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## ***Distinguishing Duties of Care of Sports Coaches in a UK Context***

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### **Abstract:**

The concept of duty of care is under unprecedented scrutiny in the context of sport, and more specifically, with regard to sports coaching. Existing academic scholarship offers limited detailed analysis of the duty of care incumbent upon coaches, the majority of whom are volunteers. Moreover, Baroness Tanni Grey-Thompson's recent and impressive 'Duty of Care in Sport: Independent Report to Government' adopts 'a deliberately broad definition of "Duty of Care"'. However, should the concept of duty of care assume both a legal and extra-legal meaning, it is contended that this may result in conflation of moral and legal duties of care. The impact of this when defining the standard of care may expose coaches to a greater risk of legal liability by potentially extending the legal obligations of amateur coaches beyond current limits. Accordingly, by analysing the duty of care incumbent upon modern-day sports coaches, within the context of the classic jurisprudential debate surrounding the relationship between law and morality, this article uncovers serious unintended ramifications of failing to more precisely distinguish between legal and moral duties of care in this area. Furthermore, at a time when the concept of duty of care appears ever more deeply engrained in everyday language, the insights revealed here appear likely to transcend the specific circumstances of sports coaching and be of more widespread legal relevance, not least, in the burgeoning field of professional negligence.

## ***Distinguishing Duties of Care of Sports Coaches in a UK Context***

### **Introduction**

The concept of duty of care is under unprecedented scrutiny in the context of sport.<sup>1</sup> Coaches owe a duty of care to athletes. This duty of care may involve legal, moral and ethical considerations. