant was not [legally] obligated to do so. Similarly, courts that deny recovery to injured trespassers despite landowners' failure to take due care are not simply saying that a contrary holding would impose too much liability; rather, they are saying that landowners are not [legally] obligated to watch out for the interests of those who trespass upon their land.'⁸

According to this view, if A is said to owe B a duty to take care not to do *x* in a given situation, A will *actually* have a duty to take care not to do *x*, which duty will have been imposed on A for B's benefit.⁹ Let's call this the *idealistic view* of duties of care in

⁵ An equivalent analysis will apply to other kinds of duties of care. So if (say) A is *said* to owe B a duty to perform some task with a certain degree of care and skill, then, according to this analysis, A won't *actually* have a duty to perform that task with that degree of care and skill; he will simply have a duty to pay damages to B if he performs the task in question incompetently and thereby causes B to suffer some kind of loss.

⁶ P. Cane (ed), *Atiyah's Accidents, Compensation and the Law* (6th ed, 1999), 58 (emphasis added).

⁷ See *Markesinis and Deakin's Tort Law* (5th ed, 2003), 77: 'The issue of *duty* is...essentially concerned with whether the law recognises in principle the possibility of liability in a given type of situation' (emphasis in original); M. Jones, *Textbook on Torts* (8th ed, 2002), 41: '...the concept of duty of care adds nothing to the tort of negligence. In some circumstances a person is held liable for the negligent infliction of damage, and in other circumstances he is not. In the first set of circumstances it is said that a person owes a duty of care, and in the second set that there is no duty'; J.A. Weir, 'Suicide in Custody' (1998) 57 *CLJ* 241, 242-243: 'The function of the duty concept at common law is to conduce to an apparent rationalisation of a decision, reached on other grounds, that a defendant must – or need not – pay for harm suffered by the plaintiff as a relevant result of relevantly unreasonable conduct on the part of the defendant... "Duty" is an operator, not a real number'; S. Hedley, *Tort* (3rd ed, 2002), 28: '...a "duty of care" has no legal consequences until it is broken, and it seems a fiction to say that a duty hangs over D's relations with others, waiting to turn into some other type of legal liability... [A] judge who says that D owed P no duty at all must mean something like "D is not liable here, nor would D ever be liable on facts like these"'; *Clerk and Lindsell on Torts*, (18th ed, 2000), §7-05: '...[in a] "duty of care situation"...the courts recognise as actionable the careless infliction of the kind of damage of which the plaintiff complains, on the type of person to which he belongs, and by the type of person to which the defendant belongs.'

⁸ B. Zipursky, 'Legal Malpractice and the Structure of Negligence Law' (1998) 67 *Fordham LR* 649, 656 (emphasis added).

⁹ To say that A 'owes' a duty to B is a shorthand way of saying that duty has been imposed on A for B's benefit. So, for example, in the famous case of *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (1928), A carelessly knocked an unmarked package out of B's hands. The package – which contained fireworks –

negligence and those who adopt this view, *idealists*.¹⁰ So, according to the idealistic view of duties of care in negligence, if A is said to owe B a duty to take care not to do *x* in a given situation, A will have a primary obligation to take care not to do *x*. If he breaches this obligation and B suffers loss as a result, he will usually incur a secondary obligation to pay damages to B. In contrast, a cynic would say that the *only* obligation A will owe B in this situation is an obligation to pay B damages if A carelessly does *x* and B suffers loss as a result.

In this article I will argue that the idealistic view of duties of care in negligence is correct and that the cynical view is wrong. I will point out four problems with the cynical view, each of which indicates that the idealistic view is correct. I will then go on to consider and dismiss four arguments that could be made in favour of thinking that the cynical view is correct. However, before I do any of that, I should first of all explain briefly *why* the debate between cynics and idealists over the nature of duties of care in negligence matters – there is, after all, no point in discussing whether the cynics or idealists are right if it does not actually make any difference who is right.

2. Cynics versus Idealists: What Difference Does It Make?

There are at least four reasons why the debate between cynics and idealists over the nature of duties of care in negligence is important.

A. What does the law require us to do?

First of all, the disagreement between cynics and idealists over the nature of duties of care in negligence will matter a great deal to someone who is law-abiding – that is,

exploded and the shock of the explosion caused some scales to fall on and injure C, who was standing several yards away. It was held that C could not sue for damages as A did not breach a duty of care owed to *her* in knocking the package to the ground. Now – A *did* have a duty to take care not to knock the package to the ground but that duty was imposed on him for the benefit of B, whose property was foreseeably likely to be damaged if the package was knocked to the ground. That duty was *not* imposed on him for the benefit of C as there was no reason to think at the time that she would be harmed in any way if B's package were knocked to the ground. So A's duty to take care not to knock the package to the ground was owed to B, not C. Not all duties are owed to other people. There are many cases where someone will be subject to a duty that is owed to no one in particular. This will be the case, for example, if someone is subject to a duty that was imposed on him not for the benefit of a particular individual, but for the benefit of the community as a whole. See N. J. McBride & R. Bagshaw, *Tort Law* (2001), 3-4.

¹⁰ Professors John Goldberg and Benjamin Zipursky are currently the most vocal proponents of the idealistic view of duties of care in negligence: see, in addition to the article cited at n 8, above, J. Goldberg & B. Zipursky, 'The Moral of *MacPherson*' (1998) 146 *U Penn LR* 1733; J. Goldberg, 'Duty and the Structure of Negligence' [2000] *Kansas J of Law and Pub Policy* 149; J. Goldberg & B. Zipursky, 'The Restatement (Third) and the Place of Duty in Negligence Law' (2001) 54 *Vanderbilt LR* 657. One can also find endorsements of the idealistic view of duties of care in negligence in F.H. Lawson, *Negligence in the Civil Law* (1950), 34; R.G. McKerron, 'The Duty of Care in South African Law' (1952) 69 *South African LJ* 189; P.B.H. Birks, 'Obligations: One Tier or Two?' in P.G. Stein & A.D.E. Lewis (eds), *Studies in Justinian's Institutes* (1983); A.J.E. Jaffey, *The Duty of Care* (1992), 3-4; N.J. McBride & R. Bagshaw, above n 9.

someone who is concerned to do what the law requires him or her to do. For example, suppose that XYZ Co makes and sells cars. XYZ discovers that the brakes on its cars suffer from a problem which means they are liable to fail catastrophically in 1 out of every 50,000 cars manufactured by XYZ. XYZ consults its lawyers and asks them what, if anything, it is legally obliged to do in this situation.¹¹

What advice XYZ gets back will depend on whether its lawyers are cynics or idealists.¹² An idealist who advised XYZ would say, ‘It is well-established that if A – however inadvertently – has put B in danger of being killed or injured, A will owe B a duty to take reasonable steps to see that this does not happen.’¹³ I’m afraid this principle applies here – you put these defective cars into general circulation and as a result the people who are currently driving them are in danger of being killed or injured. Under the circumstances, you are legally required to do your best to warn them of the danger they are in so that they can avoid it by ceasing to drive your cars or by having the brakes looked at.’¹⁴

If XYZ then turned to a cynic for advice, it would hear a quite different story. He would say, ‘What my colleague says is true – but only up to a point. It *is* true that the law says in this situation that you owe the people who are currently driving your cars a duty to do your best to warn them of the danger they are in. But that does not actually mean that you are legally required to warn them of the danger. All this means is that if you do not warn the people who drive your cars of the danger they are in and a driver of one of your cars is subsequently injured as a result of your failure to warn him that the brakes on his car were liable to fail, you will be held liable to compensate that driver for his injuries. It is in fact entirely up to you whether you warn the drivers of your cars or not of the danger they are in.’

If XYZ believes the idealist, it will issue a warning that there is a very small chance that the brakes on its cars are liable to fail and that concerned drivers should consult a mechanic or XYZ to have the brakes checked out. If, on the other hand, XYZ believes the cynic, it may well choose not to issue such a warning. If XYZ calculates that the cost of issuing such a warning – in the shape of depressed sales – exceeds the costs it will incur compensating drivers of its cars who are injured as a result of its failure to issue a warning, XYZ may well decide that it has a responsibility to its shareholders *not* to issue such a warning.

So it will matter a great deal to XYZ whether the idealistic view or the cynical view of duties of care in negligence is correct. Likewise, it will matter a great deal to all

¹¹ I assume, for the purpose of illustrating the importance of the debate between cynics and idealists over the nature of duties of care in negligence, that there is no statutory provision that applies here, requiring XYZ either to repair the problem or to warn those currently driving cars manufactured by XYZ of the problem affecting them.

¹² Cf. D.A. Nance, ‘Guidance Rules and Enforcement Rules: A Better View of the Cathedral’ (1997) 83 *Virginia LR* 837, 858-861.

¹³ See *Clerk and Lindsell on Torts*, above n 7, §9-26, fn 34; N.J. McBride and R. Bagshaw, above n 9, 83-84; M. Jones, above n 7, 54; Rest Torts 2d (American Law Institute, 1965), §321.

¹⁴ *E Hobbs (Farms) Ltd v. Baxenden Chemicals* [1992] 1 *Lloyds 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.’

law-abiding people whether the idealistic or cynical view of duties of care in negligence is correct.

