

DUTY AND INTEGRITY
IN
TORT LAW

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CAROLINA ACADEMIC PRESS

Durham, North Carolina

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Library of Congress Cataloging-in-Publication Data

Calnan, Alan, 1959–

Duty and integrity in tort law / Alan Calnan.

p. cm.

Includes bibliographical references and index.

ISBN 978-1-59460-669-4 (alk. paper)

1. Torts--Philosophy. 2. Reasonable care (Law) 3. Negligence. I.
Title.

K923.C346 2009

346.0301--dc22

2009011594

CAROLINA ACADEMIC PRESS

700 Kent Street

Durham, North Carolina 27701

Telephone (919) 489-7486

Fax (919) 493-5668

www.cap-press.com

Printed in the United States of America

For

Leigh Taylor,
who got me started,

and

Marcy Calnan,
who keeps me going.

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PREFACE

This book is part of a more than decade-long campaign of investigation and revelation. Although my journey is highly personal, it is part of a far bigger and much longer movement. Since virtually the beginning of recorded history, man has contemplated the nature and purpose of law. Early on, people thought of law as a set of natural principles ordained by some higher power to help them attain justice. After the Enlightenment, however, most thinkers saw law more as a collection of man-made directives posited by recognized authorities to achieve their objectives. Despite the recent proliferation of theories and perspectives on law, today's legal scholars continue to adhere to one of these two major schools of jurisprudence.

Allured by the promise of justice, but yet intrigued by the prospect of a neutral middle-ground, I was determined to see if there was a prevailing philosophy of torts, my chosen field of legal study. My quest began in earnest with my 1997 book *Justice and Tort Law*. In this initial stage of the venture, I examined the essential characteristics of private justice and searched for evidence of their existence in the doctrines, theories, and concepts of tort law. What I found was both reaffirming and surprising.

Like others before me, I observed a nearly complete correspondence between tort law's bilateral framework and the Aristotelian notion of corrective justice, which obligates wrongdoers to correct their wrongs by disgorging their gains and annulling the losses of their victims. I also confirmed corrective justice's impact on the structure of all fault-based torts, dividing them into elements of either intentional or negligent wrongdoing, causation, and harm.

Other observations took me off the beaten path. I reported that tort law is not merely a product of corrective justice, but is shaped

by a variety of justice concepts, including retributive, exchange, and distributive justice. Challenging the conventional view that corrective and distributive justice are mutually exclusive, I argued that the two ideas work symbiotically in torts, with distributive justice identifying the wrongs that corrective justice seeks to rectify. Indeed, distributive justice accounts for the very rules and doctrines that comprise tort *law*, using them to allocate freedoms and freedom restrictions on the basis of fair criteria like risk and need. Thus, it alone explains the especially onerous rules for intentionally harmful torts, the more lenient standard of care for the less risky acts of negligence, and the low or no liability rules for parties acting in emergencies or in defense of themselves or others.

In fact, the prominence of distributive justice in this scheme highlighted another truth about torts that too often went unrecognized or underappreciated: Tort law is not monolithic, but is inherently dyadic. It does not simply seek private justice, as the naturalists have argued, or solely promote public objectives, as the positivists have contended—it does *both*, resolving present *personal* disputes while creating *public* rules for future behavior and as yet undetermined conflicts. Even in its approach to these dual roles, tort law is neither exclusively moral nor exclusively political, but is *both* moral *and* political. It not only establishes behavioral norms and justice principles, it imposes systemic or institutional rules that determine such basic matters as who can sue and be sued, what wrongs can be redressed, what must be proven, what can be recovered, who should decide outcomes, and perhaps most importantly, what must be done to avoid the whole process.

For most torts scholars, these opposed forces create an inner tension in the law that thwarts any possibility of coherence. But I soon discovered tort's best-kept secret. The morality and political philosophy of tort law are not antagonistic, but are grounded in the common ideology of classical liberalism. Guided by liberalism's impartiality and tolerance, Anglo-American tort law does not endorse any particular conception of the good, on the one hand, or promote the exercise of unprincipled power, on the other. Instead, it preserves the values of liberty, equality, and fairness by encouraging choice and action, proscribing conduct only insofar as it un-

duly harms the freedom of others, and when such transgressions occur, affording victims and offenders both a reasonable opportunity to present their cases and a reasonable set of rules for judging them.

