Legal Studies, Vol. 36 No. 3, 2016, pp. 491–512
DOI: 10.1111/lest.12121

Making sense of negligence

Steve Hedley*
University College Cork

What is negligence? Our answers to this are frequently misleading, because we turn all our attention on to what doctrine says rather than asking how it is actually used. So we routinely talk of personal liability, even though we know very well that individuals (as opposed to organisations, typically insurers) do not pay damages. We think of negligence doctrine as if it were applied automatically and without bias, when in fact the complex insurance arrangements involved have rather decided biases. And we treat the development of the law purely as a matter of evolving judicial thought, when in fact legislatures and insurers also routinely modify the system in response to new realities. The result is that fundamental change has occurred under the very noses of theorists, who still tell us that negligence holds individual defendants responsible for their wrongdoing (it does not) or that the economic effect of tort rules is to deter defendants (there is not much reason to think this is so). Why are the leading theoretical justifications of negligence – corrective justice, responsibility theory and economic theory – so dependent on myths? Is it because the myths do not matter? Or is it that, in fact, we have no good justification for the system as it works in practice at all – we have no good theory of why negligence makes sense because it does not, in reality, make sense?

Steve Hedley, School of Law, University College Cork, College Road, Cork T12 YN60, Ireland. Email: s.hedley@ucc.ie

> *In today's tort system, we may have the rhetoric of personal responsibility, but we certainly do not have the reality.*[1]

INTRODUCTION

What precisely is 'the tort of negligence', and does it serve us well? Those are the questions that this essay addresses. Much of the language in which negligence is framed has an ethical yet common-sense air – the talk is of reasonable foresight, due care, causes and consequences, damage – and the focus is on the relationship between the claimant who has been injured and the defendant responsible for that injury. And many take this as evidence that the tort is based on notions of personal responsibility or corrective justice. Not all are convinced. The argument for 'negligence as ethics' is strong if we focus on the language of doctrine, but matters are different when we look at the actual

* Many thanks to my colleague Patrick O'Callaghan, who commented on an earlier draft. An earlier version was presented at the IVR 2015 Conference at Belfast on 23 October 2015; many thanks to Alison Clarke, Niamh Connolly, Deirdre Ni Fhloinn and others who made useful comments. Many thanks also to the editors and reviewers at Legal Studies. All comments and criticisms are very welcome.

1. SG Gilles 'The judgment-proof society' (2006) 63 Wash & Lee L Rev 603 at 715.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

operation of the tort system: we need to look at what the law actually does in the UK and Ireland,[2] not merely at what some legal officials and law teachers say it does.

To clear the ground, three particular propositions can uncontroversially be stated to be myths – the facts are widely known, though (being inconvenient for certain types of theory) have not received the emphasis they deserve.[3] Myths are, of course, not always or necessarily bad things; indeed, at various points in legal history they have proved quite beneficial. But clarity of thought demands that we know when we are dealing with a fiction and when we are not. Nor are these myths particularly arcane. Everyone knows they are myths; the difficulty is that we do not act on that knowledge.

LAW AND PRACTICE

Three myths

The first myth told in relation to negligence is the myth of personal liability. *Personal* defendants – defendants who are real people as opposed to corporate bodies – hardly ever carry the financial consequences of negligence: they make poor targets for legal action, as their finances are rarely capable of paying the compensation that is due. Many are covered by liability insurance, usually either because the law requires it or because it was bundled in with a necessary financial product (such as home insurance). Accordingly, corporate bodies (particularly insurers, government and large business concerns) are the almost invariable targets of legal action.[4]

That is not to deny that *in theory* a personal defendant can be made to pay for his or her negligent conduct – merely to note that this hardly ever happens. Neither is it to say that this fictitious responsibility is an irrelevance – on the contrary, establishing such liability is often an essential step on the claimant's way to an award (though the personal defendant will not fund that award). Nor is it to say that private law duties *generally* are fictitious – other types of personal private liability, such as debts, are very real indeed, and many peoples' working lives are organised around accommodating that reality. But *personal* liability *for negligence* is a myth.

The second myth is that legal doctrine is the same thing as a factual description of how disputes are resolved. In a fantasy world where access to the courts is easy, quick and cheap, no doubt the two would be the same: the rules a court would apply might radiate outwards and be applied by people in their ordinary disputes. In the real world, the gap between legal doctrine and actual dispute resolution is considerable.

Examples are many. The size of the claim will be key – small-value claims get a relatively easy ride (indeed, there may be no real enquiry into liability), and high-value

2. It seems to me that most, though not all, of the observations here are also applicable to Australian and Canadian jurisdictions; though I am open to correction by anyone who actually knows about those systems in depth. New Zealand is well known to tort lawyers as a special case, and is mentioned throughout. Some observations also apply to many of the states of the US, though to a lesser extent: note, in particular, the continued existence of 'blood money' lawyers who *do* try to recover from personal defendants: T Baker 'Blood money, new money, and the moral economy of tort law in action' (2001) 35 L & Soc'y Rev 275 – though, as Baker emphasises, their existence is more important symbolically than otherwise, and '[r]eal money from real people accounts for a very small fraction of tort settlement dollars' (at 277).

3. For a broader account of widespread misconceptions in this area, see R Lewis and A Morris 'Challenging views of tort' [2013] J Pers Inj L 69 (part 1) and 137 (part 2).

4. See further below, text at nn 23–25.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

claims get correspondingly harsher treatment.[5] Many other factors affect the relative positions of the parties and hence the eventual result: rules on costs in particular will have an influence. If one side needs speedy resolution but the other does not, the patient side has an advantage and can secure better terms. Factors irrelevant before a judge (such as one side's need to preserve their reputation, or the limit on the insurance cover backing the claim) may influence a settlement. On many points the parties cannot know how a judge would rule, and most conclude that it is not worth finding out, particularly if the expense of doing so is significant:[6] the wide degree of discretion afforded to trial judges creates uncertainties that can be exploited in negotiation, in practice leading to downward pressure on settlement terms.[7] These factors are not random – their influence on the claim is predictable, systematic and indeed obvious, once we are prepared to examine not simply the relevant law but also the way in which it is applied.

So an assessment of doctrine which assumes that it is applied automatically, as if by magic, is likely to be flawed.[8] It is not that the 'hard case', requiring detailed consideration from the highest courts, does not exist; rather, we should not forget that the overwhelming majority are 'easy cases' and so are resolved differently. Traditionally, we have thought of the judicial opinion as the proper end of the court process, so much so that some wondered if settlement by the parties was subversive of justice;[9] whereas today settlement is officially encouraged, and some suggest that settlement itself can in fact achieve all that we ask of the legal process,[10] and even that *every* concluded action should realistically be regarded as at least *partially* settled.[11] For present purposes, it is not necessary to go so far; merely to note that a picture of the legal system that ignores settlement, or treats it as the exception rather than the rule, is significantly incomplete.

The third myth is the myth of negligence's seclusion – that liability is guided only by legal principle, precedent and (occasionally, controversially and to some minds regrettably) the public interest – that the law's ideals do not necessarily have much to do with ideas of contemporary public policy or society's collective needs. Yet, obviously enough, both government and the market have a huge influence on how the system works in practice, and the development of negligence takes place on a much wider stage.[12] The myth confuses the prevalent style of opinion-writing (which does indeed emphasise rather remote concerns) with the legal system itself. Judges may not be much interested in markets or politicians, but markets and politicians are decidedly interested

5. Lewis and Morris, above n 3, Part 1 at 73–80.

6. On the settlement process generally, see D Harris, D Campbell and R Halson *Remedies in Contract and Tort* (Cambridge: Cambridge University Press, 2nd edn, 2005) ch 24. For an interesting case-study, see S Halliday, J Ilan and C Scott 'Street-level tort law: the bureaucratic justice of liability decision-making' (2012) 75 Mod L Rev 347. For reflections on the difference between abstract application of doctrine and 'bargaining in the law's shadow', see P Cane *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002) ch 7.

7. D Harris 'Claims for damages: negotiating, settling or abandoning' in D Harris and others (eds) *Compensation and Support for Illness and Injury* (Oxford: Clarendon Press, 1984) pp 79, 132–134.

