

The Boundaries of Negligence

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*Almost seventy years after the seminal decision of the House of Lords in *Donoghue v. Stevenson*, the boundaries of negligence are still as blurred as ever. Some of the vagueness surrounding this tort is inescapable. It is an unavoidable price paid for the reliance on abstract, open-ended, amorphous, and incoherent notions. Indeed, there is no universal agreement even as to the meanings to be attached to the various components of this tort, such as the "reasonable person," proximity, and reliance. The boundaries of negligence are determined particularly through the filter of the duty of care. This article discusses the development of the concept of duty of care and the nature of negligence as analyzed through the prism of this duty.*

INTRODUCTION

Almost seventy years after the seminal decision of the House of Lords in *Donoghue v. Stevenson*,¹ the boundaries of negligence are still as blurred as ever. Some of the vagueness surrounding this tort is inescapable. It is an unavoidable price paid for the reliance on abstract, open-ended, amorphous,² and incoherent³ notions. Indeed, there is no universal agreement even as to the meanings to be attached to the various components of this tort. Who is the "reasonable person"? Is he (or she) the reasonable economic person,

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1 *Donoghue v. Stevenson*, 1932 A.C. 562 (appeal taken from Scot.).

2 Richard Mullender, *Negligence: The Personal Equation of Defendants and Distributive Justice*, 8 Tort L. Rev. 211 (2000).

3 See Joanne Conaghan & Wade Mansell, *The Wrongs of Torts* 7 (2d ed. 1999); Bob Hepple, *The Search for Coherence in Negligence*, 50 Current Legal Probs. 69, 81-82 (1997).

who calculates his (or her) moves according to a cost-benefit analysis?⁴ Or perhaps the average person, whether described as "the bonus pater familias" or "the man on the Clapham Omnibus."⁵ What is the meaning of "proximity"?⁶ Does this notion encompass policy considerations?⁷ Courts and legal scholars have pursued vigorously the futile search for a touchstone for the duty of care,⁸ in the process introducing new vague concepts such as "assumption of responsibility,"⁹ "reliance,"¹⁰ and "incrementalism."¹¹

What is the role and goal of the judge adjudicating a negligence case?

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- 4 For the Learned Hand test, see *United States v. Carroll Towing Co.*, 159 F.2d 169 (1947); for a critical look at this test, see, e.g., William H. Rodgers, Jr., *Negligence Reconsidered: The Role of Rationality in Tort Theory*, 54 S. Cal. L. Rev. 1, 6 (1980).
 - 5 That is the way Lord Bowen visualized the reasonable man, cited by Lord Justice Greer in *Hall v. Brooklands Auto Racing Club*, 1 K.B. 205, 224 (1933). Recent decisions of English courts described the reasonable man as the "ordinary citizen" or one of the "commuters or travelers on the underground," *MacFarlane v. Tayside Health Bd.*, [1999] 4 All E.R. 961, 977 (H.L.) (per Lord Steyn); see also *Parkinson v. Saint James & Seacroft Univ. Hosp. NHS Trust*, 2001 E.W.C.A. Civ. 530 (2001).
 - 6 There is much skepticism concerning the usefulness of proximity as a legal concept. See, e.g., Michael H. McHugh, *Neighborhood, Proximity and Reliance*, in *Essays on Torts* 5, 27-33 (P.D. Finn ed., 1989); *Hill v. Van Erp*, 71 A.L.J.R. 487 (1997); Kit Barker, *Unreliable Assumptions in the Modern Law of Negligence*, 109 Law Q. Rev. 461 (1993); John A. Smillie, *The Foundation of the Duty of Care in Negligence*, 15 Monash U. L. Rev. 302, 311 (1989); *Canadian Nat'l Ry. Co. v. Norsk Pacific Steamship Co. Ltd.*, 91 D.L.R. (4th) 289, 387 (1992) (Stevenson, J.); *Hercules Mgmts. Ltd. v. Ernst & Young*, 146 D.L.R. (4th) 577 (1997) (per Forest, J.); *Stanley Yeo, Rethinking Proximity: A Paper Tiger?*, 5 Tort L. Rev. 174, 178 (1997).
 - 7 See, e.g., *Hill v. Van Erp*, 188 C.L.R. 159, 178-79 (1997) (Dawson, J.); *id.* at 238 (McHugh, J.).
 - 8 See Jane Stapleton, *Duty of Care Factors: A Selection from the Judicial Menus*, in *The Law of Obligations: Essays in Celebration of John Fleming* 59, 60 (Peter Cane & Jane Stapleton eds., 1998).
 - 9 *Henderson v. Merrett Syndicates Ltd.*, [1995] 2 A.C. 145, 181; *Williams v. Natural Life Health Foods Ltd.*, 1998 W.L.R. 830 (Steyn, L.J.); *Bank of Credit & Commerce Int'l (Overseas) Ltd. v. Price Waterhouse*, 1998 P.N.L.R. 564, 583-87 (Sir Bingham Neill); *L. v. Reading Borough Council*, 2001 W.L.R. 1575; *Merrett v. Babb*, [2001] 3 W.L.R. 1, 12 (per May, L.J.); and the Canadian cases *London Drugs Ltd. v. Kuehne & Nagel Int'l Ltd.*, 1992 S.C.R. 299; *Edgeworth v. N.D. Lea & Assocs. Ltd.*, 1993 S.C.R. 206.
 - 10 See the recent decision of the High Court of Australia in *Modbury Triangle Shopping Ctr. Pty. Ltd. v. Anzil* 2000 H.C.A. 61 (per Gleeson, C.J.); *Stovin v. Wise*, 1996 W.L.R. 389, 400 (H.L.).
 - 11 Justice Brennan in the High Court of Australia decision *Sutherland Shire Council v. Heyman*, [1985] 60 A.L.R. 1, 43; Keith Stanton, *Incremental Approaches to the Duty of Care*, in *Torts in the Nineties* 134 (Nicholas J. Mullany ed., 1997).

Should she focus her attention solely on the fate of the immediate parties to the litigation or use the case as a vehicle for promoting some social goal, shaping patterns of behavior by changing or establishing standards and norms? Is it possible to do both? Can one speak in terms of dual goals of negligence law, namely, "to provide, or deny redress to the particular claimant but also to establish standards which the law requires and for default of which it imposes its sanctions"?¹² How should the judiciary accommodate goals of corrective justice and of distributive justice when determining liability in negligence?

Given its lack of coherence and indeterminate nature, it is hardly surprising that the boundaries of the tort of negligence are blurred. Indeed this result is quite natural, for "the law of torts must constantly be in a state of flux since it must be ever ready to recognize and consider new losses arising in novel ways."¹³ Or as Lord Macmillan stated in *Donoghue v. Stevenson*, "the conception of legal responsibility may develop in adaptation to altering social conditions and standards."¹⁴

The boundaries of negligence, while they can, and sometimes are, influenced by other components (e.g., breach of duty,¹⁵ causation,¹⁶ proximity of damage¹⁷), are determined particularly through the filter of the duty of care.

I. THE DEVELOPMENT OF THE CONCEPT OF DUTY OF CARE

The concept of duty of care is the primary device in determining the scope of liability in negligence. David Owen describes the duty of care as the overarching concept of the law. "Every negligence claim must pass through

12 *Modbury Triangle Shopping Ctr. Pty. Ltd.*, 2000 H.C.A. at 85 (per Kirby J.). For recent criticism of the instrumental goal, see Ernest J. Weinrib, *The Passing of Palsgraf*, 54 Vand. L. Rev. 803 (2001); Ernest J. Weinrib, *Does Tort Law Have a Future?*, 34 Val. U. L. Rev. 561 (2000).