Even after exposing tort's unifying features, I still wondered how a field of law so obviously adversarial—having been created for the very purpose of authorizing certain people to force others into court in order to take their money—could successfully maintain its integrity. The answer, I found, was simple yet enduringly elusive. Tort law rights wrongs with ... well ... rights—not the cosmic, divine, or natural variety, but social rights necessary to the attainment of liberal justice. Reflecting tort's other dualities, these rights come in two distinct forms. Primary or public rights operate as markers of legally protected interests, while secondary or private rights serve as powers against or over other people. Though prodigious, tort's private rights are not perpetual, absolute, or unlimited. Rather, they remain dormant until activated by the risky conduct of another, and once animated, connect to and trigger duties of care only in that actor, forging between the parties a unique juridical relationship. Because these relational duties help to define the rights in question, I knew then that they were indispensable to understanding tort justice. But regrettably, given the already ambitious scope of this project, I had to delay their consideration until another day.

In the second stage of my journey, I sought to discover if what I had found to be true in *Justice* had always been so. Thus, in my 2005 book *A Revisionist History of Tort Law*, I reexamined both the history and historiography of tort law. Conventional histories suggested that tort law started in medieval England as a primitive form of strict liability, transformed into a more sophisticated regime of fault-based liability, and eventually culminated in a thoroughly modern engine of public policy. However, after reviewing the principles of good historiography, I found these past efforts seriously deficient, often giving too much weight to pre-Norman legal sources, misreading medieval case reports, ignoring the surrounding intellectual milieu, and examining their subjects with modern perspectives and biases.

So I decided to start from scratch. Scouring legal sources from antiquity to the present, and consulting social histories to place

them in context, I arrived at a number of remarkable and unprecedented conclusions that confirmed the themes of my earlier work. Tort law did not emerge from draconian law-codes or stark royal writs, but was conceived by ancient Greek philosophers, refined by stoic Roman jurists, and transmitted by university masters to eager English scholars preparing for careers as lawyers and judges. This genealogy, in turn, discredits the notion that formative tort law was ever driven by some primitive instinct to punish people irrespective of their fault. The real truth is that torts from its inception reflected classical liberal notions of justice and wrongdoing, imposing the strict rule of trespass on presumptively wrongful acts of intentional misconduct and requiring proof of wrongful duty violations in the later action of trespass on the case. These actions not only assumed the bilateral structure of corrective justice and the allocation patterns of distributive justice, they gave litigants the power both to command royal jurisdiction and to force adverse parties to appear in court to defend their actions.

As such private powers became more entrenched, they eventually formed claim-rights like those discussed above. During this process, however, the law never waffled in its liability schemes or switched from one scheme to another. Instead, it gradually and consistently matured, first establishing a rigorous responsibility for deliberate acts posing a direct threat to liberty, then adding less onerous layers of responsibility for antisocial but accidental behavior, until finally developing a general standard of reasonable care for all other conduct.

Having sketched the broad contours of these responsibilities in the first book, and traced their lineage in the second, it is now time to study them in depth. My objective here, as will be explained more fully in the Introduction, is to offer a comprehensive theory of tort duties—one that not only incorporates the observations of my previous efforts, but also eliminates the existing confusion in current conceptions of this subject and offers a practical alternative for thinking about and analyzing tort's most prominent emissaries.

Of course, no journey this arduous could be conceived, let alone accomplished, without considerable inspiration and assistance. I have benefited from plenty of both. I was so captivated by

Ronald Dworkin's work that I spent a good portion of this book discussing it, ultimately adopting a modified version of his theory of "law as integrity" as the basis for my own interpretive duty methodology. I hope he will find my thesis a plausible and coherent extension of his ideas, or at least will forgive my enthusiasm for taking to it to unintended or unexpected extremes.

Although I have often disagreed with tort theorists John Goldberg and Benjamin Zipursky, and have even critiqued their ideas in writing, I continue to be motivated by their passion for the subject and informed by their learned insights. It is their courage to take on the duty skeptics that prompted my decision to jump into the fray, even if I do not stand completely with them in the fight.

Once the journey commenced, the faculty at Southwestern Law School offered helpful guidance by probing my thesis in a stimulating work-in-progress roundtable. Within this crew, I must give special thanks to my colleague Byron Stier for reading and providing thoughtful comments on an early draft. Further along the route, Nicole Abboud (my trusted research assistant) and Karen Clayton (crack typesetter from Carolina Academic Press) provided valuable editorial and technical services to keep the whole vessel ship-shape. Finally, I must acknowledge the loving support of my wife, Marcy, whose gracious patience gave me the time to write, and the playful encouragement of my two crazy mastiffs, Rocco and Sophie, whose persistent impatience gave me the perspective to stop.