8. Cf S Hershovitz 'Harry Potter and the trouble with tort theory' (2010) 63 Stan L Rev 67.

9. Especially O Fiss 'Against settlement' (1984) 93 Yale L J 1073.

10. L Bilsky and T Fisher 'Rethinking settlement' (2014) 15 Theor Inq L 77.

11. J Prescott and K Spier 'A comprehensive theory of civil settlement' (2016) 91 NYU L Rev 59.

12. A key text here is TT Arvind and J Steele (eds) *Tort Law and the Legislature* (Oxford: Hart Publishing, 2013).

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

in them, and their influence will be felt whether or not judicial opinions acknowledge it. Remedies for accidents, injuries and death are of intense concern to society at large, and this concern has manifested itself in governmental and business action throughout the history of the tort: its operations are constantly modified as insurers revise their policies and their rates, as lawyers decide how best to seek further clients, as adjustments to social security provision modify claimants' incentive to sue, and as legislatures change the ground rules either of negligence itself, or of procedure, or of litigation finance.[13]

So alongside the history of the law of negligence there runs a parallel history of how the market and the body politic view negligence. The tort emerged in the late nineteenth century as one way of satisfying increasing public demands for safety and financial security. In some areas, it was encouraged (notably road traffic[14]); in other areas, other ways of allocating the risks were thought preferable (notably worker's compensation[15]). With the introduction of the welfare state, various political decisions increased demand for tort (notably the abolition of workman's compensation, the creation of monolithic health authorities, and the introduction of legal aid and, somewhat later, of compulsory employer's liability). The attractions – to lawyers, to insurers, to judges, to victims and potential victims – of expanding the system were obvious, but (in retrospect at least) it is equally obvious that expansion could not continue indefinitely. By the 1970s, doubts about the working of tort (by then a massive undertaking) were felt, though no clear proposal for abolition emerged.[16] By the 1990s, pressure for reform was unstoppable (as was by then the case in many common-law systems), though it manifested itself in repeated attempts to make the legal system cheaper and more efficient rather than to abolish tort entirely. Currently, the system seems to stumble from crisis to crisis, as claimant practitioners become more inventive in pursuing claims, but pay a serious political price whenever they are *too* successful in that regard. The level of claiming, and what it tells us about modern safety culture, is a matter of continual debate.[17]

(A lesser version of this third myth is that negligence was *originally* a purely judicial creation, but has now 'disintegrated'[18] or suffered a 'catastrophe'[19] – which seems to

13. Note the related argument (not pursued further here) that other torts too are more 'public' than is often supposed: eg M Lee 'The public interest in private nuisance: collectivities and communities in tort' (2015) 74 Camb L J 329; D Priel 'A public role for the intentional torts' (2010) 22 King's L J 1.

14. Note especially the introduction of compulsory road insurance (Road Traffic Act 1930 (England/Wales and Scotland); Motor Vehicles and Road Traffic Act 1930 (Northern Ireland); Road Traffic Act 1933 (Ireland)), and the establishment of the Motor Insurers' Bureaus (UK 1946, Ireland 1955).

15. Workmen's Compensation Act 1897 (UK).

16. A proposal for a no-fault scheme for road traffic injuries, which would have greatly reduced the importance of negligence liability in that area, emanated from the Pearson Commission (*Report of the Royal Commission on Civil Liability and Compensation for Personal Injury* Cmnd 7054, 1978), but was not implemented. For the public debates over the Commission's recommendations see P Bartrip 'No-fault compensation on the roads in 20th century Britain' (2010) 69 Camb L J 263 at 274–283.

17. On that question, see esp R Lewis 'Compensation culture reviewed: incentives to claims and damages levels' (2014) 4 J Pers Inj L 209.

18. A Beever *Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) pp 1–19.

19. N McBride 'Rights and the basis of tort law' in D Nolan and A Robertson (eds) *Rights and Private Law* (Oxford: Hart Publishing, 2012) pp 331, 331–334, 359–360. In both cases, it is unclear whether this is meant as serious legal history – there is no engagement with actual historical accounts of the periods referred to.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

mean that over the years it has become corrupted by the influence of greedy lawyers and their clients, easy availability of insurance cover, and legislatures and courts only too willing to spend other peoples' money for them. But this lesser myth is still a myth. There was no Golden Age, and continual tweaking of negligence recovery to suit the public interest has always been the rule. Negligence in a recognisably modern form is a late nineteenth century phenomenon, and grew up *alongside* strong insurance markets and governments that were very willing to modify fundamental legal institutions if the need to do so was demonstrated.[20])

The uniqueness of negligence

In summary, therefore, the way in which negligence responds to accidental damage is influenced by a number of factors (the doctrine employed by the judiciary being one, but only one); and when considering what negligence is and what its merits are, it is natural to compare it with other legal and social institutions that respond to accidental damage. Some mechanisms address primarily the injured (first-party insurance, social security, the health service and the fire service); others attempt to deal appropriately with injurers or likely future injurers (health and safety regulation, consumer protection bodies and the general criminal law). Of course, each of these institutions is in some respects unique. What is unique about the law of negligence? The answer seems to be that tort is unusual in providing a *link* between injured and injurer (tort's 'bilateral structure', as the Kantians put it). An injury is of no significance unless an injurer can be identified, and vice versa. It is this link that is its major selling point: it allows negligence to contribute to a number of desirable goals (compensating the injured *and* assigning blame *and* deterring further injury), and it leaves the initiative in the hands of the claimant. But this link is also its major weakness: establishing such a link is usually cumbersome and expensive, diverting money and other resources away from victims and towards their lawyers.

That the unique point of negligence is to draw a connection between claimant and defendant has been observed by many. The point has been put starkly by David Enoch, leading him to pose his *What's Missing in New Zealand*? challenge: Suppose the law of negligence were abolished in favour of a state compensation fund (as happened some decades ago in New Zealand in relation to personal injuries). The resulting law could no longer be recognised as a recovery in negligence, but would the resulting legal system really be deficient? If so, what would be missing? If the unique approach that negligence represents were to be closed off, what (if anything) would we have lost?[21]

The strange thing is that while this connection between claimant and defendant is agreed to be the characteristic feature of negligence, it appears to be broken, or at best

20. See eg P Rawlings '"Without feeling and without remorse"? making sense of employers' liability and insurance in the nineteenth century' Queen Mary School of Law Legal Studies Research Paper No 199/2015, available at http://ssrn.com/abstract=2608917 (accessed 11 May 2016); S Hedley 'Tort and personal injuries, 1850 to the present' in TT Arvind and J Steele (eds) *Tort Law and the Legislature* (Oxford: Hart Publishing, 2013) p 235; W Cornish et al *Oxford History of the Laws of England volume XII* (Oxford: Oxford University Press, 2010) pp 903–1032.

21. D Enoch 'Tort liability and taking responsibility' in J Oberdiek (ed) *Philosophical Foundations of the Law of Torts* (Oxford: Oxford University Press, 2014) p 249 at p 251. See further below, text at n 59.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

extremely tenuous. Where it is important, it is because other social and legal mechanisms step in to ensure that such claims are met; where they do not, the theoretically available personal liability is of little practical importance. As Merkin and Steele comment, defending their claim that an understanding of insurance is necessary if we are to understand the law of obligations,

> The two-party model [of legal liability] operates as a restrictive frame or perspective. It relegates issues of wider party relationships, including much activity which is vital to the operation and shape of the law of obligations, to the edges of the frame. To look at these aspects of the law is not to shift perspective from obligations to something beyond its boundaries; it is, rather, to broaden our perspective to include other parts of the same structure.[22]

So what is unique about negligence is the *connection* it draws between the claimant's need and the defendant's misbehaviour. Yet, contrary to the impression given by doctrine alone, the defendant is *not* held to account at all: the connection is bogus. How, then, can we describe the sort of 'responsibility' that negligence brings? That is the subject of the next section.