13 C.A. Wright, *The Province and Function of the Law of Torts*, in *Studies in Canadian Tort Law* 1, 1-2 (Allen M. Linden ed., 1968).

14 1932 A.C. 562, 598 (appeal taken from Scot.).

15 Thus, although a finding of negligence cannot, technically, constitute a precedent, it often involves a value-judgment of the defendant's conduct and is treated like a decision on a question of law. See Cane, *infra* note 29, at 29.

16 In the United States, the requirement of proximate cause has important bearing on the scope of the tort of negligence.

17 John G. Fleming, *Remoteness and Duty: Control Devices in Liability for Negligence*, 31 Can. Bar Rev. 471, 474 (1953).

the duty portal."¹⁸ It is central to the law of torts because it provides the front door to recovery under the principal cause of action in the law of torts.

This concept has no precise equivalent in the civil law systems. Thus, causation or other notions, principally the notion of unlawfulness (*Rechtswidrigkeit*)¹⁹ and the notion of *Schutznorm*, German law's closest equivalent to the common law duty of care,²⁰ are used to perform the functions that the duty of care accomplishes in common law systems.²¹

Under both of the two drafts of the Restatement (Third) of Torts: General Principles,²² the duty of care set forth therein does not relate to an element of the *prima facie* negligence case. Rather, it refers to the failure of a defendant who is already presumed or found to have committed the tort of negligence to obtain a judicial exemption from the liability that a negligent actor ordinarily incurs. Despite its tremendous role in modern law, the concept of a duty of care has met with skepticism in torts scholarship.²³ It has been described as an "historical accident"²⁴ and as a superfluous concept, the fifth wheel on the coach.²⁵ However, Owen,²⁶ Weinrib,²⁷ and Goldberg & Zipursky²⁸ all have decried this relegation of the duty of care to secondary status under the drafts of the Restatement Third, suggesting that the duty be reintroduced as one of the elements of the tort of negligence.

The concept of a duty of care contributed tremendously to modern accident law, in general, and product liability law, in particular. It removed the privity of contract fallacy²⁹ and made it clear that negligence is a separate and independent³⁰ tort, not merely a component of other torts.

18 David Owen, *Duty Rules*, 54 Vand. L. Rev. 767 (2001).

19 Basil S. Markesinis, *A Comparative Introduction to the German Law of Torts* 79 (4th ed. 2002).

20 *The Limits of Liability: Keeping the Floodgates Shut* 4 (Jaap Spier ed., 1996).

21 See generally F.H. Lawson, *Duty of Care: A Comparative Study*, 22 Tul. L. Rev. 111 (1947); Basil S. Markesinis & Simon F. Deakin, *Tort Law* 72 (4th ed. 1999).

22 Restatement (Third) of Torts: General Principles (Discussion Draft Apr. 5, 1999); Restatement (Third) of Torts: General Principles (Preliminary Draft No. 2, May 10, 2000).

23 See John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. Pa. L. Rev. 1733 (1988).

24 Percy H. Winfield, *Duty in Tortious Negligence*, 34 Colum. L. Rev. 41, 66 (1934).

25 William W. Buckland, *The Duty to Take Care*, 51 Law Q. Rev. 637, 639 (1935).

26 Owen, *supra* note 18.

27 Weinrib, *supra* note 12.

28 John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 Vand. L. Rev. 657 (2001).

29 Peter Cane, *Atiyah's Accidents, Compensation and the Law* 59 (6th ed. 1999).

30 R.W.M. Dias, *The Duty Problem in Negligence*, 1954 Cambridge L.J. 198-99,

Under English law prior to *Donoghue v. Stevenson*, there was no general principle of liability applicable to all cases of careless conduct causative of damage. Rather, there were clusters of established duties of care in specific categories of relationships, in which one actor had a duty to take reasonable care for the protection of another. The courts were concerned with the particular relations in the actual litigation and limited their inquiries to these relations alone.³¹

Lord Atkin searched for a general principle underlying the list of specific duties³² and found it in the "neighbor principle": "Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."³³

For quite some time, the English courts were in no hurry to create or recognize new duties of care. They proceeded with some caution when asked to recognize a new category.³⁴

In *Dorset Yacht Co. Ltd. v. Home Office*,³⁵ Lord Reid stated that Lord Atkin's "neighbor test" should not be treated as though it were a statutory definition, but rather as a statement of principle that ought to apply unless there is some justification or valid explanation for its exclusion.³⁶

In *Anns v. Merton London Borough*,³⁷ Lord Wilberforce replaced the "neighbor test" with a two-stage test for determining the existence of a duty of care. He suggested that the law of negligence is founded on a single general

questioned the very significance of the statement that negligence is an independent tort. According to P.S. Atiyah, *Accidents, Compensation and the Law* 36 (2d ed. 1975) "the very notion of a 'distinct' tort is itself puzzling and perhaps meaningless."

31 A notable exception was the original attempt made by Brett M.R. (and later by Lord Esher) in *Heaven v. Pender*, 11 Q.B.D. 503, 509 (1883); see James P. Murphy, *Evolution of Care: Some Thoughts*, 30 DePaul L. Rev. 147, 147-48 (1980).

32 However, he asserts that "[t]o seek a complete logical definition of the general principle is probably to go beyond the function of the judge." *Heaven*, 11 Q.B.D. at 580.

33 *Id.* This is probably the most famous *dicta* in all English (and perhaps also Commonwealth and American) case law. See Cane, *supra* note 29; Robert F.V. Heuston, *An Overview of the Law of Negligence: 60 Years After Mrs. Donoghue's Visit to Paisley*, in *Donoghue v. Stevenson and the Modern Law of Negligence* 57, 66-67 (Peter T. Burns ed., 1991).

34 See, e.g., *Weller & Co. v. Foot & Mouth Disease Research Inst.*, 1 Q.B. 569, 577 (1966).

35 1970 A.C. 1004.

36 *Id.* at 1027.

37 1978 A.C. 728, 760.

unifying principle based on the notion of proximity subject to policy-based exceptions and limitations that are identified on a case-by-case basis. Under this two-stage test, if a sufficient relationship of neighborhood or proximity is found between the parties, a duty of care exists, unless policy considerations negate the duty or restrict its scope. This test was, in fact, an invitation to the courts to expand the boundaries of the tort of negligence. It was couched in broad and open-ended terms, liberating the doctrine of negligence from certain traditional restraints, advancing social objectives, and significantly increasing the role of the judiciary in shaping the law of torts.

The first years following *Anns v. Merton* were characterized by the expansion, perhaps even excessively to the point of erosion, of the traditional frontiers of liability in negligence.³⁸ This expansion was very problematic, given the undemocratic nature of adjudication³⁹ and the tremendous constraints of the legal process.⁴⁰ The overall impression was that the law of torts was "going too far, too fast."⁴¹

The two-stage test survived in England approximately twelve years. However, it has been the target of strong criticism. Recently, Weinrib described some of its shortcomings, claiming that it has radically altered negligence law, impairing its coherence. According to Weinrib, in the final analysis, the decisive factor in liability is the importance of the policy considerations relevant to the second stage of the test. These considerations are not governed by the relationship between the parties and may be beyond the courts' institutional competence to decide. Weinrib describes it as a sort of judicial confiscation of what is rightly due the plaintiff in order to subsidize policy objectives unilaterally favorable to the defendant and those similarly situated. Underlying this conclusion is the assumption that this test refers only to policy considerations that negate liability, not those that might confirm liability. Under this assumption, plaintiffs' claims for compensation are entirely constituted in the first stage of the test; the second stage deals only with factors favorable to defendants.