INTRODUCTION

The tort concept of duty lacks integrity in virtually every popular sense of that term. It is at once incomplete, inharmonious, and un beholden to any ethical principle or moral standard.¹ Although these problems are interrelated, each corrupts tort jurisprudence in its own unique way.

The problem of incompleteness goes well back into the history of the common law, though just how far remains unclear. Ironically, duty began as a remarkably coherent concept. Inspired by the classical revival of the Twelfth-Century Renaissance,² Henry de Bracton, a Judge of Assize and later Justice in Eyre of the royal court, developed in the thirteenth century a comprehensive taxonomy of tort-type duties called *delicts*, which covered everything from malicious to negligent conduct.³

This scheme, however, was remarkably short-lived. As English procedure became more prolix, Bracton's treatise, and the interest in theorizing more generally, soon gave way to a host of practical handbooks which provided information and advice on mundane subjects like pleading, remedies, and court jurisdiction.⁴ It was not until the eighteenth century, when William Blackstone wrote his epic *Commentaries on the Laws of England*,⁵ that anyone even attempted another compendium of what we now call tort law. Nevertheless, Blackstone's framework, which reflected the prevailing values of the Enlightenment, focused not on the law's *duties*, but solely on the *rights* of those who wished to invoke its protection.⁶

Another century would pass before Oliver Wendell Holmes Jr. offered the first post-Bractonian theory of tort duties.⁷ Despite its originality, Holmes' theory was largely overlooked. Indeed, only a handful of his later contemporaries took his work as a call to ac-

tion and none of these did much to improve upon it.⁸ Thus, what began as an inspired search for unity quickly slowed to an apathetic crawl. By the early twentieth century, the entire venture had ground to a halt. To this day, no one has sought to resume it.⁹

One key reason for this moratorium is the decline of the duty concept itself. Ever since Holmes' era, duty has been slowly vanishing from the face of tort law. Today, duty is nowhere to be found in any intentional tort and is neither raised nor addressed in such actions.¹⁰ While duty occasionally appears as a limit in some strict liability theories,¹¹ it is conspicuously absent in others and is rarely considered an element of proof.¹²

The only place where duty is still openly acknowledged and routinely discussed is the theory of negligence.¹³ Even here, however, there is no visible move toward integration. Courts and commentators interpreting negligence's duty concept rarely consult other tort duties, much less attempt to synthesize them into a greater cohesive whole.¹⁴

This incompleteness problem, in turn, has fostered a problem of disharmony in the duty element of negligence. No one seems to agree on what that element is or what it is supposed to do. To early realists, including Professors William Prosser and Leon Green, duty is merely a terminological façade for a judge's unfettered policy decision that liability may or may not exist.¹⁵ At the other extreme, deontologists like Professor Ernest Weinrib argue that duty is an immutable moral obligation grounded in Kantian and Hegelian notions of abstract right.¹⁶

Between these poles lie two schools of pragmatists who claim to be both less cynical than the realists and less dogmatic than the deontologists yet cannot seem to agree on much else. Instrumental pragmatists, whose views are now embodied in the *Restatement (Third) of Torts*, view duty as a universal rule that prohibits affirmative risky action,¹⁷ but readily recognize a judge's authority to create exceptions or modifications under a delineated set of circumstances¹⁸ or whenever any "articulated countervailing principle or policy" so provides.¹⁹ The conceptual pragmatists, by comparison, see duty as more complex and entrenched.²⁰ Rejecting the instrumentalists' normative skepticism, the conceptualists portray

duty as a relational obligation that creates or reinforces various behavioral norms irrespective of policy concerns.²¹

Beneath this discord lurks the third integrity issue: the problem of principle.²² Besides the deontological view, which grounds duty in exceedingly strong moral principles,²³ all of the remaining visions of the duty concept fail to give principle its due. Indeed, each nondeontological approach places pragmatism *above* principle. Realists, who dismiss principle as idealistic, see duty as nothing but the unbridled judgment of judges or juries reacting to changing social circumstances. Although the instrumental and conceptual pragmatists are more open to principled analysis, their refusal to commit to any specific and stable set of principles gives their duty concept a lot of analytical latitude.²⁴ Indeed, without foundational principles—most especially, liberal-moral principles rooted in American history, law, culture, and values—none of these approaches possesses a unifying standard; and without such a standard, all are predisposed to unpredictability, inconsistency, and incoherence.