'Responsibility' in negligence

At this point, some basic features of civil litigation need reiteration. Claimants (or their insurers) must pay their own legal costs unless the defendant (or an insurer) does so. Showing that the defendant *should* pay achieves little if the defendant *cannot* do so – quite apart from all the other risks of litigation, the claimant carries the risk that the defendant may lack sufficient assets. Accordingly, no competent lawyer commences litigation against a defendant without good reason to suppose that a successful claim will be met – and unless a personal defendant is unusually wealthy, this requires insurance. The usual statistic is that insurers pay for 94% of all sums paid as compensation in tort, and 'organisations carrying their risk' pay '[t]he great majority' of the remainder.[23] No doubt there is the occasional case where the personal defendant pays: in road accident cases, a few uninsured drivers are tracked down and sued;[24] perhaps in a few cases the parties informally agree a settlement while avoiding any formal legal claim; and in work injuries cases, the theoretical liability of the negligent

22. R Merkin and J Steele *Insurance and the Law of Obligations* (Oxford: Oxford University Press, 2013) p 9.

23. See Pearson Commission, above n 16, vol 2, para 509. This statistic is some decades old and is to that extent unreliable, though no serious observer imagines that it would be *lower* today. For the wider picture, see R Lewis 'Insurers and personal injury litigation: acknowledging "the elephant in the living room"' [2005] J Pers Inj L 1; R Lewis 'Insurance and the tort system' (2005) 25 Legal Stud 85.

24. The number is tiny in the context of the UK system. Claims in uninsured driver cases are met by the Motor Insurers Bureau (MIB); in 2013, perhaps 6% of all road accident claims. The MIB settled 48,327 claims in 2013; the CRU were aware of roughly 800,000 claims that year. In that same year, the MIB recovered £9.1 million by subrogated claims against the negligent drivers (roughly 4% of their net payments to claimants). So a crude estimate is that 6% of 4% of negligent drivers (ie about 0.25%) are made to pay personally. Figures are from http://www.mib.org.uk (accessed 11 May 2016) and https://www.gov.uk/government/collections/cru (accessed 11 May 2016).

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

employee is (very occasionally) pressed into service.[25] But these cases are very much the exception.

Of course, many negligent defendants still suffer consequences for their misconduct; but the consequences do not come from tort. The task of disciplining and deterring the careless has passed to other legal and social mechanisms, and can no longer be regarded as a goal of negligence law. Facts that prove negligence very often amount to a breach of the criminal law as well; a negligent employee may well find themselves dismissed by their employer; and a successful insurance claim resulting from negligent conduct may lead to increased premiums or even a refusal to grant cover in the future. *The law in general* has not given up on personal responsibility; but *liability in negligence* either no longer plays any significant role in imposing it or is so bound up with other mechanisms that it has effectively turned into something else.

Does the negligence duty have an influence on personal defendants in other ways, such as by guiding or influencing their behaviour, or perhaps deterring negligent conduct? It would be surprising if it did. It is true that many people comply with the law even if they know that no sanction will follow from disobedience; but few individuals are actually aware of what negligence law requires, and even those who do will probably find it a very uncertain guide, as the flexible standard of 'reasonable care' can often seem rather vacuous before the event. When people express anxiety about the effect of negligence, it is usually not because they fear its requirements but, on the contrary, because they have no means of knowing precisely what it does require. And the very idea that negligent, as opposed to deliberate, conduct can be *deterred* is in conceptual difficulties from the very start, as no-one *sets out* to be negligent.[26] Given the other incentives to act carefully, it is incredibly difficult to establish that negligence liability has any effect at all on the way individuals behave. As Cane notes,

> A motorist who is not deterred from doing something foolish by fear for his or her own safety or that of passengers in the car, nor by fear of the criminal law, nor by fear of being disqualified from driving, is not likely to be deterred by the fear of being sued in a tort action in which the damages will be paid by an insurance company.[27]

In medical contexts, fear of liability notoriously has an effect; but what that effect is, and whether it reduces accidents or only induces panic, is another question. One famous study of GPs demonstrated that defensive medicine is rampant in the UK, if by 'defensive medicine' we mean that doctors are significantly influenced by the possibility of

25. The liability was preserved by the House of Lords in *Lister v Romford Ice and Cold Storage Co* [1957] AC 555; while this is controversial (see discussion in Merkin and Steele, above n 22, pp 130–135), dicta in *Woodland v Essex County Council* [2013] UKSC 66 suggest this is still the law. Insurers have always insisted on their right to invoke the liability in cases of collusion or wilful misconduct. For an example of a claim relying on *Lister*, see *Bell v Alliance Medical and others* [2015] ScotCS CSOH 34 (though the target of the claim was in fact insured, see para [109]). On the employer's indemnity, see generally P Giliker *Vicarious Liability in Tort* (Cambridge: Cambridge University Press, 2010) pp 30–39.

26. See discussion in A Merry and A McCall Smith *Errors*, *Medicine and the Law* (Cambridge: Cambridge University Press, 2001) ch 3.

27. P Cane *Atiyah's Accident Compensation and the Law* (Cambridge: Cambridge University Press, 8th edn, 2013) p 427. He adds that '[t]here is no hard evidence that fear of the loss of a no-claims bonus or of having to pay the excess under a policy has any significant effect on the incidence of accidents'.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

patient complaints.[28] But whether they were influenced for the better or for the worse, and what role if any tort played, is unknown; the researcher had no knowledge of individual instances beyond what each GP reported, and simply classified each instance as 'positive' (beneficial) or 'negative' (harmful) based on his own arbitrary criterion.[29] A subsequent study of hospital doctors again found high levels of defensive medicine, defined as 'a doctor's deviation from standard practice to reduce or prevent complaints or criticism'.[30] Again, no serious attempt was made in the study to show that harm to patients resulted; its authors seemed either unaware or uncaring that a departure from standard practice is more likely to *encourage* legal action than to prevent it (as adherence to standard practice is usually a complete defence[31]). What effect a different legal regime would have is therefore a matter for speculation; indeed, unless *all* avenues for complaint by patients were blocked, it is not obvious that it would have any effect at all.[32] There are, of course, a number of ways in which law and society seek to deter dangerous conduct; unsurprisingly, attempts to demonstrate that the existence of negligence liability has any effect at all yield ambiguous results.[33]

Should negligence, then, be viewed as imposing genuine duties on defendants, as opposed to mere financial liabilities on those who are effectively liable? Is the law better described from an 'idealist' point of view ('Defendants ought not to break the duty of care') or from a 'cynical' point of view ('Defendants who break the duty of care are liable to compensate')?[34] Posed that way, there is a great deal to be said for the 'cynical' view. But the question is wrongly posed; there is nothing cynical about enquiring how the legal system actually works, nor anything idealistic about deliberately ignoring relevant facts. Broadly speaking, *the law* does impose a genuine duty to be careful (particularly through health-and-safety regulation) – but negligence liability has proved an inept tool for articulating that duty, and is retained only so that it can serve other

28. N Summerton 'Positive and negative factors in defensive medicine: a questionnaire study of general practitioners' (1995) 310 (no 6971) BMJ 27.

29. 'Negative defensive practice … may be taken to include such things as prescription of unnecessary drugs; increases in follow up, referral rate, and diagnostic testing, as well as avoidance of certain treatments and the removal of patients from the practitioner's list. In contrast, positive defensive medical practices are defined as quality improvements such as increased screening, development of audit or consumer satisfaction activities, and more detailed patient explanations or detailed note taking': ibid, at 27, fn omitted.

30. O Ortashi et al 'The practice of defensive medicine among hospital doctors in the UK' [2013] 14 BMC Med Ethics 42. For further discussion, see N Smellie 'Does the phenomenon of defensive medicine truly exist in practice, and how desirable would a healthcare system built on this premise be for the United Kingdom?' (2014), available at http://tinyurl.com/z3bqqc5 (accessed 11 May 2016).

31. *Bolitho v City and Hackney Health Authority* [1992] AC 232; *Roche v Peilow* [1985] IR 232. Both rulings allow for an exception if the practice is glaringly flawed, though they use rather different language in describing this.

32. For discussion of the interaction between damages (paid by insurers) and injury to the doctor's reputation (which is, of course, borne by the doctor), see T Keren-Paz 'Liability regimes, reputation loss, and defensive medicine' (2010) 18(3) Med L Rev 363.

33. Cane, above n 27, pp 420–435. The US material on these questions is voluminous; see especially T Baker *The Medical Malpractice Myth* (Chicago: University of Chicago Press, 2005).

34. For opposing viewpoints, see N McBride 'Duties of care – do they really exist?' (2004) 24 Oxford J Legal Stud 417; and D Priel 'Tort law for cynics' (2014) 75 Mod L Rev 703.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

functions. *As far as negligence law is concerned*, the consequences of breach are merely financial, a simple matter of risk allocation, and it is difficult to see them as representing anyone's moral disapproval of anything. But the proper role of negligence can only be understood in the context of the legal system of which it forms an important part; those who view it as if it stood alone are likely to be misled.

The developing legal system

So the great growth of negligence law over the past century or more has involved the quiet abandonment of what might once have been its central notion: that it allows the claimant to bring home personal liability against the defendant. One of the ideals motivating negligence (that the victims of injury deserve compensation) has been allowed to eclipse another (that the *injurer* should be made to compensate). Personal liability in negligence has been directly rejected in the cases where it matters, not as an unforeseen consequence of other reforms, but explicitly on the ground that it is unjust: the injured victim deserves financial restitution *whether or not* the injurer is in a position to pay. And while it would also be unjust for the injurer to escape without consequences, merely imposing liability to compensate is no solution: relatively few injurers are caught that way, and the liability bears no relation to the injurer's level of responsibility. A society that is serious about disciplining such defendants would not do it that way. Accordingly, the law has been only too happy to accommodate the wish of risk-averse defendants to escape the Russian roulette of simple negligence liability, in favour of a system that spreads the cost of compensation over the community in general.

How did it come to this? Or, more specifically, given the clear rejection of personal negligence liability, why have we not simply abolished the law of negligence and replaced it with a no-fault system? Various answers suggest themselves. One is that exchanging an established system, with well-known benefits as well as flaws, for an untried system that *may* be better, will always be a hard sell politically. Secondly, protesting against negligence's conceptual flaws commits the philosopher's error, of putting conceptual clarity above all. The law of negligence does many useful things; indeed, it has been called the 'Swiss Army knife' of the law – those who so named it did not mean this as a compliment,[35] but it sums up the dilemma of those who would oppose it quite neatly. If a legal institution is not only very well established but in many contexts achieves useful results, even a very well-founded argument that it is conceptually confused is unlikely to make much of an inroad into it – and this is as it should be, unless a clearly superior reform proposal is made.

In some jurisdictions, and in some contexts, better proposals *have* been made, and implemented. Worker's compensation has pushed employer's tort liability to injured workers into a decidedly minor role in nearly all jurisdictions in the developed world (the UK and Ireland being two of the few exceptions[36]). Negligence liability is modified in particular contexts to meet particular needs.[37] And the New Zealand system stands as proof that a

35. Allan Beever uses this phrase repeatedly in *Rediscovering Negligence* (above n 18) eg pp 197 and 268, though he does not claim originality for it.

36. For discussion, see G Wagner 'Tort, social security, and no-fault schemes: lessons from real-world experiments' (2012) 23 Duke J Comp & Int'l L 1. For a survey across 12 jurisdictions, see K Oliphant and G Wagner (eds) *Employers' Liability and Workers' Compensation* (Berlin: de Gruyter, 2012).

37. For example, under the Defective Products Directive, Council Directive 85/374/EEC of 25 July 1985.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

comprehensive no-fault scheme, replacing negligence law for personal injuries, *can* work, though it has required repeated modification and reform. But dissatisfaction with negligence has also led to reforms that (while they do much to make it conceptually dubious) also shore it up and make its abolition less likely. The gains made by making the negligence system less adversarial have been so substantial that abolition is not on the agenda.

So the obvious weaknesses of negligence have led to novel compensation schemes, but also to reforms of negligence itself. And while the theoretical benefits of no-fault systems for allocating risks are clear, actual experience of them rubs off some of the shine. Their administration is more expensive than had been assumed, take-up of benefits increases more than had been imagined, the need for deterrence remains unmet, and problems of fraudulent claiming and other moral hazards exceed those that had been contemplated.[38] The New Zealand scheme has survived, although its development has not been without incident.[39] It is probably going too far to label most actually existing no-fault scheme as failures,[40] but the merits that they so clearly have in theory are not always borne out in practice. It may be, as Engstrom suggests, that the current state of the law is a state of *adversarial equilibrium*, in which the law of negligence (as modified by successive generations of dissatisfied legislatures) and existing no-fault systems (seen now as they actually are, not merely as theoretical proposals) are of comparable merit in the political arena: neither is clearly superior to the other, and so both are likely to persist. And the sheer complexity of the resulting systems makes further reforms extremely difficult.[41]

As legal historians, continuity rather than radical change is what we expect to see. Actually existing schemes will always have defenders, whereas the benefits from radical change will always be to an extent hypothetical and disputable. It is therefore no surprise that the abandonment of the unworkable system of personal responsibility has for the most part taken the path of increasing the scope of insurance rather than outright repudiation of negligence. It is also no great surprise to see the various different legal mechanisms for the aftermath of accidents growing together – so that (for example) if the facts of *Donoghue v Stevenson*[42] were to recur, the insurer would have to pay not merely for May Donoghue's own losses, but also for the cost of her emergency NHS care and any social security payments (eg Employment and Support Allowance) occasioned by her encounter with the snail.[43] And such great interlinking between

38. For a review of literature comparing no-fault schemes with tort, see M Trebilock and P-E Veel 'No-fault accident compensation systems' in J Arlen (ed) *Research Handbook on the Economics of Torts* (Cheltenham: Edward Elgar, 2013) p 588.

39. For the development of the scheme in its first few decades, see 'Symposium: looking back at accident compensation: finding lessons for the future' (2003) 34 VUW L Rev 189–467.

40. Cf N Engstrom 'Exit, adversarialism and the stubborn persistence of tort' (2015) 6 J Tort L 75, available at http://ssrn.com/abstract=2579835 (accessed 11 May 2016).

41. See N Engstrom 'An alternative explanation for no-fault's "demise"' (2012) 61 DePaul L Rev 303. Engstrom defines adversarial equilibrium as 'a process by which distinct but parallel legal systems shed their excesses and patch their limits to become progressively more alike'; ibid, at 312. See also R Gaskins 'The fate of "no-fault" in America' (2003) 34 VUW L Rev 213.

42. *M'Alister* (*or Donoghue*) *v Stevenson* [1932] AC 562.

43. Text assumes (as is probable) that a claim of this sort would today be covered by the defendant's insurance. For state recovery of benefits from personal injury damages in the UK, see Social Security (Recovery of Benefits) Act 1997, Road Traffic (NHS Charges) Act 1999 and Health and Social Care (Community Health and Standards) Act 2003 ss 150–169. For the Irish position, see Social Welfare and Pensions Act 2013 ss 13–14.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

legal institutions of course makes it still less likely that one will be abolished if the other is not; they are no longer entirely distinct from one another.

What, then, do we make of the personal standard of care?

The standard of care required in negligence is therefore something of a puzzle. Cut off from its roots, it no longer serves a serious purpose in regulating the behaviour of individual defendants, who will almost certainly be unaware of its demands both before and after the accident. It limits the amount that insurers must pay, but on no clear principle; none of the suggested theoretical accounts of it is quite satisfactory. Some, indeed, simply note that the duty is by any sensible standard incoherent, and leave it at that.[44]

The most obvious point of interest is the high level at which it is set, considerably broader than we might expect if personal blameworthiness by the defendant were the target.[45] There are no degrees of negligence (a slight instance of negligence attracts liability for the whole loss), and it is irrelevant whether the defendant would in theory have the means to pay the damages. Some writers doubt that negligence is really distinct from strict liability,[46] though this remains a controversial viewpoint. While the standard does not demand perfection, it is hard to satisfy. For example, even experienced drivers commit a number of acts of negligence for every hour they are on the road.[47] The negligence standard is quite distant from anything we would regard as a moral standard;[48] indeed, in relation to low-value claims, insurers rarely dispute breach at all (as it would not be cost-effective to investigate the facts in *that* much detail[49]). To the extent that there is anything doctrinal in this, the work is done by the principle of 'objectivity': the defendant is judged not according to what is reasonable given the actual state in which s/he is, but by a higher 'objective' standard. So a learner driver on her second driving lesson is judged by the standard of the reasonably experienced driver;[50] the surgeon performing an operation for the first time is judged by the standard of the surgeon experienced in that type of operation;[51] and a man suffering from schizophrenia is judged by the standard of the mentally well, unless he was insane by the *M'Naghten* standard.[52] This makes an interesting contrast with *contributory* negligence, where the courts seem to have no difficulty in

44. See eg L Alexander and K Ferzan 'Confused culpability, contrived causation, and the collapse of tort theory' in Oberdiek, above n 21, p 406.
45. For general discussion, see PS Atiyah *The Damages Lottery* (Oxford: Hart Publishing, 1997) pp 33–38; J Goldberg 'Inexcusable wrongs' (2015) 103 Calif L Rev 467; O Ben-Shahar and A Porat 'Personalizing negligence law' NYU L Rev, 2016, forthcoming, available at http://ssrn.com/abstract=2654458 (accessed 11 May 2016).
46. A Calnan 'The fault(s) in negligence law' (2007) 25 Quinn L Rev 695; KS Abraham 'Strict liability in negligence' (2012) 61 DePaul L Rev 271.
47. Though the studies here are admittedly old. See Cane, above n 27, pp 175–176.
48. On various versions of negligence as a moral standard, see H Hurd 'The innocence of negligence' (1 July 2014), available at http://ssrn.com/abstract=2612084 (accessed 11 May 2016).
49. R Lewis and A Morris 'Challenging views of tort' [2013] J Pers Inj L 69 at 75–76.
50. *Nettleship v Weston* [1971] 2 QB 691.
51. *Wilsher v Essex Area Health Authority* [1987] QB 730.
52. *Dunnage v Randall* [2015] EWCA Civ 673.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

accommodating subjective standards, and so allow excuses to claimants that would be refused to similarly situated defendants.[53]

So the judiciary seem to feel they must retain the *form* of liability in negligence, but so long as that form is observed, they tend to err on the side of generosity. Claimants do not win *every* case that turns on breach of duty, but a century's worth of judicial sympathy (which is also evinced by the slow but steady expansion of secondary liability) expands the reach of the law. The judiciary are pushing the concepts to their pro-claimant limits. Why do they do this? Perhaps it is simply that case-hardened judges, who have spent much of their professional lives dealing with the aftermath of avoidable accidents, have lost any sense they may once have had that such occurrences are unforeseeable. Or perhaps it is simply natural sympathy for claimants, buttressed by awareness that the bill will be met by insurers. Or perhaps it is a hindsight bias, which pays lip service to the idea that reasonable people sometimes make mistakes, but in practice invariably treats such mistakes as negligence: 'All too often the yardstick is taken to be the person who is capable of meeting a high standard of competence, awareness, care etc *all the time*. Such a person is unlikely to be human.'[54] All of these explanations might have something in them; perhaps there are other factors too.[55] Whatever the explanation, the courts know perfectly well that the individual found to be negligent will suffer no adverse consequences from the ruling; so within their self-imposed constitutional limits, judges have no reason not to be generous. And arguments that they should be even-handed as between claimant and defendant have no traction, because the defendant's involvement in the dispute is almost entirely imaginary.

Summary: what negligence is, and the problem of justification

Negligence law allows the victims of injury to claim compensation. Legal doctrine suggests that it allows them to claim only *from the person who injured them*, but while someone who holds that point of view still has a few straws to clutch at, in a hefty preponderance of cases this is not so: it is not the injurer who pays, though s/he will probably have contributed (along with innocent parties, including perhaps the claimant) to the scheme under which the compensation is paid. The task of holding injurers responsible has passed to other areas of law, and the connection between individual injurers and victims is for practical purposes severed. It is extremely artificial to describe the system as one of fault-based liability, and much more plausible to describe it as one of insurance against certain risks.

The principal effect of negligence is therefore to insure community members against specific types of risk, insurance that is paid for by members of the general class of risk-creators. The terms under which claimants justify their claims still owe a great deal to

53. Whether this apparently unequal treatment of claimants and defendants can be defended doctrinally is a matter of dispute. Compare RW Wright 'Negligence in the courts: introduction and commentary' (2002) 77 Chi-Kent L Rev 425 at 466–485 with A Dorfman 'Negligence and accommodation: on taking others as they really are' (27 December 2014), available at http://ssrn.com/abstract=2543262 (accessed 11 May 2016).

54. A Merry and A McCall *Smith Errors, Medicine and the Law* (Cambridge: Cambridge University Press, 2001) p 173. See also D Teichman 'The hindsight bias and the law in hindsight' in E Zamir and D Teichman (eds) *Behavioral Economics and the Law* (New York: Oxford University Press, 2014) p 355, esp pp 356–357.

55. For a philosophical argument that people generally are reluctant to conclude that major accidents occur without fault, see MR Reiff 'No such thing as an accident' (2015) 28 Can J L & Juris 371.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

the older language of personal fault, misleading many into believing that defendants still pay or that it is somehow appropriate to pretend that they do. In fact, the modern system is more generous to claimants than that older system could ever have been: an insurer is typically more solvent and less keen on delay than a risk-averse individual defendant would have been; in most cases, an insurer is far readier to admit liability than an individual whose reputation for care and competence would be at stake; and courts and legislators, very well aware of how the system works, are more generous to claimants in the liability they impose.

But this very generosity is what is hardest to justify. Once it is clear that it is not the injurer personally who is paying the compensation, it is not at all obvious why the victim should have to demonstrate the existence and culpability of an injurer. Victims of wrongdoing receive a generous remedy while victims of circumstance receive nothing – a preference that would be easy to justify if the wrongdoer paid, but is rather bizarre if payment comes from an insurer. Is this a rational preference for the legal system to have? Or is it *unprincipled*, in the sense of having no sensible justification for its existence? That is the problem addressed in the second part of the paper.

WHERE DOES THIS LEAVE MODERN THEORY?

The big picture

Most justifications for the current law, then, rely heavily on fictions about it, treating negligence as something it is not and cannot be. In particular, they assume that negligence creates linkage between an injured claimant and the defendant who injured them, giving a lustre to negligence that other remedial institutions do not have. Insurance and social security see to the needs of the injured, regulation keeps an eye on those who injure but negligence *does justice* by connecting the injured to their injurer. (A variant on this theme admits that all of the law's institutions do justice, but claims that negligence does *corrective* justice, and the others *distributive* justice – whether this distinction points to a real difference is a matter of some debate.[56]) This core idea motivates a number of philosophical defences of traditional doctrine, whether called corrective justice[57] or responsibility theory.[58]

This, then, is the area of Enoch's *What's Missing in New Zealand*? challenge: whether negligence law really has any significant advantage over a centralised risk-pooling fund or similar arrangement.[59] From the point of view of the claimant, it is hard to see a great difference in principle between the two, or that there is anything missing in the latter. Enoch's own suggestion, that tort liability makes the injurer takes responsibility for the injury,[60] is unsatisfactory. A successful claimant will receive nothing from the actual injurer, and from the insurer will probably receive merely a settlement offer, which will explicitly state that no liability is admitted. Of course, if claimants choose to treat the settlement as some kind of vindication or acknowledgment of a wrong, they are free to do so, and some writers have discussed circumstances where they might plausibly do so;[61] but researchers interested not in what claimants could, theoretically, feel

56. For discussion, see eg J Gardner 'What is tort for? Part 2. The place of distributive justice' in Oberdiek, above n 21, p 335; and H Sheinman 'Tort law and distributive justice', ibid, p 354.
57. See eg Beever, above n 18.
58. See eg P Cane *The Anatomy of Tort Law* (Oxford: Hart Publishing, 1997) esp chs 2 and 7.
59. Enoch, above n 21.
60. Ibid, at 266.
61. See eg L Radzick 'Tort processes and relational repair' in Oberdiek, above n 21, p 231; Hershovitz, above n 8, at 93–105.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

but rather in what they actually *do* feel tell a different story: 'Far from feeling that the law is backing him in what he sees as his moral rights, the accident victim involved in a legal claim seems frequently to feel confused, anxious, and buffeted by the system.'[62]

This is no peripheral criticism of 'responsibility' and related theories of negligence, but goes to the heart of their accounts. Those who injure others do not, in fact, pay them damages or acknowledge wrongdoing. That is not because their conduct is seen as rightful, but because the response to the injury qua wrong is provided by other parts of the law. Therefore, discussion of why defendants should pay cannot in any simple fashion justify the current system of negligence law, which makes no attempt to make them pay. The very invocation of ethics or deontology seems to be an error: the system is hardly ever concerned with holding personal defendants to account for their actions, or pronouncing on what they should have done. Whatever may be the justification of the system, it is not to be found here.

Particular theories, new and old

One clue as to what has gone wrong is the (slightly odd) fact that to many of those attentive to tort theories, it is controversial to assert that negligence is about the recovery of compensation. Some even say that this assertion is 'incorrect'.[63] Most admit its truth but deny its relevance: it is 'banal and misleading'.[64] Astoundingly, we have to go back over half a century to find theories that start from the facts of the matter; namely, that the claimant receives compensation but the defendant hardly ever pays the cost of that compensation directly. The most prominent theorist to do so, Fleming James, was clear on the point,[65] and it seems very odd that this basic feature of the legal system has slipped out of the sight of modern theorists.

The reason why it has done so, I suggest, is largely a result of quite different modern expectations as to what a good theory of tort should consist of.[66] Some might see this change as beneficial: there is no doubt that modern theories have much greater theoretical sophistication than earlier efforts. But with this greater refinement has come a lowering of horizons. The new theories of tort are almost entirely descriptive or interpretive, rather than prescriptive. Corrective justice theorists insist that their theories are theories of what the law *is*, and refuse to discuss whether such a law is a desirable one; lawyer–economists argue for the most efficient laws, but have little to say on how trade-offs between efficiency and other desirable objectives might be managed. And these new theories typically discuss tort without reference to the wider legal system, as if the law applied itself. The task that the prominent

62. S Lloyd-Bostock 'Fault and liability for accidents: the accident victim's perspective' in Harris and others, above n 7, pp 139, 160.

63. N McBride and R Bagshaw *Tort Law* (Harlow: Pearson Education, 2001) p 24.

64. See eg J Stapleton 'Tort, insurance and ideology' (1995) 58 Mod L Rev 820, 828 n 24: '… it is as banal and misleading to say that the "function" or "purpose" of tort is compensation as it is to say that the "function" or "purpose" of a petrol station is to dispense petrol: the question of interest is who is entitled to have the benefit dispensed and why'.

65. Especially relevant to the themes in this paper is Fleming James Jr 'An evaluation of the fault concept' (1965) 32 Tenn L Rev 394.

66. On this shift of view, see esp G Edward White *Tort Law in America – An Intellectual History* (New York: Oxford University Press, 1985) ch 7. For another perspective on these changes in theoretical vision, see JC Goldberg 'Twentieth-century tort theory' (2003) 91 Geo L J 514.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

theorists set themselves is of finding normatively attractive theories that can plausibly be seen as fitting the law we actually have – or, as they themselves might put it, of 'justifying' the current law.

A glance back at Fleming James would show that theory has other uses, perhaps better uses. James insisted that negligence was about compensation for injury, but did *not* regard this as a normatively attractive theory – on the contrary, he thought it unjust and wasteful. If we are to create a society-wide system for compensating injuries, why would we limit it to the very specific types of injury that tort provides for? What is the point of conceptually linking compensation to a personal wrongdoer if we have abandoned the idea that such wrongdoers should pay? His ultimate vision for the law was the abolition of tort, or at least its complete remodelling in the wake of the public social insurance scheme, which he thought should take over most of tort's functions.[67] Whether we should share his vision today is not the subject of this essay; his answers may have been wrong, but he was asking the right questions, and did not need to bury inconvenient facts about the operation of the system. Modern theories, by contrast, seem to have misconceptions about the law's workings baked into them.

Those who approach the matter in a Kantian framework argue that negligence law provides for the defendant to pay where corrective justice demands it. They acknowledge (faintly) that this does not happen, but say that such questions are outside their field of enquiry:

> While the corrective justice model holds that tort law is a system of corrective justice, it does not (or not necessarily) also argue that it gets its political justification from the fact that corrective justice is something that our societies ought to enforce. That is an essentially separate political, rather than legal, matter …[68]

So the argument is that a corrective justice model of negligence need only concern itself with personal liability, and it is entirely irrelevant what the position may be as to procedure, or vicarious liability, or insurance, or the actual practice of the courts or lawyers or insurers, or anything else 'outside' negligence.[69]

This treats negligence if it were an abstract set of rules unrelated to the rest of the law, and expounded purely for the joy of doing so. But the law is a seamless web: which torts it is reasonable to recognise is intimately bound up with what remedies they lead to and what other avenues of recourse people have. And while it is often convenient to limit our attention to some small part of the law (such as 'negligence' or 'tort'), by doing so, we do not identify something that exists on its own or can operate on its own. Nor is it reasonable to dismiss the rest of the legal system as merely 'politics' or 'social philosophy':[70] rules on compulsory insurance, procedure and costs are laws by any

67. In fact, James changed his mind over the question of the desirable future role of tort, though always against the backdrop of a proposed public insurance scheme. Compare his 'Tort in midstream: its challenge to the judicial process' (1958–1959) 8 Buff L Rev 315 with his 'The future of negligence in accident law' (1967) 53 Va L Rev 911.

68. Beever, above n 18, p 191 fn, responding to J Morgan 'Tort, insurance and incoherence' (2004) 67 Mod L Rev 384.

69. On vicarious liability, see Beever, above n 18, pp 35–36; on insurance, ibid, eg pp 199–200. There is no significant discussion of corporate responsibility, or how it might differ from the responsibility of an ordinary individual.

70. Beever, above n 18, p 191 fn.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

standard. And to treat negligence as uninfluenced by those laws certainly does not qualify as 'taking the law in its own terms', as Kantians claim to do.[71]

Economic justifications of negligence doctrine are also in difficulty here, though of a different type. If negligence doctrine is to be explained as deterring defendants from wasteful or inefficient behaviour, then it is a problem if the supposed deterrent does not exist, or merely affects other parties such as insurers.[72] Perhaps, however, the economic approach may be easier to adapt to the corporate reality: in some limited contexts at least, it may be plausible to say that large business organisations are aware of, and respond to, the duties that the law of negligence imposes – though actual evidence of this, as opposed to economic argument that it 'must' have an effect, is hard to come by.[73] But that law is not stated in terms of *corporate* fault – whether it should be is considered below.[74]

Other writers, while not relying on either ethics or economics in such a formal way, nonetheless urge caution in taking too 'realistic' a view of negligence, arguing that we should doubt the relevance of insurance,[75] should limit reliance on policy arguments,[76] should realise that private law litigation is a very poor form of regulation[77] and should not be so fascinated by the flexibility of legal concepts that we forget what may be intrinsic to them.[78] These arguments, which all seek to buttress doctrine as against more purposive or instrumentalist approaches, are more balanced, as they acknowledge the existence of other institutions running parallel to tort. Much depends here on precisely what it is that we are arguing about.

Sometimes the topic is really about which arguments should be acceptable *from the bench*: and as always there are the twin arguments, that judges do not have the expertise to broach such wider questions, and that they have no political legitimacy in doing so. This is all true, but it is only one side of the coin. A case can certainly be made that there are ideas intrinsic to private law concepts – courts cannot do just *anything* with them – but that insight should not be stretched into a denial that courts have considerable latitude, or a refusal to investigate how that latitude is exploited. Private law litigation does indeed make a poor showing as regulation, but which way does that cut: is it an argument for denying that it serves regulatory purposes, or for seeking to reform it to perform its regulatory tasks better? As to policy, the rather formal approach taken by the judiciary, while in some contexts desirable, in this area discourages them from

71. Similar points can be made in relation to the approach of Weinrib (in EJ Weinrib *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995)): see P Cane *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002) pp 242–245.

72. For some of the issues, see J Arlen and W MacLeod 'Beyond master–servant: a critique of vicarious liability' in M Stuart Madden (ed) *Exploring Tort Law* (New York: Cambridge University Press, 2005) p 111.

73. See Cane, above n 27, pp 419–455; and studies referred to in Arlen, above n 38, p 178. This parallels the findings of Dewees Duff and Trebilock (DN Dewees, D Duff and M Trebilcock *Exploring the Domain of Accident Law: Taking the Facts Seriously* (Oxford: Oxford University Press, 1996)) that evidence of deterrence by tort is patchy, dependent on context and quite inadequate to justify the existing tort system.

74. Below, text at n 94.

75. See eg Stapleton, above n 64.

76. See eg R Stevens *Torts and Rights* (Oxford: Oxford University Press, 2007) ch 14.

77. See eg P Cane 'Tort law as regulation' (2002) 31 Common L World Rev 305.

78. See eg P Goold 'The analytic jurisprudence of the new private law' New Private Law (blog) (10 June 2015), available at http://blogs.law.harvard.edu/nplblog/2015/06/10/the-analytic-jurisprudence-of-the-new-private-law-patrick-goold/(accessed 11 May 2016).

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

employing their undoubted expertise in an area that sorely needs it – liability for negligence has few friends in national politics, and its development might at least be in the hands of a judiciary that understands its basic principles rather than cowering in the shadow of a (largely imaginary) 'compensation culture'. Both judges and politicians have a right to contribute to the development of the law, to which they contribute very different things.[79] Stapleton is entirely correct that taking insurance into account is no 'neutral injunction', and signifies an important change in the way tort law is applied[80] – but this important change has already occurred. There may be excellent arguments against allowing insurance considerations to infiltrate private law, but it is at least a century too late to make them – that ship has sailed, and indeed was well clear of the harbour long before May Donoghue's fateful encounter with the snail.[81]

So there is certainly an issue about how judges should reason in negligence cases, and how their constitutional position should be respected. But on the broader question of how we *as academics* should view the system, it is hard to see how constitutional values are relevant. It is precisely because academics may have access to wider ranges of knowledge than the judiciary that they might refer to these wider issues; and it is precisely because academics have no formal political position, and no political power other than the power of persuasion, that they are fully entitled to advocate novel approaches. And, by the same token, they are not entitled to claim a bogus 'neutrality' that ignores the actual effects of the theories they advocate.[82] The reasons why we might prefer judges to believe in myths (or at least to act as if they do) do not apply to academics. Nor should they.

The wider question, then, is whether or how *as disinterested observers of the legal system* we can make sense of negligence. Given its size and importance in early twenty-first century society, it is hard to see how we can do so if the fictions it attracts are not debunked, if they are not recognised not merely as factually untrue but *not even attractive as ideals*. It is not simply that defendants do not pay; it is that a world in which they did would benefit only a few (the subset of victims who could point to a wealthy injurer). It is not simply that nearly all cases settle; it is that we would truly be in litigation hell if it were otherwise. And if we wish the law to bear at least some relation to public needs, in an ever-changing legislative and market environment, then responsiveness to external pressures is both inevitable and good, and continuous modification to the law is unavoidable.

Making sense of negligence?

How, then, should we see contemporary theories of negligence? The most obvious point about these theories is their highly abstract nature. Some appeal simply to 'common law'[83] or 'private law',[84] or to a Western tradition of philosophy dating back over

79. For discussion, see P Cane 'Taking disagreement seriously: legislatures and the reform of tort law' (2005) 25 Oxford J Legal Stud 393.

80. Stapleton, above n 64. For argument on this precise question, see also Morgan, above n 68; and R Merkin 'Tort, insurance and ideology: further thoughts' (2012) 75 Mod L Rev 301.

81. For general discussion, see Merkin and Steele, above n 22, ch 8.

82. T Keren-Paz *Torts, Egalitarianism and Distributive Justice* (Aldershot: Ashgate, 2007) esp ch 3.

83. See eg Stevens, above n 76, p vii: 'I have focused on English cases … However, the book would look much the same if I had primarily used the case law of any other common law jurisdiction'. For completeness, we must note that Stevens does not accept that there *is* a tort of negligence (ibid, pp 291–300), though the implications of that point for the argument of this paper are relatively slight.

84. See eg Weinrib, above n 71.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

2,000 years;[85] these writers are not describing any particular jurisdiction at all but, rather, particular legal concepts found in many jurisdictions. This level of abstraction is not in itself a ground for criticism; it is hard to see how serious work can be done to further understanding of legal systems other than by such abstract enquiries – and that even though a degree of simplification inevitably creeps in.[86] What *should* be subject to criticism is the *importance* attributed to those abstractions. It is not so much that (say) a Kantian account of doctrine is *inaccurate* (it captures some elements of doctrinal rhetoric perfectly) as it is not a very *important* aspect of the law, and entirely misleading if taken to characterise the entire system. Nor is the point confined to the Kantians: theorists generally are keen to claim that their theories are 'foundational', but slow indeed to explain in what respect this is so.[87]

As a result, the weakest points of contemporary theories of negligence are glossed over, merely by refusing to address them. Theories of private law assume that it is to be explained without reference to public law; theories of common law assume that it is best explained without reference to statute; theories of doctrine assume that it is best explained without reference to procedure or to the actual context in which doctrine is applied. In a nutshell, therefore, the principal defect of most modern theories of negligence is that they are theories *of negligence*. As Balganesh and Parchomovsky point out,[88] the explanation of the persistence of negligence in the legal system is most likely to be that it is *not* explicable by one single theory but, rather, has achieved a level of vagueness that makes it consistent with a number of theories, and so seems to satisfy a number of diverse needs within the legal system. It is too clear to be dismissed as mere verbiage, yet too unclear to be captured by any particular ideology. The law 'retains a constant structural framework in its various doctrines, while simultaneously allowing the normative meaning of those very concepts to accommodate plural and often-conflicting values and ideals'.[89] By apparently giving at least something to most of the major players in the debate, it can remain as a stable structure in the law.

This, then, is a further fiction on which negligence doctrine so much relies: that negligence is coherent, there is some master theory or value that 'explains' negligence, and that, once understood, will justify it – in other words, the myth that we *know* negligence makes sense, and that formulating the precise reasons why this is so is a minor sub-problem. This is the myth of Hercules, that some judicial demigod or superhero would be able to tell us definitively how the law is best explained. This is perhaps the most durable of the fictions, because (to those steeped in doctrine) the alternative appears to be

85. See eg Beever, above n 18, p 48: 'our general understanding of corrective justice … has … changed little since Aristotle [though] our understanding of its best application is sure to vary with time'.

86. See esp W Lucy 'Method and fit: two problems for contemporary philosophies of tort law' (2007) 52 McGill L J 605.

87. Many examples could be given. A particularly egregious one is the recent Oxford University Press *Philosophical Foundations* series. While these books are splendid contributions to current debates (and this paper would have been much the poorer if unable to refer to Oberdiek, above n 21), the claim that philosophy's contribution is *foundational* is not supported by argument, and indeed does not seem to be made seriously.

88. S Balganesh and G Parchomovsky 'Structure and value in the common law' (2015) 163 U Pa L Rev 1241.

89. Ibid. The quotation is from the abstract, available at http://ssrn.com/abstract=2494380 (accessed 11 May 2016).

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

intellectual chaos. The myth motivates an extreme reluctance to look more broadly at the legal system, because that broader look would emphasise just how unlikely it is that any one theory could 'explain' everything. If the frame is widened to include procedural aspects; if we acknowledge that 'easy' cases are treated quite differently from 'hard' cases; if we admit that the real struggle in either sort of case not merely involves insurance companies, but will very probably be resolved by the decisions of insurance executives; and that the law is not a solid rock but simply one player in a process in which the law, the market and the government continually react to and interact with one another – when the realities are looked at, the prospects for some 'Herculean' theory seem bleak indeed.

This leads some theorists to despair. Negligence appears merely to distribute compensation without providing any principled basis for doing so.[90] Acknowledging the state we are in seems to open up an abyss, where the law is nothing but confusion heaped on confusion. Part of the despair results from being too close to the subject matter. Any area of law will have elements of uncertainty or even incoherence if studied closely enough. Yet a completely clear and logically coherent law would nonetheless be of little value if it served no discernible social purpose.

OUT OF THE ABYSS

Is a workable theory possible? More intellectual work has yet to be done, work that we are not sure how to do. Can we develop some fresh vision of what negligence does, one that describes how it achieves interpersonal justice, and without the use of fictions? While it seems unlikely to this writer that some new vision of the law could rescue it, is not *entirely* implausible that such a vision could be developed, and the fact that it is so difficult to devise other systems that would be clearly superior to the system we have suggests that there is at least *something* to be said for the system we have. But what would be the guiding principles of this new vision? Writers have hinted at various competing approaches, none complete in themselves, but which may nonetheless contain the seeds of a better conception of the law.