I am not sure this is, indeed, the case. Although the inquiry in the second

38 Lord Denning, in 485 Parl. Deb., H.L. (1987) 1478, stated, "We have extended the law of negligence to an altogether excessive degree." See also Judge Colin Phegan, *The Tort of Negligence Into the New Millennium*, 73 Australian L.J. 885, 885 (1999).

39 Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer*, 26 Ga. L. Rev. 725, 750 (1992).

40 James A. Henderson, *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 Ind. L.J. 467 (1976).

41 Lewis N. Klar, *Recent Developments in Canadian Law: Tort Law*, 23 Ottawa L. Rev. 177, 183 (1991).

stage of the test focuses on policy considerations that justify denying the existence of a duty of care, it seems wrong to assume that in this process, the courts are required to disregard policy considerations that favor finding a duty of care. These considerations are relevant to the decision about whether the policy considerations that favor the defendant should prevail.⁴²

In *Caparo Industries v. Dickman*,⁴³ the court abandoned the two-stage test and instead introduced a three-stage test. Under this test, three considerations are involved in deciding whether a duty of care exists:

1. Whether the alleged wrongdoer could have reasonably foreseen that a particular act or omission on his or her part would be likely to cause harm to the person who actually suffered damage or to a person in the same position.
2. Whether a relationship characterized by the law as one of proximity or neighborhood exists between the alleged wrongdoer and the plaintiff.
3. Whether it is just and reasonable that the law should impose a duty of a given scope on the alleged wrongdoer for the benefit of a person such as the plaintiff.

This test is fraught with problems, in that its various criteria seem to overlap.

New Zealand,⁴⁴ Canada,⁴⁵ and Israel⁴⁶ adhere to the two-stage test or a variant thereof, despite its rejection in England and Australia. Israeli tort law recognizes two kinds of duties of care, namely, a notional duty of care and a duty in fact.⁴⁷ A notional duty exists where there is proximity between the category of defendants to which the given defendant belongs and the category of plaintiffs to which the given plaintiff belongs, with regard to the type of actions to which the actions of the defendant belong and the type of damage suffered by the plaintiff.⁴⁸ The existence of a duty in fact is established when a duty of care exists between the particular defendant and the particular plaintiff with regard to the particular acts or omissions of the defendant and in relation to the damage inflicted upon the plaintiff.⁴⁹

42 Cf. Ariel Porat, *Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice*, 2 *Theoretical Inquiries L.* 161 (2001).

43 Lord Bridge of Harwich in *Caparo Indus. Plc. v. Dickman*, [1990] 2 A.C. 605, 617-18; *Pyrenees Shire Council v. Day*, 1998 H.C.A. 3, 244 (Kirby J.); *Gibson v. Orr*, 1999 S.C. 420, 431 (Lord Hamilton).

44 *Invercargill C.C. v. Hamlin*, [1994] 3 N.Z.L.R. 513.

45 See Klar, *supra* note 41; see also *Martel Bldg. Ltd. v. Canada*, 2000 S.C.R. 60.

46 C.A. 243/83, *City of Jerusalem v. Gordon*, 39(1) P.D. 113, 129.

47 This distinction can be traced to Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 *Law Q. Rev.* 184 (1926).

48 *City of Jerusalem v. Gordon*, 39(1) P.D. at 113.

49 *Id.*

The employment of this distinction in the positive law is unfortunate and *ipso facto* problematic. It imposes upon the judicial process an unnecessary additional burden, while the value of a separate examination of the notional duty is questionable. If this duty is couched in general terms, e.g., "a medical doctor owes her patients a notional duty of care," it hardly can serve any useful purpose and lacks legal precision, since under certain conditions, medical doctors do not owe a notional duty of care to their patients. In order to give such a duty of care precise meaning that will exclude various kinds of exceptions, it must be expressed in a more detailed fashion, one that will bring it closer to an exposition of fact.

II. THE NATURE OF NEGLIGENCE

The term negligence denotes a mode of conduct or a particular type of conduct (or omission), i.e., careless conduct, as well as an independent tort, namely, a breach of a duty of care resulting in undesired damage to another.

In its first sense, negligence is a species of *culpa*. *Culpa* is the legal concept, and negligence a non-technical description of its most recurrent type. According to some writers, negligence in this sense is a mental state equivalent to total or partial indifference to an act or omission and/or to its undesired consequences.⁵⁰ The state of mind is either awareness on the part of the defendant that his or her conduct involves an unreasonable risk of harm or a lack of such awareness due to the failure to exercise a reasonable level of mental vigilance. According to Professor Hart, what is condemnable is not doing something in a blank state of mind, but, rather, letting oneself be in such a state of mind in circumstances that warrant care.⁵¹

Other scholars, however, have properly noted that negligence in this sense is not a state of mind, but, rather, conduct in a particular state of mind. Negligence in this sense is but one of the various types of conduct that may give rise to liability under a specific tort. Take the tort of private nuisance, for example. The essence of this tort is an action — the invasion of another's interest in the use and enjoyment of his or her land. This invasion may occur

⁵⁰ See, e.g., W.V.H. Rogers, Winfield & Jolowicz On Tort 51 (15th ed. 1998).

⁵¹ H.L.A. Hart, *Negligence, Mens Rea and Criminal Responsibility*, in *Oxford Essays in Jurisprudence* 29, 30, 38 (Anthony G. Guest ed., 1969).

either through negligence (e.g., by nonfeasance⁵²) or through intentional, reckless, or abnormally dangerous conduct.

The second sense of the term "negligence" refers to the tort of negligence. This tort differs in certain respects from "particular," or "specific," torts. Particular torts are characterized by their relatively limited scope of application. Each one is limited to the protection of a defined particular interest and specifies certain *sine qua non* conditions for imposing liability. The tort of negligence, on the other hand, is broader in scope than these torts and is not limited to the protection of particular interests. The crux of this tort is not the existence of specific fixed elements, but, rather, the legal concept of the scope of tortious liability. Instead of providing courts with a set of definite rules and principles, as do particular torts, the tort of negligence provides courts with a legal framework, namely, general guidelines to reach fair and efficient decisions.⁵³ Courts, when dealing with the tort of negligence, do not simply apply the law, they often create it, although many judges are not willing to admit this.⁵⁴

Another difference between the tort of negligence and the particular torts is in the terminology. Particular torts are usually analyzed in functional terms, such as the nature of the defendant's conduct, the extent of his or her mental involvement, and the nature of the harm suffered by the plaintiff. Negligence, on the other hand, is analyzed in terms of the concept of a duty of care.

The tort of negligence has prevailed despite the radical shift toward strict liability in central areas of accident law. It has been utilized to blur the boundaries between private law and public law. It has influenced all other fields of the law, leaving its mark on labor law,⁵⁵ family law,⁵⁶ constitutional

52 For instance, in cases where a defendant failed to control the land effectively and did not remove a private nuisance created by someone else, liability came to be dependent upon knowledge or means of knowledge of the nuisance.

53 The credit for this fine description should go to Justice Mishael Heshin, *The General Law of Torts* 85-86 (2d ed. 1977) (Heb.).

54 Judges sometimes deny the existence even of judge-made law, *see, e.g.*, *Willis & Co v. Baddeley*, 2 Q.B. 324, 326 (1892) (per Lord Esher M.R.).

55 *See, e.g.*, Terry A. Bethel, *Negligent Retention and Arbitration: The Effect of a Developing Tort on Traditional Labor Law*, 2000 J. Disp. Resol. 215. For the tort of retaliatory discharge and wrongful dismissal cases, *see Johnson (A.P.) v. Unisys Ltd.*, 2001 U.K.H.L. 13.