B. What may the courts do to us?

Of course, if XYZ is a ‘rogue’ or ‘bad’ company that always acts in its own self-interest, irrespective of what the law tells it to do, then it will not matter to XYZ whether it is legally required to warn its customers of the problem with the brakes on its cars. XYZ will simply calculate whether the costs involved in not giving a warning outweigh the costs involved in giving a warning and act accordingly. But even those who do not care about doing what the law tells them to do have reason to be interested in whether the idealistic view or the cynical view of duties of care in negligence is correct.

Suppose for example that the law says that A owes B a duty to take care not to do *x*. Suppose further that A wants to do *x*. Even if A is a ‘bad man’ and is willing to break the law if his self-interest is served by doing so, it will still matter to A whether the idealistic or cynical view of duties of care in negligence is correct. This is because if the idealists are right, B should be able to get – so long as other things are equal – an injunction against A, requiring A to fulfil the duty of care that he owes B. Moreover, if the idealistic view is correct then if A deliberately does *x*, the courts could legitimately punish A for ignoring the demands that the law makes on him. If, on the other hand, the cynical view of duties of care in negligence is correct, then A is legally free to do *x* if he wants – his only duty is to compensate B for the harm that she will suffer if A does *x*. So if the cynical view of duties of care in negligence is correct, the courts will have no grounds for granting B an injunction here, requiring A to take care not to do *x*; moreover, it would be quite improper for the courts to punish A if he did *x*, however deliberately.

So here is a second reason why the debate between the cynics and idealists over the nature of duties of care in negligence matters: whether the cynics or idealists are right makes a big difference to what the courts may do to us on those occasions we want to do something that will involve a breach of a duty of care owed to another.

C. The basis of liability in negligence

The third point of difference between cynics and idealists will be over the basis of liability in negligence. Liability in negligence is traditionally said to arise out of the fact that someone has breached a duty of care owed to someone else.¹⁵ An idealist will have no problem taking this formulation seriously. She will argue that if A is held liable in negligence to pay compensation to B for some loss that B has suffered, he is held liable because A breached a duty of care that he owed to B and B suffered that loss as a result.

¹⁵ See *Donoghue v Stevenson* [1932] AC 562, at 618-619 (*per* Lord Macmillan): ‘The law takes no cognizance of carelessness in the abstract. It concerns itself with carelessness where there is a duty to take care and where failure in that duty has caused damage. In such circumstances carelessness assumes the legal quality of negligence and entails consequences in [the] law of negligence’; and *Haynes v Harwood* [1935] 1 KB 146, at 152 (*per* Greer LJ): ‘Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim.’

In other words, to an idealist, A's liability to B will be *wrong-based*: it will arise out of the fact that he has committed a *civil wrong*¹⁶ in relation to B.¹⁷

By contrast, a cynic will find it impossible to accept that liability in negligence arises out of the fact that someone has breached a duty of care owed to someone else. Such an explanation of the basis of negligence liability will strike him as being vacuous and circular.¹⁸ To a cynic, to say that A is held liable in negligence to compensate B for some loss that she has suffered because she suffered that loss as a result of A's breach of a duty of care that he owed her, is to say no more than that A is held liable because: (1) in the situation that A and B found themselves in, the law will hold someone like A liable if someone like B suffers loss as a result of A's carelessness, and (2) B suffered the loss she did as a result of A's being careless. Which just begs the question – *why*, in the situation that A and B found themselves in, will the law hold someone like A liable if someone like B suffers loss as a result of A's carelessness? So if A is held liable in negligence to compensate B for some loss that she has suffered, what then *will* be the basis of A's liability? Unable to say that A's liability arises out of the fact that A breached a duty of care owed to B, the only answer a cynic will be able to give is that, 'A is held liable to B because he behaved unreasonably and B suffered loss as a result.' So a cynic will see A's liability to compensate B as being based on a 'fault principle' which demands that if you act unreasonably in some way and I suffer some kind of loss as a result then I should be able to sue you for compensation for that loss.¹⁹

So the third reason why the debate between cynics and idealists over the nature of duties of care in negligence matters is that cynics and idealists differ over the basis of liability in negligence. If the idealists are right, then liability in negligence is *wrong-based*. If the cynics are right, then liability in negligence is *fault-based*, not *wrong-based*.

¹⁶ A will commit a civil wrong in relation to B if he breaches a duty owed to B: see P.B.H. Birks, 'The Concept of a Civil Wrong' in Owen (ed), *Philosophical Foundations of Tort Law* (1995); also N.J. McBride & R. Bagshaw, above n 9, 3-4.

¹⁷ Of course, that cannot be the end of the explanation as to why A will be held liable to B: it would still have to be explained why the fact that A has committed a civil wrong in relation to B means that A will be held liable to compensate B for the loss that she has suffered as a result of A's committing that wrong. A number of theorists have started groping towards such an explanation. See P.J. Kelley, 'Who Decides? Community Safety Conventions at the Heart of Tort Liability' (1990) 38 *Cleveland State LR* 315; B. Zipursky, 'Rights, Wrongs, and Recourse in the Law of Torts' (1998) 51 *Vanderbilt LR* 1; and N.J. McBride, 'On the Conceptual and Philosophical Foundations of Tort Law' in J. Horder (ed), *Oxford Essays in Jurisprudence, 4th Series* (2001).

¹⁸ See, for example, M. Jones, above n 7, at 32: '[The notion of a duty of care] does not provide a justification or reason for imposing liability, but rather marks out the boundaries of what is or is not actionable. Justifications for setting the boundary at any particular point have to be sought elsewhere.' Similarly, J.C. Smith charged that 'it is circular reasoning to conclude that there is no liability because the defendant did not owe the plaintiff a duty of care, or that there is because he or she does...': see his *Liability in Negligence* (1984), 13.

¹⁹ Given the fact that overwhelming majority of tort scholars are cynics, it should come as no surprise that the overwhelming majority of tort scholars also think that negligence liability is based on this fault principle: see M.A. Millner, *Negligence in Modern Law* (1967), 7; P. Cane (ed), above n 7, 27; D. Howarth, *Textbook on Tort* (1995), 25; P. Giliker & G. Beckwith, *Tort* (2000), 3; A. Burrows, *Understanding the Law of Obligations* (1998), 123.

D. The dispensability of the duty concept in negligence

A fourth reason why the debate between cynics and idealists matters arises out of the fact that cynics and idealists disagree over the dispensability of the duty concept in negligence.

A cynic will think that it is perfectly possible to set out the law of negligence without referring to the concept of a duty of care at all.²⁰ According to a cynic, A will be held liable in negligence to B if he caused B to suffer some kind of loss by acting unreasonably and the law does not afford A any kind of defence against being sued by B. If this is right, then there is no need to invoke the idea of ‘duty’ at all in setting out the law of negligence. All one need do is give an account of: (1) when someone will be held to have acted unreasonably; (2) when someone will be held to have caused another to suffer some kind of loss; and (3) the situations in which the law will protect someone from being sued in negligence even though they have caused another to suffer loss by acting unreasonably.²¹ If one understands (1), (2) and (3), then one can fairly claim to understand the law of negligence – one will be able to tell in any given case whether or not a claimant will be able to sue a given defendant in negligence for compensation for some loss that she has suffered.²²

In contrast, an idealist will think that giving an account of the law of negligence without mentioning the idea of duty is like putting on a performance of *Hamlet* without the Prince. To an idealist, the idea of duty is the central organising concept around which the whole of the law of negligence revolves. After all, an idealist would say, a claimant will only be entitled to sue a defendant in negligence if: (1) the defendant owed her a *duty*

²⁰ Indeed, Richard Buckley attempts to do precisely this in his account of *The Modern Law of Negligence*, 3rd ed (1999). The index to that book lists only seven entries under the heading ‘duty of care’ – and all of those (with one exception) are concerned with the issue of when someone will be held to have breached a duty of care owed to another; not with the issue of when someone can be said to owe another a duty of care. By way of contrast, the index to N.J. McBride & R. Bagshaw, *Tort Law* (2001) – which adopts an idealistic view of duties of care in negligence – lists 56 entries under the heading ‘duty of care’; all of which are concerned with the issue of when someone can be said to owe someone else a duty of care.

²¹ This closely parallels the way in which David Howarth chooses to set out the law of negligence in his *Textbook on Tort* (1995). He begins his presentation of the law of negligence with a discussion of ‘fault’ (that is, the issue of when someone will be held to have acted unreasonably), goes on to discuss when someone can be said to have caused another to suffer some kind of loss, and only then does he discuss the notion of ‘duty of care’ – which discussion, for him, amounts to no more than a discussion of the situations in which the law will protect someone from being sued in negligence even though they have caused another to suffer loss by acting unreasonably: see Howarth, ‘Negligence after *Murphy*: Time to Re-think’ (1991) 50 *CLJ* 58, 93-94; also A. Grubb (ed), *The Law of Tort* (2002) §12.1 (the relevant section is written by David Howarth).