(1) Resuscitating the link between injurer and victim?

Some recognise the distance the system has moved from any genuine attempt to impose liability on injurers or to treat them as wrongdoers, but nonetheless have hopes of a revival. At least three routes can be considered:

- Some, lawyer–economists especially, argue that tort liability can at least in a distant sense sometimes end up imposing liability on defendants, and if not actually make them pay damages, at least impose a measure of control on their activities. Insurers are very conscious of the moral hazard posed by those with cover against legal claims, and corporations are aware of the risk posed by negligent employees. Yet in practice the avenues for asserting such control are rather limited. Some researchers looking for such an effect in fact, and not merely in theory, have been able to find it;[91] but it seems a delicate thing, often almost invisible amongst all the other pressures towards carefulness. Is it substantial enough it be part of a justification for the current system?
- Others go to the root of the problem, noting that personal liability is impossible under the current system, and advocating reforms that would make it possible again. This

90. See eg Morgan, above n 68, at 394.
91. See esp literature reviews in Arlen, above n 38, chs 7 and 9.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

is, of course, about rolling back the past century's worth of changes to the system, such as by forbidding liability insurance.[92] As an admission of how far we have come from a purely corrective justice approach, these suggestions are welcome[93]; as proposals for reform, they lack practicality. Negligence law has been heading *away* from personal responsibility for some time now, and without some consideration of why that is, a proposal to revert to the older ways is unconvincing.

- Yet others suggest that a link between compensation and responsibility can be re-established in a quite different way, by insisting on the responsibility *of corporate bodies*. Such an approach could preserve many of the features of the law that have to be abandoned if defendants are individuals: corporate defendants in many cases know what the law is and can be guided by it, can pay the legal judgment, and can be deterred from further wrongdoing.[94] It may even be practical to make them to acknowledge liability by means of an apology if the situation demands it. Taking a broad view, the notion of tort liability for corporate responsibility is considerably less unarguable than that of individual responsibility, and it may be possible to restate it as such.

Yet if the law is to be recast along these lines, there is much intellectual work to be done in deciding what will count as responsibility. If these difficulties are seen as surmountable, presumably responsibility would have at least three branches: a corporation would be responsible to a claimant if they have undertaken responsibility (eg by insurance contract), or if they are themselves at fault, or they are vicariously liable for someone else who is at fault (unless vicarious liability can be subsumed into some form of 'enterprise liability'). The current law of vicarious liability is in a state of some confusion, from which it would have to be rescued. And legal theory would also have to take on board the fact that corporate bodies typically have a sufficiently sophisticated grasp of the law to attempt to escape liability by a number of means: getting potential claimants to sign away their rights, hiring workers on terms that avoid vicarious liability, or succumbing to 'moral hazard' if their insurer allows them to. No doubt there is also work to be done on whether resolution of all these problems can be accomplished within an intellectually satisfying model of corporate *moral* responsibility, not to mention of precisely what responsibility means for the various stakeholders involved.[95]

It is difficult, however, to avoid the feeling that all of these suggestions are merely clutching at straws, and are driven by a wish that the law of negligence should *look* like

92. See eg SG Gilles 'The judgment-proof society' (2006) 63 Wash & Lee L Rev 603 at 671–705, 714–715; RL West 'Gatsby and tort' (2015), available at http://ssrn.com/abstract=2645934 (accessed 11 May 2016).

93. On the gap left by negligence law's retreat from corrective justice, see RA Duff 'Repairing harms and answering for wrongs' in Oberdiek, above n 21, p 212, esp pp 225–230; HM Hurd 'Finding no fault with negligence', ibid, p 387.

94. For discussion, see RH Kraackman 'Vicarious and corporate civil liability' in M Faure (ed) *Tort Law and Economics* (Cheltenham: Edward Elgar, 2009) p 134. See also S Halliday, J Ilan and C Scott 'The public management of liability risks' (2011) 31 Oxford J Legal Stud 527.

95. For some of the issues, see D Brodie *Enterprise Liability and the Common Law* (Cambridge: Cambridge University Press, 2010); B Ewing 'The structure of tort law, revisited: the problem of corporate responsibility' (2015) J Tort L (published online 4 July 2015), available at http://www.degruyter.com/view/j/jtl.ahead-of-print/jtl-2015-0015/jtl-2015-0015.xml (accessed 11 May 2016).

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

a responsibility-based concept, rather than embodying on any solid reason why responsibility-based approaches are better than the alternatives.

(2) Negligence as compensation for injury?

If the link to individual injurious conduct is thought beyond salvage, we appear to have a system where (in effect) the population is well insured against certain types of injury, and while social insurance grants other protections too, they are on a markedly less generous scale. Given the importance of insurance in the practical working of the law of negligence, it is inevitable that up to a point it will be regarded as 'not about corrective justice or deterrence but really just about the cheapest way of insuring and distributing risks'.[96] Indeed, some are prepared to argue that we are there already: Merkin and Steele paint an interesting picture of road traffic law, in which the duty to drive with reasonable care has effectively been transformed into an allocation of risk or (from another angle) a duty to insure rather than a duty of care.[97]

As a description of the current position, this has a great deal to be said for it. But if this description is accepted, it invites the question whether it is sensible or justified. Granted that it is essential for society to provide a safety net for the victims of misfortune, why does it make sense for that net to be considerably better resourced when the misfortune had an identifiable author than when it had not? If we have abandoned the idea that wrongdoers should pay for their misdeeds, should we not also abandon the idea that victims of wrongdoers deserve more than victims of circumstance? For those who wish to justify the current system, this is a question that must be tackled.

(3) Improving the system?

If the system is acknowledged to be one of social insurance, questions also arise as to whether it can be made a better one. Various angles can be taken. If seen in this way, there is no huge difference between it and a New Zealand–style compensation fund – should an overt move to such a system be reconsidered? Questions might be asked as to whether the benefits the system provides are provided even-handedly: is the current system open to criticism for favouring men over women, or for favouring the rich over the poor?[98] Or is the correct conclusion that, if we are at last prepared to concede that the aim of the system is to pay for certain types of risks people run, then we should approach the matter more directly: tort should be abolished, and a market in first-party cover should be encouraged to fill the gap.[99]

CONCLUSION

There can be little doubt that negligence, so understood, is untidy. It has always been one of the more powerful arguments for a Kantian view of private law that, without it, 'private law is a congeries of unharmonized and competing purposes'[100] – though

96. Stapleton, above n 64, at 832. Stapleton was of course arguing that this development was *un*desirable.

97. R Merkin and J Steele 'Policing tort and crime with the MIB: remedies, penalties and the duty to insure' in M Dyson (ed) *Unravelling Tort and Crime* (Cambridge: Cambridge University Press, 2014) p 22. For a more general picture of tort law as risk allocation, see Merkin and Steele, above n 22, esp chs 8–9.

98. Keren-Paz, above n 82.

99. See eg D Campbell 'Interpersonal justice and actual choice as ways of determining personal injury law and policy' (2015) 35 Legal Stud 430.

100. Weinrib, above n 71, p 5.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press

the appeal of that argument has always seemed to me primarily aesthetic, and to rest on an unspoken wish that the world could be simpler than we know it to be. The theoretician's distaste for endless complexities cannot, on its own, be a very substantial argument one way or another; and the complexity of negligence seems the inevitable price of its prominence and importance within the law.

Whether the law of negligence still serves a useful purpose, or whether something better can be devised, has to be regarded as one of the more urgent questions confronting tort lawyers. But the merits and demerits of negligence cannot be appreciated if it is considered in isolation from the other means by which society attempts to minimise and remedy accidents; nor if the very language we use to describe it is shot through with fictions. It is therefore vital that its true nature is understood, which cannot happen if doctrine and its preoccupations are taken to be the only important things about it. And those who wish to make sense of it must first start to take seriously the very plausible alternative – that negligence does not, in fact, make sense at all.

© 2016 The Society of Legal Scholars

https://doi.org/10.1111/lest.12121 Published online by Cambridge University Press