56 *See, e.g.*, Richard A. Campbell, *Transition: The Tort of Custodial Interference — Toward a More Complete Remedy to Parental Kidnappings*, 1983 U. Ill. L. Rev. 229.

law,⁵⁷ administrative law,⁵⁸ evidence law,⁵⁹ and so forth. Contract law has not been left untouched either in this respect. Lord Macmillan asserted in *Donoghue v. Stevenson* what is today commonly recognized, that the fact that there is a contractual relationship between the parties that may give rise to an action for breach of contract does not exclude the co-existence of a right of action based in negligence between the same parties, independently of the contract though arising out of the contract-created relationship.⁶⁰ In *Henderson v. Merrett Syndicates Ltd.*, Lord Goff rejected the argument that the law of torts can be used only to fill the gaps left by the law of contract. His approach was to "treat the law of tort [as] the general law out of which the parties can, if they wish, contract [since] ... the common law is not antipathetic to concurrent liability... there is no sound basis for a rule which automatically restricts the claimant to either a tortious or contractual remedy."⁶¹

Sometimes the overlapping is between the tort of negligence and the statutory regime. For example, the House of Lords held in *Murphy v. Brentwood D.C.*⁶² that a builder is not liable in negligence to the owner of a house built by him, in respect of construction defects that did not cause personal injury or damage to other property. The Court classified the action as a case of pure economic loss of a sort that should be governed by the law of contract. At the same time, however, the Premises Act, 1972, imposes upon the builder of a dwelling liability transmissible from one owner to another, for the very defects of quality that were being complained of. The limitation period under the Act is six years from completion of building. The limitation period for the common law duty could be longer. The Court therefore refused

57 Note the development of constitutional torts in United States. This field is in its infancy stage in Canada, England, and Israel.

58 The Israeli Supreme Court has infused concepts of tort law into Israeli administrative law. Moreover, tort actions against administrative authorities have successfully fulfilled the ombudsperson-role of tort law.

59 The law of spoiled evidence, tort actions for loss of a chance, and the doctrine of evidentiary damage have been developed by Israeli scholars Ariel Porat & Alex Stein, *Tort Liability under Uncertainty* (2001).

60 *Donoghue v. Stevenson*, 1932 A.C. 562, 610 (appeal taken from Scot.).

61 [1995] 2 A.C. 145, 193. The opposite view is represented by Lord Scarman in *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank*, 1986 A.C. 80, 107, and Justice Tipping in *Simms Jones Ltd. v. Protochem Trading New Zealand Ltd.*, [1993] 3 N.Z.L.R. 369, 381 ("if the parties have chosen a contractual bed they should ordinarily be expected to lie in it alone without the seductive company of tort").

62 [1991] 1 A.C. 398.

to allow an action in negligence, thereby permitting a circumvention of the statutory limitation period and other exclusions thereunder.

This conclusion was criticized by Rogers:

[I]f this approach were taken to its logical conclusion, there would never by any expansion of tort law, indeed, it would be a good deal narrower in its scope than it now is, for there is almost always some legal regime governing the situation and if it gives no civil remedy in damages to the plaintiff it might be argued that that reflects a proper view of public policy.⁶³

Along similar lines, David Howarth warns against adopting the mistaken view that the only cases that should be "covered" by negligence are those where there is a set expectation that negligence law will apply. Under this view, there are no misfortunes to which some field of law other than negligence does not apply in some sense, even if under that field, no remedy is provided to the injured party. Thus, any case involving public authorities is "covered" by administrative law; any case involving a motor accident is "covered" by criminal law; and so forth.⁶⁴

Another case illustrating the overlapping of statutory law and negligence law is the decision in the English *CBS Songs Ltd. v. Amaral Consumer Electrics Plc.*⁶⁵ In this case, the defendants manufactured tape-to-tape domestic audio systems that facilitated illegal copying of copyrighted material. The House of Lords refused to recognize the existence of a duty of care owed by the manufacturers to the owners of the copyright, pointing out that with the copyright legislation, the legislature had set a code to govern the rights of copyright owners, and this code imposes liability only where copying has been authorized. Here, this requirement was not met, since purchasers were warned against illegal copying. The Court refused to sidestep the statutory regime.

The infiltration of negligence actions into areas that previously had not produced tort claims or even claims of any sort is inevitable in view of the abstract and open-ended nature of negligence and the unavoidable overlap with other areas of liability.⁶⁶ However, this important matter mandates separate treatment. This article focuses only on the impact of the tort of negligence on other torts.

63 Rogers, *supra* note 50, at 106.

64 David Howarth, *Negligence After Murphy: Time to Re-Think*, 50 Cal. L.J. 58 (1991).

65 [1998] 1 A.C. 1013.

66 Jane Stapleton, *In Restraint of Tort*, in 2 *The Frontiers of Liability* 83, 84 (Peter Birks ed., 1994).

Uncontrolled expansion of liability by way of the tort of negligence threatens the very foundations of the legal system and raises difficult institutional problems.

In 1967, Professor Millner claimed that

[t]he growth of the tort of negligence has proceeded by way of infiltration into the causes of action of other torts, sometimes modifying the rules of those torts, sometimes ousting them entirely from particular situations. In either event the outcome is the annexation of more territory by the tort of negligence at the cost of the other torts, which are either diminished in importance or undergo certain changes in character.⁶⁷

These concerns have been expressed by others, with the House of Lords warning "against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss."⁶⁸ However, as Lord Templeman observed, "The tort of negligence has not yet subsumed all torts and does not supplant the principles of equity or contradict contractual promises or complement the remedy of judicial review or supplement statutory rights."⁶⁹

III. THE RELATIONSHIP BETWEEN NEGLIGENCE AND DEFAMATION

When can a plaintiff circumvent difficulties encountered in establishing liability under a particular tort by making a claim in negligence? When should this not be allowed? The specific characteristics of each individual tort are, of course, relevant in this context. Hence, it is important to compare the two torts in question and examine the relationship between them both in general and in the context of the particular case.

It is desirable, however, to search for a principle or set of guidelines for determining liability in cases of the overlapping of torts. In this section, I will seek to shed some light on some of the problems that arise when torts overlap, specifically overlap between general torts and particular ones. I will analyze a few cases of overlap between negligence and certain particular torts.

67 M.A. Millner, *Negligence in Modern Law* 15 (1967).

68 *Downsview Nominees v. First City Corp.*, 3 All E.R. 637 (1993).

69 *China & South Sea Bank v. Tan*, 3 All E.R. 839, 841 (1989).

The first relationship analyzed is between negligence and defamation. A renowned modern decision that explores the relationship between these two torts is the House of Lords' decision in *Spring v. Guardian Assurance Plc.*⁷⁰ In this decision, the majority held that an employer could be liable in negligence to a former employee for providing an inaccurate reference of employment. In *Spring*, the former employer of the plaintiff sent a letter of reference to a prospective employer (an insurance company) following a request by the latter and without any involvement on the part of the plaintiff. The letter of reference included a sentence to the effect that the plaintiff is "of little or no integrity and could not be regarded as honest." Subsequent to this letter of reference, the potential employer declined to allow the plaintiff to sell its policies. The trial judge had held that the plaintiff, while incompetent, was not dishonest and that the defendant's employees, who had supplied the potential employer with the false information, had been negligent, although not malicious.

This was clearly a case of defamation. However, the plaintiff was precluded from basing his claim on a defamation cause of action. Although the contents of the reference were defamatory, the provision of a reference at the request of a prospective employer is a classic instance of qualified privilege. In the absence of malice, the plaintiff could succeed neither in a defamation action nor in the alternative claim for malicious falsehood.