²² Cf. R.W.M. Dias, ‘The Breach Problem and The Duty of Care’ (1956) 30 *Tulane LR* 377, 408: ‘It is high time that we escaped from the shackles of verbal forms and refused to let our thinking be guided by words and phrases, such as “duty,” “duty of care,” “breach of duty”. If, in any given case of carelessness, it is desired to know whether the plaintiff has a remedy, all that must be asked are four questions. (1) Is the careless infliction of this kind of harm on this type of person recognised by the law as remediable? (2) Did the defendant’s conduct in the given situation fall short of the ideal behaviour of a reasonable man in a like situation? (3) Would a reasonable man have foreseen that the defendant’s conduct in that situation would have inflicted on this plaintiff at least some harm of the kind that he actually sustained? (4) Was it the defendant’s conduct that caused the harm sustained by the plaintiff?’

of care; (2) the defendant breached that *duty of care*; (3) the breach of that *duty of care* caused her to suffer some kind of loss; and (4) the loss suffered by the claimant as a result of the defendant's breach was the kind of loss which the *duty of care* breached by the defendant was imposed on him in order to avoid. So an idealist will place the notion of duty front and centre in any account that she gives of the law of negligence and will regard as bizarre and misconceived accounts of the law of negligence which fail to mention the notion of duty or which only deal with the notion of duty *after* giving an account of such concepts as 'unreasonableness' or 'fault' or 'causation'.

Why does this disagreement matter? Well, if the cynics are right – and the notion of duty is genuinely superfluous in the law of negligence – then the duty of care requirement in negligence *should* be abolished. If the cynics are right, when the courts in negligence cases ask 'Did the defendant owe the claimant a duty of care?' they are really asking, 'On balance, is there any reason why the defendant should not be held liable to the claimant?' So if we abolished the duty requirement in negligence and instead said that a defendant will be held liable in negligence to compensate a claimant for some loss that the claimant has suffered if: (1) the claimant suffered that loss as a result of the defendant's acting unreasonably in some way and (2) there is no reason why the defendant should not be held liable to pay compensation to the claimant, we would not make any fundamental change in the law of negligence but we *would* force the courts to be more upfront and straightforward than they are at the moment when they approach the question of whether a given claimant is entitled to sue a defendant in negligence for compensation for some loss that she has suffered. This is something we should all support.²³

However, if the idealists are right then abolishing the duty requirement in negligence would be nothing short of revolutionary. The law of negligence would be remade overnight in the image the cynics have of it. Liability in negligence could no longer be said to be wrong-based: it would instead be fault-based. The law of negligence would no longer purport to guide people's behaviour, requiring them on occasion to act reasonably in the interests of their fellow citizens, while giving the courts powers to act against those who ignored its demands. Instead, the law of negligence would simply attach costs to certain forms of behaviour and leave it up to individual citizens to decide whether or not to participate in those forms of behaviour.

It is likely that the calls from cynics for the duty of care requirement in negligence to be abolished will increase in volume over the next few years – especially now that the threat to the duty requirement in negligence created by the decision of the European

²³ While most cynics are content to retain the duty requirement in negligence, some cynics – in the interests of making negligence law clearer and more straightforward – have advocated that the duty requirement in negligence be abolished. See, in particular, B. Hepple, 'Negligence: The Search for Coherence' [1997] *CLP* 69, condemning the duty of care requirement in negligence as 'redundant and incoherent' and proposing 'a new framework of principle in which [the duty requirement] can be abandoned' (ibid, 93); and R.D. Gibson, 'A New Alphabet of Negligence' in A. Linden (ed), *Studies in Canadian Tort Law* (1968), describing the duty requirement in negligence as a 'front for a miscellaneous bag of exceptions to the general principle of liability to all reasonably foreseeable plaintiffs' and remarking that 'Most modern writers seem to regard this control function as a justification for the retention of the duty concept... I do not agree. The exceptions cannot be denied of course, but to retain the obsolete language of duty to describe them serves no useful purpose. Indeed, to the extent that it cloaks the arbitrary nature of these exceptions and makes them seem to be based on principle, the duty notion may perform a disservice' (ibid, 192).

Court of Human Rights in *Osman v UK*²⁴ seems to be receding.²⁵ In order to decide whether to accede to these calls, we have to know whether the idealists are right when they say that abolishing the duty of care requirement in negligence would be a revolutionary step, completely transforming the law of negligence from top to bottom,²⁶ or whether the cynics are in fact right when they say that ‘If we abolish the duty of care requirement in negligence and instead say that a defendant will be held liable to compensate a claimant for a loss that he has unreasonably caused the claimant to suffer if there is no reason why he should not be held liable, we will not change the law of negligence in any fundamental way but we will make the law clearer and force the courts to be more honest.’ Ultimately this will depend on whose view of the nature of duties of care in negligence is right. It is to this issue that I will now turn.

3. Four Problems with the Cynical View

Here are four problems with the cynical view of duties of care in negligence:

A. The paradoxical nature of the cynical view

Suppose that A is driving down a road at the same time as B is walking along the pavement beside the road. It is well-established that under the common law, A will owe B a duty to take care not to run her over. Now, according to a cynic, the common law does not actually impose a duty on A to take care not to run B over: it merely imposes a duty on A to pay B damages if he carelessly runs her over. If this is right, then it seems that the common law only seeks to protect B’s interests if A carelessly runs her over: before then, it shows no interest in her. This is very strange – why would the common law seek to protect B *after* she has been run over but not *before*? Of course, if one adopts the idealistic view then no such paradox arises. The common law seeks to protect B’s interests while she is walking along the pavement by imposing a duty on A to take care not to run her over; and if A disregards that duty with the result that B is run over, then the common law seeks to protect B’s interests by requiring A to pay B damages.

B. The law on exemplary damages

²⁴ [1999] 1 FLR 193. The case seemed to suggest that dismissing a claim in negligence on the ground that no duty of care was owed to the claimant might violate her rights under Article 6(1) of the European Convention on Human Rights. However, the European Court of Human Rights has now retreated from this position, confessing that its decision in *Osman* was based on a misunderstanding of English law: *Z v UK* [2001] 2 FLR 612, at [100].

²⁵ Basil Markesinis has been particularly vocal in calling for the duty requirement in negligence to be scrapped. See, for example, his casenote ‘Plaintiff’s Tort Law or Defendant’s Tort Law? Is the House of Lords Moving Towards a Synthesis?’ (2001) 9 *Torts Law Journal* 3, at 13-17. I am grateful to Tom Hickman for drawing my attention to this casenote.

²⁶ Of course, even if abolishing the duty of care requirement in negligence were to have as revolutionary an effect as the idealists say, that would not necessarily give us a reason to refuse to abolish that requirement. But it would at least give us pause for thought.

It is a big problem for the cynical view of duties of care in negligence that in all common law jurisdictions other than England, exemplary damages are routinely awarded against defendants who deliberately breach the duties of care they owe other people.²⁷ If the cynical view is correct, this simply should not happen. According to that view, someone who breaches a duty of care owed to another does not do anything legally wrong, so it is hard to see – if one takes the cynical view – why someone who deliberately breaches a duty of care owed to another should be punished.

A cynic could argue, in response to this point: ‘The fact that exemplary damages are routinely awarded against defendants who deliberately breach the duties of care they owe others in the non-English common law jurisdictions merely establishes that duties of care in those jurisdictions actually do exist. It does not tell us anything about whether duties of care in England actually exist.’ But two replies can be made to this. First: it would be strange if there existed such a fundamental divide between England and the other common law jurisdictions that duties of care actually existed in those other jurisdictions, but not in England. When did this divide arise? And how?

Secondly: it seems likely that it is only a matter of time before exemplary damages are awarded against a negligent defendant by an English court. The reason why there currently exists no English case where exemplary damages have been awarded against a negligent defendant is that *until recently* English courts adopted a ‘cause of action’ test to determine in what sort of cases exemplary damages could be awarded²⁸ and, according to this test, exemplary damages could *not* be awarded in negligence cases. Under this test, if A committed a tort in relation to B and B wanted to sue A for exemplary damages, such damages could not be awarded against A unless there existed a case decided before 1964 in which exemplary damages had been awarded against someone who committed the tort that A committed. As there is no case decided before 1964 in which exemplary damages were awarded against a negligent defendant, the ‘cause of action’ test meant exemplary damages simply could not be awarded in a negligence case in England.

However, the ‘cause of action’ test for determining whether exemplary damages can be awarded in a tort case has now been swept aside by the House of Lords in *Kuddus*

²⁷ Australia: *Coloca v B.P. Australia Ltd* [1992] 2 V.R. 441; *Gray v Motor Accident Commission* (1999) 158 A.L.R. 485. New Zealand: Accident Insurance Act 1998, s 396; *Bottrill v A* [2001] 3 N.Z.L.R. 622 (rev’d, *A v Bottrill* [2003] 1 A.C. 449). Canada: *Jackson v Canadian Pacific Railway* (1915) 24 D.L.R. 380; *Denison v. Fawcett* (1958) 12 D.L.R. (2d) 537, 542; *Robitaille v Vancouver Hockey Club Ltd* (1979) 19 B.C.L.R. 158 (aff’d, (1981) 16 C.C.L.T. 225); *Josefsburg v Wilson* (1984) 45 C.P.C. 260; *Coughlin v Kuntz* (1987) 17 B.C.L.R. (2d) 365; *Vlchek v Koshel* (1989) 52 D.L.R. (4th) 371. United States: *Rennewanz v Dean*, 229 P.3d 372 (1924); *Stoiber v Honeychuck*, 162 Cal Rptr 194 (1980); *Bowman v Doherty*, 686 P.2d 112 (1984); *Cohen v Allendale Coca-Cola Bottling Co*, 351 SE.2d 897 (1986); *Biswell v Duncan*, 742 P.2d 80 (1987); *Nast v Lockett*, 539 A.2d 1113 (1988); *Dugan v EMS Helicopters Inc*, 915 F.2d 1428 (1990). So, whatever the position may be in England, it is very hard to take a cynical view of the duties of care that are recognised in rest of the common law world and argue that someone who breaches one of those duties does not actually do anything legally wrong.

²⁸ The ‘cause of action’ test was first propounded in *AB v South West Water Services Ltd* [1993] QB 507, following certain *dicta* of the House of Lords in *Broome v Cassell & Co Ltd* [1972] AC 1027, at 1076 (*per* Lord Hailsham), 1130-1131 (*per* Lord Diplock).

v. Chief Constable of Leicestershire.²⁹ That decision establishes that if A deliberately commits a tort in relation to B, exemplary damages *may* be awarded against A so long as the case does not fall foul of the limits that the House of Lords placed in *Rookes v. Barnard*³⁰ on when exemplary damages may be awarded. B's right to sue A for exemplary damages will no longer be affected by the nature of the tort that A committed.

It therefore follows that exemplary damages may *now* be awarded under English law against someone who deliberately breaches a duty of care owed to another – provided, of course, that the facts of the case fit within one of the categories of situation in which *Rookes v. Barnard* held that exemplary damages may be awarded.³¹ So if A, a public authority, deliberately breaches a duty of care owed to B and in so doing acts in an 'oppressive, arbitrary or unconstitutional' manner, the decision in *Kuddus* indicates that B will now be able to sue A for exemplary damages. Similarly, the decision in *Kuddus* indicates that if A deliberately breaches a duty of care owed to B because he figures that he can make more money by breaching that duty of care than he would have to pay out to B by way of compensation,³² exemplary damages may be awarded against A.

C. The law on injunctions

If the cynical view were correct, then we would not expect the courts *ever* to issue an injunction against a defendant to stop him breaching a duty of care that he owes to another. Unfortunately for the cynical view, there *are* some American cases in which the courts have done precisely this.

²⁹ [2002] 2 AC 122.

³⁰ [1964] AC 1129. Lord Devlin ruled in that case that exemplary damages could only be awarded against a tortfeasor in three situations. (1) Where a public authority commits a tort and thereby acts in a 'oppressive, arbitrary or unconstitutional' manner. (2) Where someone commits a tort figuring that he will make more money by committing that tort than he will have to pay out in compensation to the victims of his tort. (3) Where statute law authorises an award of exemplary damages to be made against the tortfeasor.

³¹ It might be objected that *all* the House of Lords did in *Kuddus* was abolish the 'cause of action' test for determining whether exemplary damages could be awarded against a tortfeasor: they said nothing as to whether exemplary damages can now be awarded in negligence cases and so that question remains to be resolved at a future date. However, while it was *open* to the House of Lords to decide *Kuddus* in this way (that is, to say, 'The "cause of action" test is abolished but we leave it up to future courts to decide whether or not exemplary damages will be awardable for particular torts'), their Lordships were apparently unaware of this possibility and seemed to think that if they abolished the 'cause of action' test, exemplary damages could then be awarded against *any* deliberate tortfeasor so long as making such an award was allowed under *Rookes v. Barnard*: see [2002] 2 AC 122, at [45] (*per* Lord Mackay), [60] (*per* Lord Nicholls), [120] (*per* Lord Scott). So by voting by 4 to 1 to abolish the 'cause of action' test, the House of Lords can be taken at the same time to have voted in favour of the proposition that if A deliberately commits a tort in relation to B, an award of exemplary damages may be made against A – *irrespective* of what kind of tort it was that A committed – so long as the decision in *Rookes v. Barnard* allows such an award to be made against A.

³² As legend has it, this is what happened in the famous Ford Pinto case (*Grimshaw v Ford Motor Co*, 174 Cal Rptr 348 (1981)). In that case, it is popularly believed, Ford deliberately decided not to correct a dangerous feature on their Pinto car because it would have cost more to correct the dangerous feature than Ford calculated it would have to pay out in compensatory damages to those injured as a result of the car's having this dangerous feature. However, it seems that the truth is somewhat different: see G. Schwartz, 'The Myth of the Ford Pinto Case' (1991) 43 *Rutgers LR* 1013.

First, in *Shimp v. New Jersey Bell Telephone Co.*,³³ the plaintiff asked the Superior Court of New Jersey to issue an injunction against her employer, a telephone company, requiring it to ban smoking in her workplace. She claimed that the telephone company's failure to institute such a ban put it in breach of the duty it owed her to take reasonable steps to see that she did not come to any physical harm in working for the telephone company. The court issued the injunction, holding that 'an employer is under an affirmative duty to provide a work area which is free from unsafe conditions'³⁴ and that where 'an employer is under a common law duty to act, a court of equity may enforce an employee's rights by ordering the employer to eliminate any preventable hazardous condition which the court finds to exist.'³⁵

Secondly, there are a number of cases where a defendant who has put a claimant in danger of suffering some kind of physical injury *in the future* has been ordered to create a fund which would be used to pay for that claimant to undergo medical tests in the future to monitor his condition.³⁶ The exact basis of these 'medical monitoring' awards remains disputed, but Professors John Goldberg and Benjamin Zipursky have brilliantly suggested that in making such awards, the courts force a defendant who has put a claimant in danger of suffering some kind of physical injury, to discharge the duty of care he will owe that claimant to take reasonable steps to see that that risk does not materialise.³⁷ Two aspects of the law in this area make this a particularly attractive explanation.

First, it seems that medical monitoring awards will only be made in cases where a defendant has put a claimant in danger of suffering some kind of physical injury which can be substantially avoided if it is detected early enough.³⁸ So such awards will only be made where the defendant's paying for the claimant's condition to be monitored would help the claimant to avoid the injury which the defendant has put him in danger of suffering. Secondly, the United States Supreme Court has ruled that medical monitoring awards should *not* take the form of a lump sum payment to the claimant, but must rather

³³ 368 A 2d 408 (1976). See also, to the same effect, *Smith v. Western Electric Co.*, 643 S.W. 2d 10 (1982).

³⁴ 368 A 2d 408, 521.

³⁵ *Ibid.*, 524.

³⁶ See, for example, *Friends for All Children v Lockheed Corporation Inc.*, 746 F 2d 816 (1984) (Lockheed ordered to create fund to pay for Vietnamese children – who were involved in a plane crash which was Lockheed's fault – to undergo regular neurological exams to check for any incipient brain disorder caused by the decompression they had experienced in the crash); *Ayers v Jackson*, 525 A 2d 287 (1987) (company that polluted residents' water with carcinogenic chemicals was ordered to create a fund to pay for the residents to undergo regular medical tests in the future to detect whether or not the pollution had caused them to develop cancer); also, to the same effect, *Potter v Firestone Tire & Rubber Co.*, 863 P 2d 795 (1993) (medical monitoring award made against tyre company that dumped hazardous waste next to claimants' land, thus putting them in danger of developing cancer).

³⁷ J. Goldberg & B. Zipursky, 'Unrealized Torts' (2002) 88 *Virginia LR* 1626, 1709-1715.

³⁸ See *Hansen v Mountain Fuel Supply Co.*, 858 P 2d 970 (1993): held that defendant who exposed contractors to excessive quantities of asbestos dust while they were working for defendant could be ordered to create a fund to pay for contractors' health to be monitored – but only if the contractors were in danger of developing a serious disease as a result of being exposed to the asbestos 'for which a medical test for early detection exists...and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness' (*ibid.*, at 979).

take the form of periodic payments made to the claimant each time the claimant goes for a medical test.³⁹ As Goldberg and Zipursky point out, this ‘mode of payment bespeaks an ongoing obligation, rather than a one-time satisfaction of a debt owed in light of a wrong already done.’⁴⁰

A cynic might attempt to dismiss these cases on the ground that they merely indicate that duties of care actually exist in the United States: they say nothing about what the position is in England.⁴¹ But again two replies can be made to this. First: it would be strange if the law in England and the law in the United States differed over whether duties of care actually exist. Secondly, it is hard to imagine that the English courts would refuse in an appropriate case to follow the example set by these American cases and decline to award an injunction against a defendant in order to prevent him breaching a duty of care that he owes someone else.

For example, take the case of Olive Nockels, which was reported in the newspapers last year.⁴² She underwent surgery for a broken hip and her condition subsequently deteriorated. Her doctors decided that her life was no longer worth living and stopped feeding or hydrating her; they did however keep her sedated. Mrs Nockels’ family went to court, seeking to obtain an injunction that would compel her doctors to start feeding and hydrating her again. They were successful in obtaining an interim injunction but Mrs Nockels died soon after⁴³ and so it was never decided whether a final injunction would be awarded. But if it had been established that the doctors’ failure to feed and hydrate Mrs Nockels put them in breach of the duty they owed her to treat her

³⁹ *Metro-North Commuter Railroad Co v Buckley*, 521 US 424 (1997).

⁴⁰ J. Goldberg & B. Zipursky, above, n 37, 1709.

⁴¹ There are no English cases which indicate one way or the other whether an injunction can be granted to stop a defendant breaching a duty of care that he owes to another: see, for example, *Miller v Jackson* [1977] QB 966, 980 (*per Lord Denning MR*). This dearth of authority is relatively easy to explain. If A owes B a duty of care but proposes to breach it, B will normally have no warning of this until *after* A has breached it – by which time it will of course be too late for B to ask the courts to compel A to comply with the duty of care that he owes her. Some might argue that another reason for the dearth of English authority on the issue of whether the courts will ever compel A to perform a duty of care that he owes B is that a claimant can only sue a defendant in negligence if she has suffered some kind of *damage* as a result of the defendant’s actions. So B can only bring a claim in negligence against A to stop him doing *x* if she has suffered some damage as a result of A’s doing *x* – but by the time this has happened, it will obviously be too late for her to obtain an injunction against A requiring him not to do *x*. However, as *Meagher, Gummow and Lehane’s Equity: Doctrines and Remedies* (4th ed, 2002), points out at [21-05], this argument is flawed: ‘it has sometimes been thought that [an injunction] could not [be granted in a negligence case], because whether the defendant is threatening to do an act for the first time, or to continue or repeat an act, since the existence of damage is one of the ingredients of the plaintiff’s cause of action and since one can never tell in advance whether the defendant’s activity will cause damage, no occasion to seek the injunction can, as a matter of logic arise. Such reasoning is faulty; if accepted, one could never obtain an injunction to restrain a nuisance, a tort in which damage is equally an ingredient.’ The analogy with claims in nuisance for an injunction indicates that if B wants to bring a claim in negligence against A to stop him doing *x*, all she has to show is that it is *very likely* that she will suffer damage if A is allowed to do *x*.

⁴² *Daily Telegraph*, October 7, 2003.

⁴³ On 10 October: see *Daily Telegraph*, October 11, 2003.

with reasonable skill and care, would a final injunction have been awarded against them? The answer is obviously ‘Yes’.⁴⁴

D. The law on causation

The fourth problem with the cynical view is this: the courts will sometimes distort the law on causation in order to ensure that people who are subject to a particular duty of care are not allowed to breach that duty of care without incurring some kind of sanction.

For example, in *Reeves v Commissioner of Police of the Metropolis*,⁴⁵ the police owed a prisoner in their custody a duty to take reasonable steps to see that he did not commit suicide. The police breached that duty and the prisoner took advantage of their negligence to kill himself. It was argued that the police’s negligence had not actually caused the prisoner to die as he had voluntarily⁴⁶ and unreasonably chosen to kill himself and that as a result there was a break in the chain of causation between the police’s negligence and the prisoner’s death. The House of Lords rejected this contention even though it is well acknowledged in other contexts that voluntary and unreasonable acts break chains of causation.⁴⁷ Lord Hoffmann explained that *in this context* the normal principle that voluntary and unreasonable acts break chains of causation could not be allowed to apply: if it were, then every time the police owed a prisoner of sound mind a duty to take reasonable steps to stop him committing suicide, they would be free to breach that duty, safe in the knowledge that if the prisoner took advantage of their breach to kill himself, they would be able to argue that their negligence did not cause the prisoner’s death and thereby escape all liability for his death.⁴⁸

⁴⁴ A cynic might object: ‘Such an injunction would *not* have been awarded in order to compel Mrs Nockels’ doctors to discharge the (illusory) duty of care they owed her. Instead, the injunction would have been awarded under the Human Rights Act 1998 or, as the hospital was an NHS hospital, by way of judicial review of Mrs Nockels’ doctors’ decision to stop treating her.’ But this objection does not work. Even if these avenues of legal recourse had not been available to Mrs Nockels’ family, it still cannot be doubted that a final injunction would have been granted to Mrs Nockels’ family had it been established that the doctors treatment of Mrs Nockels put them in breach of the duty they owed her to treat her with a reasonable degree of care and skill. One self-confessed cynic who read this paper in draft form argued that the fact that an injunction could be awarded against a doctor who was failing to treat a patient properly did not establish that duties of care actually exist, because doctors do not owe their patients a duty *of* care; rather they owe them a duty *to* care for them. The fact that cynics have to resort to such sophistry to support their views indicates just how weak their views actually are.

⁴⁵ [2000] 1 AC 360.

⁴⁶ *Reeves* was decided on the basis that the prisoner in that case was of sound mind and was therefore acting voluntarily when he decided to kill himself: *ibid*, at 368.

⁴⁷ See, for example, *McKew v Holland & Hannen & Cubitts Ltd* [1969] 3 All ER 1621 and *Knightley v Johns* [1982] 1 WLR 349.

⁴⁸ [2000] 1 AC 360, at 367: ‘[If] the law [has imposed] a duty [on someone] to guard against loss caused by the free, deliberate and informed act of a human being...[it] would make nonsense of the existence of this duty if the law were to hold that the occurrence of the very act which ought to have been prevented negated [the existence of a] causal connection between the breach of duty and the loss’ (*per* Lord Hoffmann).

Similarly, in *McGhee v National Coal Board*,⁴⁹ the defendants employed the claimant to clean some brick kilns for them. At the end of each day, the claimant had to cycle home to wash off the brick dust that had accumulated on his body because the defendants had failed to provide him with any washing facilities at work. In so doing, the defendants breached the duty of care they owed the claimant to take reasonable steps to see that he would be reasonably safe working for them. The claimant subsequently developed dermatitis. He was allowed to sue the defendants for compensation even though he could *not* show that the defendants' negligence caused him to develop dermatitis – in other words, he could not show that he would not have developed dermatitis had he been allowed to wash at work and not been forced to cycle home and wash there. Lords Simon and Salmon explained that if the claimant's claim were not allowed, then if A employed B to do work akin to that done by the claimant, A would be free to disregard the duty she would owe B to provide him with washing facilities at work – she would know that if B subsequently developed dermatitis, she would not be held liable because B would be unable to prove that his dermatitis was attributable to A's negligence.⁵⁰

McGhee was of course followed in *Fairchild v Glenhaven Funeral Services Ltd*,⁵¹ where it was held that: if (1) A is employed over the course of his working life by B, C and D; and (2) B breached the duty of care she owed A to see that he would be reasonably safe working for her by exposing him to excessive quantities of asbestos dust; and (3) C and D did exactly the same as B when A worked for them; and (4) A now suffers from a cancer associated with exposure to asbestos dust; and (5) A cannot prove whose negligence – B, C or D's – caused him to develop that cancer; then (6) A will be allowed to sue B, C and D in negligence for compensation for the fact that he now suffers from cancer. One justification that was offered by the House of Lords for its decision in *Fairchild* was that A could not be left without a remedy in the case just described because if he were then employers generally would be left free to breach the duty of care they owe their employees not to expose them to excessive quantities of asbestos dust.⁵²

⁴⁹ [1973] 1 WLR 1.

⁵⁰ See *ibid*, at 9: '[Not to hold for the claimant] would mean that the [defendants] were under a legal duty which they could, in the present state of medical knowledge, with impunity ignore' (*per* Lord Simon of Glaisdale); and at 12: '[Not to hold for the claimant] would mean that in the present state of medical knowledge and in circumstances such as these (which are by no means uncommon) an employer would be permitted by the law to disregard with impunity his duty to take reasonable care for the safety of his employees' (*per* Lord Salmon).

⁵¹ [2003] 1 AC 32.

⁵² See *ibid*, at [33]: 'Were the law [not to allow A's claim in the case we are considering], an employer exposing his employee to asbestos dust could obtain complete immunity against mesothelioma...claims by employing only those who had previously been exposed to excessive quantities of asbestos dust. Such a result would reflect no credit on the law' (*per* Lord Bingham); at [62]: 'a rule requiring proof of a link between the defendant's asbestos and the claimant's disease would, with the arbitrary exception of single-employer cases, empty the duty of content. If liability depends upon proof that the conduct of the defendant was a necessary condition of the injury, it cannot effectively exist' (*per* Lord Hoffmann); and at [155]: 'if the law did [here] impose a standard of proof that no [one claiming compensation for mesothelioma] could ever satisfy, then, so far as the civil law is concerned, employers could with impunity negligently expose their workmen to the risk of...mesothelioma. The substantive duty of care would be emptied of all practical content so far as victims are concerned' (*per* Lord Rodger).

Each of these cases show that if A owes B a duty of care of some description, the courts will go out of their way to ensure that A is not given an *option* to be careless so far as B is concerned. But according to the cynics, A *does* have an option to be careless so far as B is concerned – so why would the courts go out of their way to deprive him of this option? If, on the other hand, the idealistic view is correct, then there is no problem. The courts will go out of their way to ensure that A is not given an option to be careless so far as B is concerned because he is under a legal duty not to be careless so far as B is concerned.

4. Four Arguments in Favour of the Cynical View

To sum up so far, there at least four problems with the cynical view of duties of care in negligence, each of which indicates that the cynical view of those duties of care is wrong and that the idealistic view is correct. But let's see now what arguments can be made in favour of thinking that, despite these problems, the cynical view is in fact correct. There are four arguments that might be advanced in favour of the cynical view. Unfortunately, none of them work.

A. Too many duties

It has been objected to me that if the idealistic view is correct then that would mean every person living in England would be subject to millions of duties. The observation on which this objection is based is correct.

For example, it is well established that if it is reasonably foreseeable that A's doing *x* will expose someone like B to an unreasonable risk of being physically injured, A will owe B a duty to take care not to do *x*. Let's say that there are 100,000 different things that A could do which, it can reasonably be foreseen, will expose someone like B to an unreasonable risk of being injured – he could poison B's water supply, regularly hit a cricket ball into B's back garden, drive his car at 100 mph when B is in the vicinity, and so on. A will then owe B a duty to take care not to do each of these of things – that is, A will owe B 100,000 duties. And that's just B. A will owe roughly the same number of duties to everyone else. So we can easily see how if the idealistic view is correct, every person living in England will be subject to millions of duties.

But is this a problem? The fact that people living in England will be subject to millions of duties if the idealistic view is correct does not automatically indicate that the idealistic view is wrong. For example, not even the most cynical of lawyers would deny that if you take two given individuals, A and B, A will owe B a duty not to torture B – even though this means as a result that any given individual who lives in England will be subject to around 49 million duties, each requiring him not to torture a particular individual who also lives in England.⁵³

Of course, our minds recoil from the idea that each of us might be subject to millions of duties because we automatically think that subjecting us to that number of

⁵³ The latest UK census estimates the population of England to be around 49 million people: see <http://www.statistics.gov.uk/census2001/pop2001/england.asp>.

duties would be oppressive. As a result, we automatically think that if the idealistic view of duties of care in negligence implies (as it does) that we are all subject to millions of duties, then there must be something wrong with the idealistic view. However, there is nothing oppressive in subjecting a given person – A – to millions of duties so long as almost all of those duties are negative in content, requiring A *not* to act in certain ways. A will then find it very easy to comply with all his duties, no matter how many he is subject to. As it happens, almost all of the duties of care in negligence that we are subject to are negative in content. The law will only find that A owes B a positive duty of care in negligence – a duty to do something positive for B – if there exists a ‘special relationship’ between A and B or if A has ‘assumed a responsibility’ to B. As a result, the number of positive duties of care in negligence that any given individual is subject to will be extremely limited. So it is hard to see that the fact that the idealistic view of duties of care in negligence implies that we are each subject to millions of duties gives us any reason to think that the idealistic view is wrong.

B. No duties between strangers

David Howarth raises the following objection to the idealistic view of duties of care in negligence:

‘...the language of duty...sounds unnatural in the absence of a pre-existing relationship between the people involved in the dispute. One might say that to make a promise creates a duty to carry out what was promised and that to fail to do so involves the breach of a pre-existing obligation. But to say that I breached an obligation to the complete stranger that I ran over in the street seems to presuppose a degree of intimacy with the stranger that simply did not exist... [So] the ‘duties’ that negligence law alleges that defendants owe to specific plaintiffs are fictional duties, duties invented after the fact to justify a certain legal result rather than obligations that would be recognised as such at the time of their alleged tortious conduct.’⁵⁴

So if A is driving a car in the vicinity of a pedestrian, B, we say that A owes B a duty to take care not to drive dangerously. An idealist would say that that duty actually does exist. Howarth argues that this shows that the idealistic view of duties of care in negligence is incorrect because strangers cannot owe duties to each other. But this argument is hard to accept. Suppose that I take a gun to the top of a tall tower and line up its sights on a complete stranger to me, B. Does the law not impose on me a duty not to shoot B and does it not impose that duty on me for the benefit of B? If it does – and it does – then I owe B a duty not to shoot him, even though B and I are complete strangers.⁵⁵ But if I can owe B a duty not to shoot him, even though we are complete strangers, then why can I not owe B various duties of care – such as a duty to take care not to drive dangerously when he is in the vicinity of my car? As John Goldberg and Benjamin Zipursky observe, ‘duties of care can and do exist among “strangers”. A pre-

⁵⁴ D. Howarth, above, n 19, 158.

⁵⁵ It is important to recall that A will ‘owe’ B a duty not to do *x* if he has a duty not to do *x* and that duty was imposed on A for B’s benefit: see above, n 9.

existing status or contractual relationship is not necessary to support the existence of some duties of care.’⁵⁶

C. The baby food problem

A much better objection to the idealistic view of duties of care in negligence is suggested by an observation of Fleming James Jr’s.⁵⁷ Suppose A manufactures baby food. Unfortunately, one of A’s tins of baby food – manufactured in June 2001 – became contaminated in the manufacturing process. At the time the baby food was contaminated, A had not taken adequate steps to guard against such contamination occurring and had he done so the baby food would not have become contaminated. The contaminated tin was stored, shipped out and eventually put on sale. B’s mother, who gave birth to B in April 2002, bought the tin of baby food and fed it to B. B fell ill as a result.

In this case B would have no problem in suing A in negligence for compensation⁵⁸ – we would find that at the time A manufactured the tin of baby food, A owed B a duty to take care to see that the baby food was not contaminated, that A breached that duty and that A’s breach caused B to become ill. Now an idealist would say that that duty of A’s actually existed – but, it might be objected, how *could* A have owed B a duty of care in June 2001, when B was only born in April 2002?⁵⁹ It seems impossible that such a duty of care could have been genuinely owed by A to B at the time A manufactured the baby food that made B ill. But if A did not really owe B a duty of care in manufacturing the baby food, that casts doubt on whether the idealistic view of duties of care in negligence is correct – after all, if the duty of care which is said to exist in this case does not actually exist, why should we believe in the existence of the duties of care which are said to exist in other negligence cases?

However, an idealist would be able to maintain that A *did* owe B a duty of care in this case. An idealist could argue, ‘At the time A manufactured the tin of baby food at issue in this case, A had a duty to take care to see that it was not contaminated. This duty was imposed on him for the benefit of whoever ate the tin of baby food in the future. So A’s duty was owed to “whoever eats the tin of baby food in the future”. As things turned out, B ate the tin of baby food. So, as things turned out, A’s duty was owed to B – even though B did not even exist at the time the tin of baby food was manufactured.’

A cynic might object, ‘This argument cannot be accepted because it gives rise to a paradox. If *no one* ate the tin of baby food – if, say, the tin was destroyed in transit – it seems to follow from the above argument that A did not owe *anyone* a duty of care in manufacturing the tin of baby food and that therefore A did not have a duty of care in manufacturing that baby food. So whether or not A had a duty of care in manufacturing

⁵⁶ J. Goldberg & B. Zipursky, ‘The Restatement (Third) and the Place of Duty in Negligence Law’ (2001) 54 *Vanderbilt LR* 657, 742-743.

⁵⁷ See F. James Jr, ‘Scope of Duty in Negligence Cases’ (1953) 47 *NorthWestern Univ LR* 778, 788.

⁵⁸ Of course, B would not have to sue A in negligence; she could bring an action under the Consumer Protection Act 1987.

⁵⁹ Even if, for legal purposes, we take B as existing as a person from the moment of conception, B was only conceived in August 2001 – so the problem of how A could have owed B a duty of care in June 2001 still exists.

the tin of baby food will depend on what happened to that tin *after* it was manufactured – which is impossible.’ However, this counter-argument does not work. The fact that A did not owe anyone a duty of care in manufacturing the tin of baby food does not mean that he did not have such a duty in manufacturing the baby food. He *did* have such a duty; but, as things turned out, that duty was not imposed on him for the benefit of any particular individual – the duty was therefore owed to no one in particular.⁶⁰

D. The popularity of cynicism

The fourth and final argument that can be made in favour of the cynical view of duties of care in negligence goes as follows: ‘If the idealistic view of such duties is correct, why do virtually all of the leading tort academics adopt a cynical view of those duties? Doesn’t that indicate that the cynical view has more going for it than the idealistic view?’ It does not. At least four alternative explanations can be provided as to why the cynical view of duties of care in negligence is so popular nowadays among tort academics.⁶¹ They are set out in the next section.

5. The Sources of Cynicism

A. The influence of Sir Percy Winfield

It is easy to fall into the trap of thinking that the great tort lawyer, Sir Percy Winfield, was a cynic. After all, his classic article ‘Duty in Tortious Negligence’⁶² is replete with cynical-sounding statements such as ‘[the duty requirement] in negligence might well be eliminated from the tort of negligence.’⁶³ However, the better view is that Winfield was not a cynic; he was an *ultra-idealist*. He believed that if you take any two given individuals, A and B, A will *always* owe B a duty to take care not to harm B or to fail to save B from harm. If, then, A carelessly harms B or fails to save B from harm, he will breach a duty of care owed to B.⁶⁴ So Winfield could not understand why, if B could

⁶⁰ Such duties are not unusual: duties which are imposed for the benefit of the community as a whole are not owed to anyone in particular. See above, n 9.

⁶¹ There may of course be other explanations. For example, it is a striking fact that those who take the view that the law encourages us to act in economically efficient ways tend to adopt a cynical view of duties of care in negligence: see, for example, J. Coleman, *The Practice of Principle* (2001), 12: ‘most economists of law...[deny] that the concept of duty plays any part in tort law at all.’ Why this should be so is too difficult to explain here but points up a fifth possible explanation of the popularity of the cynical view of duties of care in negligence: the many tort scholars who believe that the law encourages us to act in economically efficient ways seem as a result to be pre-disposed to accept that the cynical view of duties of care in negligence is correct and to reject the idealistic view of those duties of care.

⁶² (1934) 34 *Col LR* 41.

⁶³ *Ibid*, 66.

⁶⁴ Winfield was not, of course, alone in being an ultra-idealist. Buckland seems also to have been an ultra-idealist: see his ‘The Duty to Take Care’ (1935) 51 *LQR* 637, 641: ‘My duty is a duty not to harm others by my carelessness and that duty I owe to everyone. It seems absurd to say that a careless driver owes a duty

show that A had carelessly harmed her or failed to save her from harm, the law required her to show *in addition* that A had breached a duty of care owed to B in acting as he did before it would grant her a remedy. If B has shown that A carelessly harmed her or failed to save her from harm, surely she has *already* shown that A breached a duty of care owed to her?⁶⁵ So, to Winfield, the duty requirement in negligence cases was ‘superfluous’⁶⁶ because it is always satisfied. According to Winfield, in any given negligence case, one can take it as read that the defendant owed the claimant a duty to take care not to harm the claimant or to fail to save the claimant from harm – the only real issue is whether the defendant carelessly harmed the claimant or carelessly failed to save the claimant from harm, thereby breaching the pre-existing duty of care that he owed the claimant.

Winfield attempted to back up his claim that the duty of care requirement in negligence cases is ‘superfluous’ by pointing out that, before the forms of action were abolished, A could sue B in negligence in five situations: (1) where B was employed as an innkeeper or a common carrier or in some other kind of common calling and he performed his job so incompetently that A suffered harm; (2) where B was employed in a public office and performed his job so incompetently that A suffered harm; (3) where B held goods on a bailment for A and due to his carelessness, those goods were lost or damaged; (4) where B carelessly failed to perform some duty arising from prescription or custom and A suffered harm as a result; and (5) where B carelessly allowed a dangerous thing to get out of control and A suffered harm as a result.⁶⁷ In each of these situations, Winfield pointed out, if A wanted to sue B in negligence, all he had to do was to show that B had been careless – he did not have to show *in addition* that B had owed him a duty of care not to act in the way B did. It was only when the forms of action were abolished that the courts – very much by accident, according to Winfield – fell into the habit of requiring someone who wanted to sue someone else in negligence to prove not only carelessness on the part of the defendant but that that carelessness amounted to a breach of a duty of care owed to the claimant.

to everyone who is there but none to one who is not there.’ See also the judgment of Andrews J in *Palsgraf v. Long Island Railroad Company*, (1928) 162 NE 99, 103: ‘Everyone owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others.’

⁶⁵ Winfield, above n 62, 44. Compare the position with other torts such as battery or trespass to land. If A wants to sue B for battery, all A has to do to win his case is show that B hit him when she had no lawful justification for doing so. He does not have to show *in addition* that B breached a duty owed to A in acting as she did because if she hit him when she had no lawful justification for doing so, it is self-evident that she breached a duty owed to A in doing so – it is already well-established, time out of mind, that if you take two given individuals they will each owe the other a duty not to hit the other if they have no lawful justification for doing so. Similarly, if A wants to sue B for trespassing on his land. A will not need to show that B owed him a duty not to trespass on his land because it is already well-established that B will have owed him such a duty. All A will have to do to win his case is show that B walked on his land when she had no lawful justification for doing so. I daresay that the same is true nowadays of negligence cases which involve a claimant suing a defendant for running her down. The claimant will not need to spend time showing that the defendant owed her a duty to take care not to run her down – that is so well-established that it need not be argued about. All she will have to do to win her case is show that the defendant carelessly ran her down.

⁶⁶ *Ibid.*, 43, 66. Similarly, Buckland thought that the duty of care requirement in negligence was an ‘unnecessary fifth wheel on the coach’: Buckland, above n 64, 639.

⁶⁷ Winfield, above n 62, 44-48.

While no serious lawyer would nowadays endorse Winfield's ultra-idealism,⁶⁸ Winfield's historical arguments have proved very influential in convincing other tort lawyers that: (1) for several centuries liability in negligence under English law was not based on the idea that the defendant had breached a duty of care owed to the claimant; and (2) the idea of requiring the claimant to show that the defendant owed her a duty of care before she would be allowed to sue the defendant in negligence was originally quite foreign to English law and only got into our law by virtue of a historical accident.⁶⁹

It may, of course, be disputed whether either of these claims are actually correct. It is perfectly possible to argue, for example, that liability in negligence under English law has *always* been based on the idea that the defendant has breached a duty of care owed to the claimant.⁷⁰ When the forms of action held sway, in each of the five situations where an action in negligence could be brought by A against B, the requirement that B owed A a duty of care would automatically be satisfied. So if A wanted to show that B had breached a duty of care owed to him, all he had to do was to show that B had carelessly harmed him.⁷¹ When the forms of action were abolished it became possible to bring claims in negligence outside the original five situations where a claim in negligence could be brought. As a result, it could no longer be guaranteed in any given situation where A sued B in negligence that B had owed A a duty of care. So if A wanted to sue B in negligence it was not enough for him to show that B had carelessly harmed him; he had also to show that B had owed him a duty to take care not to act in the way she did.

⁶⁸ For example, no serious lawyer could argue that if you take two given individuals, A and B, A will always owe B a duty to save him from harm or a duty to take care not to cause him some kind of harm falling short of physical injury. A serious lawyer might attempt to argue that A will always owe B a duty to take care not to cause him physical injury. However, even this seems too ambitious: (1) it involves doing violence to the reasoning in cases such as *Donoghue v Stevenson* [1932] AC 562 and *Palsgraf v Long Island RR*, 162 NE 99 (1928), recasting such cases as 'breach' or 'remoteness of damage' cases rather than 'duty' cases; (2) there are occasions where A will be allowed to injure B against B's will, such as when A is acting in self-defence. For criticisms of Winfield's ultra-idealism, see G. Williams, 'The Foundations of Tortious Liability' (1939-41) *CLJ* 111; R.G. McKerron, above n 10; F.H. Lawson, 'The Duty of Care in Negligence: A Comparative Study' (1947) 22 *Tulane LR* 111.

⁶⁹ See T.W. Price, 'The Conception of "Duty of Care" in the *Actio Legis Aquiliae*' (1949) 66 *South African LJ* 171, 178; W. Prosser, *Selected Topics on the Law of Torts: The Thomas M Cooley Lectures, 4th Series* (1953), 209-210; R.W.M. Dias, above n 22, 401; D. Ibbetson, 'The Tort of Negligence in the Common Law in the Nineteenth and Twentieth Centuries' in E.J.H. Schrage (ed), *Negligence: The Comparative Legal History of the Law of Torts* (2001), 235-236; J. Fleming, *The Law of Torts*, 9th ed (1998), 149.

⁷⁰ See P.B.H. Birks, above, n 10; F. James Jr, above n 57, 779.

⁷¹ Winfield himself conceded that the lack of reference to the notion of 'duty' in negligence cases brought before the forms of action were abolished might be accounted for by the fact that, at that time, claims in negligence could only be brought in situations where the duty requirement was already satisfied. In the context of a discussion of the negligence liability of common carriers, Winfield remarked, '...nobody talked about a precedent duty to take care, for by professing a common calling a man in mediaeval times in effect assumed what we should call a status from which the duty sprang' (above n 62, 45). Talking of the period before the forms of action were abolished, Winfield observed, 'There were many sets of circumstances in which a man was civilly liable for inadvertent harm to his fellow-creatures. In not one of them can it be said that there was any formal and conscious postulation of a precedent duty on the defendant's part to take care. *Such duty was repeatedly taken for granted* and [arose out of] the defendant either having put himself in a position in which any sensible man would act carefully...or in having assumed something like a status which demanded professional skill on his part' (ibid, 48-49; emphasis added).

Be that as it may, the important point for our purposes is that, thanks to Winfield, many tort lawyers nowadays believe that claims (1) and (2), above, *are* correct. As a result, many tort lawyers are nowadays predisposed to accept the cynical view of duties of care in negligence, which suggests that the duty of care requirement in negligence is not actually an essential part of our law; and for the same reason, many tort lawyers are nowadays predisposed to reject as unsound the idealistic view of duties of care in negligence, which insists that liability in negligence under English law is based on the idea that the defendant has breached a duty of care owed to the claimant.

B. The tripartite classification of common law obligations

It is popularly believed that all our common law obligations⁷² can be divided up into three groups, according to how they arise: some of them arise out of the making of a contract; some of them arise out of the fact that someone has committed a tort; and the rest arise out of the fact that someone has been unjustly enriched.⁷³ However, this is an oversimplification. Not all of our common law obligations can be said to arise in response to the making of a contract or someone's committing a tort or someone's being unjustly enriched; some arise out of some other kind of event.⁷⁴ So it is more accurate to say, as Peter Birks does, that 'every [common law obligation] arises [either] from a contract, from a [tort], from an unjust enrichment, or from some other kind of event.'⁷⁵ But what is important for our purposes is that it is still popularly believed that *all* of our common law obligations arise either from the making of a contract or from the commission of a tort or from the fact of someone's being unjustly enriched. Let's call someone who believes this, a *trichotomist*.

The fact that so many legal academics nowadays are still trichotomists provides us with a second explanation as to why so many tort academics nowadays endorse the

⁷² 'Obligation' is just a convenient word for a duty which is owed to another, as opposed to a duty which is owed to no one in particular.

⁷³ See J. Cooke & D. Oughton, *The Common Law of Obligations*, 3rd ed (2000), 5; A. Burrows, 'Contract, tort and restitution – a satisfactory division or not?' (1983) 99 *LQR* 217.

⁷⁴ For examples, see P.B.H. Birks, *An Introduction to the Law of Restitution* (1989), 48. The point made here should be obvious to anyone who acknowledges that a tort is a form of civil wrong. If a tort is a form of civil wrong – and it is – then someone who commits a tort breaches a duty owed to another; in other words, someone who commits a tort breaches an obligation. This obligation is usually a common law obligation. But where does this obligation come from? It does not arise out of the making of a contract or the fact of someone's being unjustly enriched and it makes no sense to say that it arises out of the committing of a tort (see, on this, P.B.H. Birks, 'Rights, wrongs and remedies' (2000) 20 *OJLS* 1, 22). It must arise out of some other event. In light of this, it is puzzling why Andrew Burrows – who acknowledges that a tort is a form of civil wrong – continues to insist that 'most of' our common law obligations can be analysed as arising in response to the making of a contract or the commission of a tort or the fact of someone's being unjustly enriched: see his *Understanding the Law of Obligations* (1998), 3. The truth is quite the opposite: *most* of our common law obligations do *not* arise as a result of a contract being made or a tort being committed or someone's being unjustly enriched; they arise from some other event such as 'the event of attaining capacity as a citizen or from the assumption...of a position connoting special responsibilities': P.B.H. Birks, 'Definition and division: a meditation on Institutes 3.13' in P.B.H. Birks (ed), *The Classification of Obligations* (1997), 12.

⁷⁵ *Ibid*, 19.

cynical view of duties of care in negligence. The reason is that a trichotomist will be unable to accept that duties of care in negligence actually exist because such duties – if they existed – would not arise in response to someone’s making a contract or committing a tort or being unjustly enriched. So a trichotomist will be automatically predisposed to accept the cynical view of duties of care in negligence, which says that such duties do not actually exist; for the same reason, he will be hostile to the idealistic view of duties of care in negligence, which says that such duties actually do exist.

C. The influence of French law

Article 1382 of the French Code Civil provides that: ‘Any human deed whatsoever which causes harm to another creates an obligation in the person by whose fault it was caused to compensate it.’ What exactly does ‘fault’ (in French, *faute*) mean here? There seems to be an emerging consensus that someone will be at ‘fault’ if he has behaved in an unreasonable way.⁷⁶ So Article 1382 effectively provides that if B suffers some kind of harm as a result of A’s unreasonable conduct, B will be entitled to sue A for compensation for that harm.

Now there are some academics who think (or assume) that there exists a ‘common law of Europe’ under which English law and French law and German law and so on essentially give effect to the same principles of liability.⁷⁷ It should be obvious that such academics will be automatically predisposed to accept that the cynical view of duties of care in negligence is correct. For, as we have seen, if the cynical view is correct, then English law *will* be very similar to French law: negligence liability in England will be fault-based,⁷⁸ just as it is in France. So someone who views the English law of negligence with cynical spectacles on will be able to say, as David Howarth does, that while the scope of liability in negligence under English law has always been hedged round with ‘restrictions and reservations, the underlying principle [of liability] is the same in English law as [it is] in [France] – fault, including both failure to act properly and acting badly, which causes legally recognised injury, gives rise to an obligation to pay compensation to the people who have been harmed.’⁷⁹

In like fashion, those who think there exists a ‘common law of Europe’ will be automatically predisposed to reject the idealistic view of duties of care in negligence. For if they accepted that the idealistic view was correct, then they would have to accept that,

⁷⁶ F.H. Lawson & B. Markesinis, *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law*, vol 1 (1982), 98 (defining *faute* as ‘an error of conduct...conducting [oneself] in an anti-social manner’); W. van Gerven, J. Lever & P. Larouche, *Tort Law* (2000), 302: ‘*faute*...refers...to conduct which is regarded – objectively – as unacceptable behaviour in society’; K. Zweigert & H. Kotz, *Introduction to Comparative Law*, 3rd rev’d ed (1998), 619: fault involves ‘criticable conduct which a responsible person similarly circumstanced would not have committed’ (quoting from H. Mazeaud, L. Mazeaud & A. Tunc, *Traité Théorique et Pratique de la Responsabilité Civile* (1965)). See also J. Bell, S. Boyron & S. Whittaker, *Principles of French Law* (1998), 358-359.

⁷⁷ See, for example, B. Markesinis, ‘The not so dissimilar tort and delict’ (1977) 93 *LQR* 78; C. von Bar, *The Common European Law of Torts*, vol 1 (1998), vol 2 (2001).

⁷⁸ See above, text at nn 15-19.

⁷⁹ D. Howarth, above, n 19, 25.

in fact, English law is very *different* from French law. If the idealistic view of duties of care is correct, the principle of liability which underlies the English law of negligence goes as follows: ‘If B suffers harm as a result of A’s breaching a duty of care owed to B, B will normally be entitled to sue A for compensation for that harm.’ This, of course, bears no relation to the principle of liability set out in Article 1382.⁸⁰

So this gives us a third possible explanation as to why so many tort academics nowadays take a cynical view of duties of care in negligence: some such academics may think (or assume) that the English law of negligence is essentially based on exactly the same principles of liability as the French law of negligence. This view is only tenable if the cynical view of duties of care in negligence is correct. So such academics will be automatically pre-disposed to accept that the cynical view is correct. In the same way, they will be automatically pre-disposed to reject the idealistic view of duties of care in negligence, which implies that the English law of negligence is based on very different principles of liability from the French law of negligence.

D. The rage for liberty

Many cultural commentators have observed that societies such as the one we live in – by which I mean, modern Western liberal societies – are peculiarly hostile to the whole notion of duty.⁸¹ So the commentator David Selbourne observes that the notion of obligation is today ‘in eclipse’.⁸² In modern Western liberal societies, ‘obligations of all kinds – to oneself, to one’s familiars, to the community, to the civic order – [are] contemplated with increasing discomfort, or [are] neglected, or [are] refused entirely.’⁸³ Instead, a ‘dutiless individualism’ reigns where everyone seeks to advance their own interest without concern for the interests of others or the wider public good.

Selbourne’s analysis is echoed by the jurist Robert Bork, who notes that Western liberal societies over the last few decades have ‘constantly moved away from...the constraints on personal liberty imposed by religion, morality, law, family and community.’⁸⁴ Similarly, Francis Fukuyama notes that,

‘Anyone who has lived through the decades between the 1950s and the 1990s in the United States or other Western countries can scarcely fail to recognize the massive value changes that have taken place over this period. These changes in norms and values are complex, but can be put under the heading of *increasing individualism*... [People nowadays] question

⁸⁰ Of course, things would be different if *faute* under French law involved the breach of a duty owed to another. It was thought at one time that *faute* did indeed involve just this. See, for example, F. H. Lawson, above n 10, 31: ‘French jurists now recognise that for the act or omission to be characterised as *faute* it is not sufficient that the defendant should have failed to attain the standard of diligence normally shown by a reasonable man; the circumstances must have been such as to make his failure wrongful.’ See also F.H. Lawson, above, n 68, 118. However this view of *faute* is now generally rejected: see the texts cited at n 76, above.

⁸¹ See, in addition to the texts cited below, J. Collier, *The Rise of Selfishness in America* (1991); D. Frum, *How We Got Here: The 70’s* (2000); G. Himmelfarb, *One Nation, Two Cultures* (2001).

⁸² D. Selbourne, *The Principle of Duty* (1997), 2.

⁸³ *Ibid*, 166.

⁸⁴ R. Bork, *Slouching Towards Gomorrah: Modern Liberalism and American Decline* (1996), 61.

nowadays the authority not just of tyrants and high priests, but of democratically elected officials, scientists, and teachers. They chafe under the constraints of marriage and family... Individualism, the bedrock virtue of modern societies, [has begun] to shade over from the proud self-sufficiency of free people into a kind of closed selfishness, where maximizing personal freedom, without regard for responsibilities to others becomes an end in itself.⁸⁵

If this is right and our society has since the 1960s become one which is deeply hostile to the notion of duty then this provides us with a fourth explanation as to why so many tort academics are cynics nowadays. It may be that in adopting a cynical view of duties of care in negligence, some tort scholars are simply reflecting the *mores* of the society they live in – that is, a society which is profoundly resistant to the idea that we owe duties to each other and seeks to deny the existence of such duties whenever possible.⁸⁶

6. Conclusion

We began by contrasting two different ways of thinking about duties of care in negligence. According to the first view – the cynical view – if A is said to owe B a duty of care, A will not actually be legally required to be careful so far as B is concerned: A will merely be required to pay B damages if he carelessly harms B in some way. We have seen that the cynical view enjoys overwhelming popularity among tort academics today. However, enough has been said in this article to indicate that the cynical view of duties of care in negligence is wrong, and that we should adopt the idealistic view of such duties, according to which if A is said to owe B a duty of care, A is actually legally required to be careful so far as B is concerned. As we have seen, the cynical view of duties of care in negligence suffers from four flaws or problems, each of which indicate that the idealistic view of such duties is correct. Moreover, none of the arguments that might be made in favour of adopting the cynical view of duties of care in negligence stand up to scrutiny. Given this, I would suggest that the case for adopting the idealistic view of duties of care in negligence is overwhelming.

⁸⁵ F. Fukuyama, *The Great Disruption* (1999), 47-48 (emphasis in original).

⁸⁶ It might be argued against the writers quoted above that modern Western liberal societies are characteristically obsessed with *rights* and that, as rights imply duties, such societies are, by implication, in fact extremely receptive to the idea that we owe duties to each other. But this is not quite correct. The sort of rights that are characteristically claimed in modern Western liberal societies are rights against the *State* (rights to education, to welfare, to free hospital treatment) and rights against *companies* (rights to be paid a decent wage, to be given maternity/paternity leave, to be given redundancy pay). So people in modern Western liberal societies are very receptive to the idea that the State and companies owe *them* duties. But that does not mean that they are receptive to the idea that *they* might owe *other people* duties.

Footnotes