For some theorists, these impediments to integrity are not really problems at all. Skeptical realists, in particular, are more likely to view them as unavoidable and even desirable byproducts of spontaneous policymaking. But to most other thinkers, the law's lack of coherence should be a matter of great concern. This is especially true of classical liberals, who seek to ensure that any governmentally created limits on freedom are clearly articulated, copiously justified, openly imposed, and most important for our purposes, fairly and consistently interpreted and applied.

Of the various forms of law, the common law, including the common law of torts, poses perhaps the greatest threat to these ideals.²⁵ It is not methodically enacted by a representative body after objective investigation, long study, and rigorous debate, but is spontaneously promulgated by unelected or unaccountable judges on the basis of slanted evidence presented by biased parties to influence the outcomes of personal disputes. In this rather haphazard rendition of lawmaking, integrity does not just happen on its own. Instead, it must be meticulously planned and deliberately constructed.

Although various integrity schemes are possible, the approach offered by eminent liberal theorist, Ronald Dworkin, is perhaps the most promising. Under Dworkin's theory of "law as integrity," judges must "find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community,"²⁶ much in the way that authors in a serial novel must strive to create "a single unified novel that is the best it can be"²⁷ with continuity in its "characters, plot, genre, theme, and point."²⁸ To do this, Dworkin adds, judges need not achieve historical or "vertical" consistency in law,²⁹ but should seek interpretive or "horizontal" consistency by "fan[ning] out [their interpretations] from the cases immediately in point to cases in the same general area or department of law, and then still farther, so far as this seems promising."³⁰

Dworkin's integrity program appears especially germane to the current duty conundrum in tort law. First off, Dworkin's theory is comprehensive in scope, thus equipping it to unite an area as broad as the duty concept of torts. Moreover, for those theorists, like me, who believe tort law is grounded in liberal values,³¹ Dworkin's approach comes equipped with a value-set capable of locating duty's common bonds, even if Dworkin's vision of liberalism ultimately deviates from my own.³² In fact, because Dworkin casts "law as integrity" as the mean between the extremes of conventionalism and pragmatism, that theory aptly embodies the early classical liberal notions of moderation, proportionality, and balance so critical to theoretical consensus-building and so central to the history of the common law.³³ This liberal-justice perspective, in turn, makes Dworkin's theory acutely sensitive to rights, duties, and principles, including the rights, duties, and principles of tort law, which he uses to illustrate his theory. Finally, courts deciding "hard" duty cases in negligence actions already appear to apply multifactor analyses strongly reminiscent of Dworkin's "horizontal" mode of interpretation,³⁴ so applying it across the spectrum of tort duties seems more like a natural progression than an arbitrary revolution.

Still, Dworkin's theory may not be perfectly suited to this task. As I have shown elsewhere, tort-type duties have a long history in

the Western legal tradition.³⁵ That tradition began in ancient Greece, passed to the Romans, took root in the early English common law, and continued on more or less uninterrupted until it was abruptly halted by Holmes in the nineteenth century. While Dworkin views this tradition as mostly irrelevant to modern legal interpretation, it may well tell us something quite profound about the principles underlying this tradition, their connection to the law's present value system, and their role in shaping that system's cultural identity.

Thus, in this book, I shall offer a modified Dworkinian theory of tort duty that not only fits and justifies the law's present values, doctrines, and structures, but also respects and promotes its historical tradition. Chapter 1 begins by briefly examining the role of duty in a liberal state. It then explores common law duties in particular, revealing their developmental patterns and exposing their integrity problems. Chapter 2 reviews Dworkin's approach to these problems, explaining his theory of "law as integrity" and highlighting some of the problems in his approach. In Chapter 3, the focus shifts to the concept of duty in tort law. After tracing the historical development of duty in torts, it examines the duty concepts in tort's three modern theories of liability. It finds great integrity in intentional torts, a lost integrity in strict liability, and most notably, the promise of integrity in negligence.

Inspired by this promise, the remainder of the book demonstrates how integrity analysis can help redeem tort law's most important and discordant liability theory. Chapter 4 examines the history, or vertical integrity, of negligence's duty concept, exposing several flaws in the modern view. Then, picking up on Dworkin's approach, it explores the horizontal integrity of this concept, identifying duty's substantive bases and conceptual limits in Chapter 5, proposing a structured, interpretive analysis in Chapter 6, and illustrating the application of that analysis in a difficult duty case in Chapter 7. Chapter 8 culminates the discussion by offering a general methodology for analyzing negligence duty issues, highlighting the significant features of this approach, and addressing some of its likely criticisms.