The House of Lords' decision in this case raised three significant questions. The first question relates to the appropriate balance between freedom of expression and the right to reputation. The second question deals with the subject of the overlapping of torts. The third question involves the norm prescribed in this case and evaluates its impact on letters of reference in general and in the labor market in particular.

In dealing with the first question, the House of Lords rejected the defendant's contention that public policy dictates dismissal based on the doctrine of qualified privilege, which protects the freedom to express one's views in good faith even if done negligently. Lord Lowry⁷¹ makes no mention at all of the freedom of expression. Instead, he focuses on negligence law and weighs the damage caused to the plaintiff against future damage to prospective reference givers. His conclusions are unequivocal: "Public policy considerations do not justify denial of liability in negligence and as a general

70 1995 A.C. 296.

71 *Id.* at 325.

rule should be invoked only in clear cases in which the potential harm to the public is incontestable."⁷²

Undoubtedly, by allowing the negligence action to proceed, the Court allowed the plaintiff to circumvent the insurmountable impediments on the way to recovery under the torts of malicious falsehood and defamation. In doing so, the Law Lords refused to accept the proposition that defamation and malicious falsehood constitute the exclusive legal regime for the resolution of a claim such as the plaintiff's and that the introduction of liability for negligence would improperly subvert the goals of the law in respect of those torts.⁷³

Gatley⁷⁴ delineates the following justifications for the conclusion reached by the House of Lords in *Spring*. The first justification refers to the differences between the relevant torts: negligence and defamation are different torts with different elements. Negligence requires that the plaintiff establish the existence of a duty of care and show a breach thereof; in the case of defamation, the plaintiff can establish his or her cause of action simply by showing that the words were defamatory, thereby shifting the burden of proof to the defendant to prove one of the set defenses, such as the defense of truth, qualified privilege, and fair comment. Defamation is actionable *per se* in most cases, whereas in negligence, the plaintiff must prove actual loss caused by the defendant's negligence.

The relevance of this first justification to the issue of the overlapping of torts is questionable. The Court was apparently trying to show that due to the vast differences between the two torts in question, allowing a plaintiff to invoke one would not affect the other. Yet this was not true in the case at hand, nor is it ever the case when the problem of an overlapping of torts is invoked. This problem arises when each of the alternative causes of action will produce a different result, each irreconcilable with the alternative expected result.

Gatley's second justification is that it is not just to require a defamed employee to prove malice. Proving malice is extremely difficult, and moreover, an employee is entitled to the protection of the law even in the absence of malice — not only in cases of recklessness, but also in negligence cases. Thus, the application of qualified privilege in such a case is inappropriate.

⁷² *Id.*

⁷³ *See, e.g.,* Bell-Booth Group v. A.G., [1989] 3 N.Z.L.R. 148; Balfour v. A.G., 1991 N.Z.L.R. 519; South Pacific Mfg. Co. v. N.Z. Sec. Consultants & Investigation, 1992 N.Z.L.R. 282.

⁷⁴ Clement Gatley, *Gatley on Libel and Slander* 507-08 (9th ed. 1998).

Though I too believe that the requirement of malice is unjust, it does not follow that it should be circumvented. Rather, amendment to the law of defamation is called for, not stripping it of all content by sidestepping its prescriptions.

The rest of Gately's justifications touch on the third question dealt with by the House of Lords and explain why a negligence action should prevail under a balance of interests.

In *Spring*, the Court mentions the effects on the labor market and the severe expected damage to the subjects of letters of references in such cases.⁷⁵ It urges caution on the part of former employers in preparing references, recalling the proximity between the parties and, according to Lord Goff, the assumption of responsibility by the employer toward the former employee.⁷⁶

The Court is not unaware of the opposing argument, which relies largely upon the proposition that as a result of such liability, no one will be willing to give a reference or, alternatively, will do so "defensively" so as to minimize the risk of liability.⁷⁷ Here we find a clear manifestation of over-deterrence. Imposing such a duty of care on former employers would increase the costs of giving references, to the point that referees would give fewer references and provide less information in each reference. Indeed,

[a] lack of useful information about job applicants could lead to an inefficient allocation of human resources, lower productivity and perhaps an increase in social security expenditure. A lack of information could also put the public at risk if for example a dishonest person was appointed to a position of trust.⁷⁸

However, imposing a duty of care upon referees would not necessarily have a dramatic effect on the amount of references given. Moreover, it would definitely increase the accuracy of references. It seems preferable, by and large, to have fewer reliable references rather than many suspicious ones. With regard to the latter possibility, in the absence of a cheap mechanism to determine reliability and accuracy, the overall utility of all references is severely hampered.

75 It is quite probable that in many cases, the damage can be mitigated, for example, by sending another reference or by explaining the mistake in the first reference to the recipients of this document.

76 *Spring v. Guardian Assurance Plc.*, 1995 A.C. 296, 319.

77 In such a case, the recipient of the reference may sue the reference giver.

78 Thomas Alen, *Liability for References: Spring v. Guardian Assurance*, 57 Mod. L. Rev. 111, 113 (1994).

On the other hand, it is possible to conceive of circumstances in which the quantity of information is probably more important than the accuracy. The New Zealand Court of Appeal in *Balfour v. Attorney General*⁷⁹ declined to impose a duty of care in respect of a school inspector's reports on teachers, in part because the court felt that the public interest mandates that inspectors report anything that might indicate that a teacher represents a risk to students. This decision has been justified also in terms of the desire to prevent negligence law from circumventing defamation law.

In this case, a teacher claimed that his employment prospects had been damaged by a statement in his file that he is a homosexual. His defamation claim was unsuccessful because the alleged defamatory statement was true and because the defendant would be able to raise the defense of qualified privilege, which could be dispensed with only by proving malice. The plaintiff's attempt to circumvent this difficulty by suing in negligence also failed. The court explained that "[a]n inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame."⁸⁰

A recent Australian case,⁸¹ two appeals that were heard together, follows in the footsteps of the New Zealand courts. Both appeals were brought by the fathers of young children suing medical practitioners and social workers at the Sexual Assault Referral Centre. The fathers alleged negligence in examination, diagnosis, and reporting of their children's state and in reaching the wrong conclusion that they had been sexually abused. In the first case, the matter had been referred to the police, who charged the father with sexual offences. The charges were ultimately dropped, but as a consequence of the allegations and charges, the appellant suffered shock, distress, and psychiatric harm, as well as personal and financial loss. In the second case, similar conclusions by the defendants were believed by the appellant's wife and resulted in the breakdown of the marriage. The defendants claimed that they owed no relevant duty of care to the appellants. Although the harm inflicted upon the appellants had been foreseeable, the trial court had decided that the defendants indeed bore no such duty of care. Thus, it was ruled that the harm suffered by the appellants had not been the direct result of the conduct of the defendants. A parent who is the potential suspect in a conclusion of sexual abuse can hardly be regarded as a person whose interests the defendants could

79 *Balfour v. Attorney General*, [1991] 1 N.Z.L.R. 519.

80 *Balfour*, [1991] 1 N.Z.L.R. at 529.

81 *Suttin v. Nationwide News*, [1996] 39 N.S.W.L.R. 32; "GS" v. News Ltd., [1998] Austl. Torts. R. (8) 446.

be expected or required by the law to consider. The relevant statute imposed a duty upon the defendants to protect children, to investigate allegations of child abuse, and to make the necessary reports. The interests of the child were to be the paramount consideration. Recognizing a duty of care owed by the defendants toward alleged abusers would discourage or inhibit the performance of their statutory duties. It would subject them to an intolerable burden of potential liability and constrain their freedom of action in a gross manner. Moreover, the tort of negligence would subvert many other principles of law and statutory provisions, which strike a balance between rights and obligations, duties and freedoms.

The House of Lords decision in *Spring* was relied upon in the recent *Cox v. Sun Alliance Life Ltd.*⁸²

In sum, it seems to me that the decision of the House of Lords in *Spring v. Guardian Assurance Plc.* seems to be justified. It is justifiable in terms of both economic efficiency and equity considerations. Writing references, as any other activity, should pay its true social price. It should internalize any external costs caused by it. Such a rule would help the unfortunate victim of the negligent activity, namely, its subject or its recipient, to cope with the adverse effects of the reference. Moreover it would give the compiler of a reference an incentive to be more careful and accurate when preparing it. To overcome fear of over-deterrence and "defensive references", it is advisable to explore and even develop the possibility of obtaining insurance against liability for negligent references and even demanding payments for references.

Although in this case, most of the theoretical justifications for allowing the plaintiff to pursue his negligence action were unconvincing, an argument made by Lord Wolf is, nonetheless, most intriguing. He claimed that following the New Zealand approach "would mean that a plaintiff who would otherwise be entitled to succeed in an action for negligence would go away empty-handed because he could not succeed in an action for defamation."⁸³ In other words, Lord Wolf actually emphasized the reciprocal nature of such an overlapping of torts: preference for one would come at the expense of the other.

Maintaining the *status quo ante* is a clear decision in favor of the tort that, for historical reasons or otherwise, is regarded by the legal system as the tort to be reckoned with in this type of legal conflict. In view of the reciprocal nature of the overlapping between the torts, if a defendant in a

82 2001 E.W.C.A. Civ. 649 (May 9, 2001).

83 *Spring v. Guardian Assurance Plc.*, 1995 A.C. 296.

negligence action can successfully claim that the action should be dismissed on the grounds of falling within the exclusive ambit of defamation law, then, similarly, a defendant in a defamation case should be able to successfully claim that the action should be dismissed because the plaintiff failed to prove carelessness.

Finally, in the process of delineating the boundaries between conflicting causes of action, the courts should examine which cause of action is the most suitable in terms of equity and efficiency. Gately asserts that "[i]f the statement is true, there can be no liability in negligence any more than for defamation."⁸⁴ It seems to me that this proposition is not devoid of difficulty. No one has license to reveal to the whole world true facts about another person. Obviously, one is not allowed to infringe on that person's privacy. It is conceivable that under certain circumstances, it would be negligent to convey information, even if true, to a recipient likely to misuse it and harm the subject of that information. The rationale of Gately's proposition can be examined in light of the Israeli Supreme Court decision in *Shaha v. Dardiryian*.⁸⁵

In this case, the plaintiff, an archbishop in the Armenian Church in East Jerusalem, brought a defamation action in the District Court of Jerusalem against the Church's Patriarch. Both parties were citizens of the Kingdom of Jordan, living within the East Jerusalem Arab community and had strong ties with the Arab world. The plaintiff claimed that the defendant had accused him of collaborating with the Israeli government. These accusations were included in a statement made by the defendant to the Jordanian government and were published in a Jordanian newspaper and distributed in East Jerusalem and Judea and Samaria. Following this publication, the Jordanian authorities decided to deny the plaintiff entry into the Kingdom of Jordan. The plaintiff claimed that the accusations were false and defamatory and that their publication had damaged his reputation amongst many Arabs, especially those residing in East Jerusalem and other territories occupied by Israel, and had exposed him to their hatred. The plaintiff also claimed that as a result, he had been injured in his vocation, which entailed frequent visits to Arab states; he also claimed he had suffered pecuniary damage since he was prevented from making use or enjoying real estate he owned in Jordan.

The District Court accepted the defendant's motion to strike the claim for lack of cause of action. The Supreme Court, in turn, unanimously dismissed

84 Gately, *supra* note 74, at 512.

85 C.A. 466/83, *Shaha v. Dardiryian*, 39(4) P.D. 734; Daniel More, *Informers, Defamation and Public Policy*, 19 *Geo. J. Int'l & Comp. L.* 503 (1989).

the plaintiff's appeal. The decision was justified in terms of public policy considerations. Justice Levin stated,

As a matter of judicial policy, it is impossible and inconceivable that an Israeli court would determine that collaboration with the government of Israel and its policy is an activity that should be regarded, under certain circumstances, as defaming the collaborator.

...

A person who collaborates with the government of Israel for the realization of these goals [of maintaining law and order] or enjoys its protection for that reason will not be regarded as doing something wrong just because his activities are regarded unfavorably by the enemies of the State who disagree with its policy in the occupied territories and with its right to rule and operate there Some matters ... are supreme and overshadow all niceties of ... the usual legal rules. ... Judicial policy may demand denying accessibility to courts in certain unworthy matters. Such a policy is indeed irregular and should be pursued carefully yet vigorously in the appropriate exceptional circumstances such as those existing in this case.⁸⁶

It would appear that this decision was wrong and unfortunate. It left remediless a plaintiff who had been defamed and had suffered not only pecuniary damage and a substantial loss of esteem, but whose very life and health were seriously endangered. This is a political reality in which collaborators or people suspected of being collaborators are exposed to mortal danger. In this case, the Israeli courts could and should have reached a different outcome. The fear that the action's success would validate and encourage wrong beliefs does not justify the decision to deny the plaintiff his right to live free of defamation.

One of the options for sidestepping the issue of whether collaboration with the Israeli authorities is "wrong" would have been to turn to the tort of negligence. If indeed there were no foundation for the allegation that the plaintiff had collaborated with the Israeli authorities, it would have been negligent and even irresponsible on the part of the defendant to ascribe to the plaintiff such behavior, thereby inflicting upon him various types of damage and endangering his life. In this case, both defamation and negligence were available causes of action. Even if the allegations were true, it is doubtful

86 *Shaha*, 39(4) P.D. at 739.

that Gatley's assertion, "If the statement is true, there can be no liability in negligence any more than for defamation,"⁸⁷ holds here.

The link between defamation and negligence was made in a recent Israeli Supreme Court decision, *Yedioth Aharonoth Inc. v. Kraus*.⁸⁸ The respondent in this case was a high-ranking officer in the police and the appellant a newspaper that had published a series of articles defaming the respondent by enumerating various suspicions of criminal offences of which he was allegedly guilty. At the time of publication, the contents of the articles had been true and the appellant had acted in good faith. Eventually, the District Attorney decided to close the file on the matter, thereby clearing the respondent's name. However, the appellant did not convey this information to its readers.

The respondent brought a defamation action. The appellant relied on the defenses of truth and qualified privilege.

The majority opinion was that the newspaper's conduct after publication of the articles does not work to exclude these defenses, since the relevant time for their application is the time of publication. The fact that the appellant had breached an ethical duty does not change the outcome of the case.

The Court mentioned only in passing the possibility of the availability of an alternative cause of action, namely, a negligence action. The majority dismissed this option, pointing out that even the respondent himself had not asked the appellant to publish the fact that his name had been cleared.

A negligence action in such a case could have been grounded in the claim that the newspaper bore a duty of care toward the respondent. The respondent's name had been defamed, and in refraining from reporting the District Attorney's decision to close the file, the newspaper left the defamatory effect intact. The appellant-newspaper could have foreseen that such omission would mean that the respondent's reputation would not be restored.

The other elements for finding a duty of care — proximity and the requirement that it is just and reasonable to find a duty of care — seem to exist here as well. Moreover, the appellant's infringement of an ethical duty reinforces the conclusion of the existence of a duty of care as well as its breach: a reasonable newspaper does not breach ethical duties.

In light of the damage caused to the respondent and the causal connection

⁸⁷ Gatley, *supra* note 74, at 512.

⁸⁸ C.A. 7325/95, *Yedioth Aharonoth Inc. v. Kraus*, 52(3) P.D. 1. *See also* C.A. 3199/93, *Kraus v. Yedioth Aharonoth Inc.*, 49(2) P.D. 843; Tamar Gidron, *Defamation — A Negligence Action?*, 7 *Hamishpat* 40 (1997) (Heb.).

between this damage and the said omission, it seems that the Court should have found liability in negligence. However, the prospects of a negligence action in this case were not particularly high, for the following reasons. First, this case involved an omission, and the legal system in general tends to be very conservative in imposing affirmative duties. Second, substantive policy considerations justify denying recognition of a duty of care in such a case. Such recognition would compel newspapers to keep track of any person ever mentioned in their publications as a suspect or as an accused and give follow-up reports as to his or her fate. Perhaps such a practice is justifiable, or even desirable, but it is costly both in terms of economic resources necessary and limitation of freedom of expression.

Peter Birks asserts that defamation and negligence overlap because of the existing legal classifications of the two.

Defamation is a wrong ... which is manifestly named by reference to the interest infringed. Negligence is a wrong named by reference to the kind of fault. It follows that the two categories must intersect ... [for] infringement of the interest in reputation will often be negligent. Is there then one wrong or two?⁸⁹

Birks explores the possibility of redefining the two categories. He argues that causes of action could be redrawn as categories so as not to intersect. All torts could be framed solely by reference to the interests they protect or by reference to the conduct of the defendant.

This approach seems rather problematic. Redefining the causes of action is possible, even commendable, with regard to the particular torts. It is impossible, however, to prevent a particular tort and a general one, such as negligence, for example, from intersecting. Indeed, negligence cannot be defined in terms of interests protected thereunder, and a particular tort cannot be defined along the lines of the nature of the wrongdoer's conduct,⁹⁰ for this would erase completely the existing law of torts. Moreover, one accident or one breach of contract can give rise to two or more causes of action.

89 Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 26 U.W. Australian L. Rev. 1, 6 (1996).

90 Cane, *supra* note 29. Cane points out three alternative ways to classify the body of the law of torts. The first way focuses on the protected interests; the second way looks at the causes of the injury (who causes what and in what way, for example, intentionally, maliciously, negligently, etc.); and the third way is to examine the relationship between the plaintiff and the defendant.

IV. INTENTIONAL CONDUCT AND THE TORT OF NEGLIGENCE

Does the tort of negligence encompass intentional conduct?

Suppose the manufacturer in *Donoghue* had intentionally put the snail in the bottle. Could Mrs. Donoghue have sued him successfully in negligence?

Negligent actions are traditionally connected with "careless" acts or omissions. In common language, no one will describe as negligent the intentional commission of a crime or other intentional, let alone malicious, conduct. Yet, when a person intentionally or maliciously infringes the protected interest of another, he deviates from the socially acceptable standard of behavior. In other words, he most definitely behaves unreasonably.

According to Peter Cane,

Negligence in tort law is failure to comply with a legally specified standard of conduct, pure and simple. It has no mental element.

On the one hand, the plaintiff in a tort action for negligence does not have to prove inattention or inadvertence on the part of the defendant. Inadvertence is not a precondition of tort liability for negligence (or under any other head). On the other hand, if a driver intentionally rams a pedestrian with [his] car in order to injure, and emotionally desiring to injure the pedestrian, the driver could be held liable in tort for negligence on the ground that a person who does that fails to take reasonable care for the safety of another.⁹¹

His conclusion was that conduct may attract liability under more than one head. For instance, intentional conduct may attract liability for negligence and also under some other head of liability for which proof of intention is a condition. Thus, a fraudulent misstatement may attract liability for negligence or for deceit. The plaintiff would have a choice whether to sue for negligence or deceit, knowing that any advantages of liability for deceit over negligence liability could be obtained only at the expense of undertaking the difficult task of proving fraud.⁹² In a recent

⁹¹ Peter Cane, *Mens Rea in Tort Law*, 20 *Oxford J. Legal Stud.* 533 (2000).

⁹² *Id.* at 537.

English case,⁹³ contributory negligence was attributed to a prisoner who had committed suicide in prison, despite the fact that this was an intentional act. This was justified on the ground that the prisoner had failed to take reasonable care for his own safety.

This is the current position of the Israeli Supreme Court⁹⁴ as well as in accord with prevailing German law,⁹⁵ although it is doubtful whether this proposition would find wide support in England. I fully agree with this approach, but since this matter requires separate inquiry, I will suffice with only a few general observations.

First, many theoretical and practical problems emanate from the inclusion of intentional and malicious conduct under the umbrella of the tort of negligence. Take the case of the overlap between negligence and deceit. This is not a case of partial overlapping, as in the cases discussed in the preceding section, but rather one of massive proportions.⁹⁶ For historical reasons, under Israeli tort law, in many types of malicious misstatements, liability for deceit arises only if the misstatement was made in writing and signed by the defendant. Is it justifiable to impose similar anachronistic requirements in an action based on a negligent misstatement, in the absence of malice? It would appear to be inconsistent and illogical to treat careless defendants more harshly than malicious ones.

Suppose the defendant acted maliciously, should the court allow him to circumvent the statutory requirement of a written misstatement signed by him, by disregarding the deceit claim and focusing, instead, on the negligence claim? Professor Englard tends to answer this question in the affirmative.⁹⁷ I disagree. I believe that in such cases, in determining the existence or non-existence of a duty of care, it is imperative that courts give decisive weight to the fact that with regard to malicious misstatements, it is the legislature's

93 *Reeves v. Comm'r of Police*, [2000] 1 A.C. 3660.

94 *Hadassa v. Gilad*, 53(3) P.D. at 529; C.A. 2034/98, *Amin v. Amin*, 53 P.D. 69, 81.

95 § 826 BGB.

96 Actually, torts never really overlap with one another. Each has its own distinctive features. When we use the term a "complete overlapping" of torts, we are actually referring to a situation in which there are more than one causes of action available to the plaintiff and he has the option to decide which one of these avenues to pursue. When we use the term "partial overlapping," we are referring to a situation in which all the elements of one tort are met and, at the same time, some but not all of the elements of another tort are fulfilled. In the latter case, the plaintiff does not have a choice, since he can sue only under the first tort.

97 Itzhak Englard, *The Contribution of the Judiciary to the Development of the Law of Torts, Its Self Image and Reality*, 11 *Iyunei Mishpat* 67, 80 (1985) (Heb.).

intention not to impose liability in the absence of a written misstatement signed by the defendant.

Second, allowing intentional and malicious conduct that falls within the boundaries of a particular tort to fall also within the ambit of negligence is not tantamount to the merger of the two distinct torts. Each tort has its own components. In a negligence action, the element of duty of care will enable the courts to make an intelligent and just decision whether to allow the action.

Third, even if as a result of a decision to include intentional and malicious conduct within the framework of negligence, intentional torts were annexed to the tort of negligence, it would still be advisable to devise liability rules specifically applicable to malicious conduct — for example, with regard to the scope of liability, remoteness of the damage, pure economic and mental damages, and punitive damages.⁹⁸

Fourth, the absence of a general principle of tort liability for intentional conduct is not the product of any ideological stance. Such a principle has in fact been recognized by the courts in certain cases. For example, in *Mogul S.S. Co. v. McGregor, Gow & Co.*,⁹⁹ the court stated that "[i]ntentionally to do that which is calculated in the ordinary course of events to damage and which does, in fact, damage another in that other person's property or trade is actionable if done without just cause or excuse."¹⁰⁰ And in *Wilkinson v. Downton*:¹⁰¹

The defendant has ... willfully done an act calculated to cause physical harm to the plaintiff — that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action; there being no justification alleged for the act.¹⁰²

Some scholars claim that a person has a cause of action in tort when someone has intentionally and without justification inflicted damage upon

98 See P.S. Atiyah, *American Tort Law in Crisis*, 7 Oxford J. Legal Stud. 279, 285-87 (1987).

99 23 Q.B. 598 (1899).

100 *Id.* at 613 (per Lord Bowen).

101 2 Q.B. 57 (1897); *cf.* *Wong v. Parkside Health NHS Trust*, 2001 E.W.C.A. Civ. 1721.

102 2 Q.B. at 58-59 (per Wright J.); *see also* *Best v. Samuel Fox & Co.*, 1952 A.C. 716; *Rooks v. Barnard*, 1964 A.C. 11129.

him.¹⁰³ Such a principle was adopted by a few of the U.S. states¹⁰⁴ and has been endorsed by the High Court of Australia.¹⁰⁵

V. THE INSTITUTIONAL PROBLEM

Negligence law is usually portrayed as a tort that focuses on the doer rather than on the deed. It is characterized by the blame attached to the actor rather than by the results of his or her activity, namely, the interference in the protected interests of others. In view of the objective nature of the requirement of fault and the retrospective application of its norms, it is advisable to reconsider these basic characterizations.

Negligence is a general tort. Its abstract and indeterminate nature precludes restricting it to blameworthy conduct. However, in adjudicating negligence actions, courts do not apply rules as they do when adjudicating particular torts; rather, they deal with standards, principles, and policies. In some cases, value judgments are required; in others, the judges actually undertake the enterprise of "judicial legislation" or "judge-made" law.

Courts must exercise caution not to transcend the limits of their powers. The Israeli Supreme Court's decision in *Ashdod Transportation Industries Ltd. v. Tsizik*¹⁰⁶ is a good example of such a transgression.

This case dealt with a strike by the naval officers in the Israeli merchant marines, which was called by the national union of naval officers. The striking officers disobeyed the authorities' instructions to move two vessels that were docked at the Haifa port, thereby preventing the unloading of other vessels. Owners of containers who suffered financial losses as a result

103 Jeremy F. Lever, *Means, Motives and Interests in the Law of Tort*, in *Oxford Essays in Jurisprudence* 50 (Anthony G. Guest ed., 1961); Tony A. Weir, "Chaos or Cosmos" *Rookes, Stratford and the Economic Torts*, 1964 *Cambridge L.J.* 225. *But see* John Dyson Heydon, *Economic Torts* 92 (1973).

104 *See, e.g.*, Ronald Alan Norwood, Note, *Prima Facie Tort — A Judicial Reaction to Public Employee Strikes in Missouri*, 50 *Mo. L. Rev.* 687 (1985); Note, 44 *Brook. L. Rev.* 720 (1978); Note, *The Prima Facie Tort Doctrine in New York — Another Writ?*, 42 *St. John's L. Rev.* 531 (1968).

105 *Beaudesert Sire Council v. Smith*, 120 *C.L.R.* 145, 146 (1966); John L. Dwyer, Note, *Beaudesert a Spurious Principle After All*, 3 *Tort L. Rev.* 169 (1995); Graeme Orr, *Abrogating the Beaudesert Aberration: The High Court on Governmental Liability in Northern Territory v. Mengel*, 15 *U. Tasmania L. Rev.* 136 (1996); Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 *Tex. L. Rev.* 1539 (1997); *Northern Territory of Australia v. Mengel*, [1996] 185 *C.L.R.* 307.

106 *C.A. 593/81, Ashdod Transp. Indus. Ltd. v. Tsizik*, 41(3) *P.D.* 169.

of the strike brought a tort action against the national union. The Supreme Court ruled in favor of the plaintiffs. Israeli law does not contain an explicit provision granting workers the right, constitutional or otherwise, to strike, but this right has been recognized in the case law of both the labor courts and the civil courts. In fact, this right has been recognized as a "freedom" that may be subject to certain restrictions. A person is allowed to exercise a freedom granted to him only insofar as he does not exceed the limitations placed upon the freedom, and a breach of a duty of care is one such type of limitation. Strikers are not immune to liability imposed for torts committed by them in connection with the strike. In *Ashdod Transportation Industries*, the freedom to strike clashed with the freedom to use public facilities and with the freedom to receive public services available from the state authorities.

The Supreme Court decided not to tackle the complicated problems posed by the application of the torts of public nuisance and breach of statutory duty, instead deciding the case on the basis of negligence law. The Court did not conduct any inquiry into the matter of the freedom to strike, nor did it hear any expert opinions on this subject. Instead, it delineated out of nowhere the boundaries of the freedom to strike in Israel. Justice Levin stated that in light of the importance accorded in Israel to the freedom to strike, the area of strikers' duty of care should be developed gradually. In any case involving a strike, courts should examine the circumstances leading to the strike, the severity of the foreseeable damage to third parties as a result of the strike, and the benefits expected to accrue to the strikers as a result of the strike.¹⁰⁷ In *Ashdod Transportation Industries*, the strikers had attempted to improve the terms of their employment contract at the expense of the plaintiffs. The strikers had made use of their control over public resources without taking any measures to warn the prospective victims. The damage had been foreseeable and even intentional. Thus, the Court recognized the existence of a duty of care, despite the fact that the plaintiffs had suffered merely economic losses.¹⁰⁸

Perhaps Justice Levin is right, but is this judge-made law legitimate?

In drafting the Civil Wrongs Ordinance, 1944,¹⁰⁹ the legislator was well aware of the freedom to strike and of a possible clash between tort law and labor law with respect to this freedom. The statutory solution was confined

107 *Id.* at 195.

108 *Id.* at 196-97.

109 Civil Wrongs Ordinance (New Version): New Version 5, 12 (1968-72).

to the tort of causing a breach of contract,¹¹⁰ protecting strikers from actions brought by third parties for harm suffered as a result of a strike, which is necessary to guarantee a genuine freedom to strike. It seems futile, however, to protect strikers only against actions for causing a breach of contract and, at the same time, allowing other tort actions on the basis of the very same acts.

The Supreme Court disregarded completely this statutory provision. Formally, this provision constitutes a specific defense against the tort of causing a breach of contract and is irrelevant to a cause of action in negligence. Although the former tort was not formally asserted in this case, the Court was wrong in disregarding the Civil Wrongs provision and the spirit behind its words. Clearly the legislator had intended to protect strikers from tort actions pursuant to the strike. It seems obvious to me that the reason behind limiting the defense to the particular tort of causing breach of contract was the conviction that this type of action poses the only danger to strikers. By disregarding it altogether, the Court bypassed the hurdles of that particular tort and reached a conclusion that does not reflect the intention of the legislator. In so doing, it exceeded its authority.¹¹¹

In delineating the boundaries of negligence, courts should be careful not to disregard the content and spirit of the statutory norms. The primary device of duty of care should curtail unjustifiable circumvention of the legislative intention.

110 *Id.* § 62(b).

111 The cause of action in negligence was very problematic due to the fact that the damage was pecuniary in nature, a fact the Supreme Court failed to consider.

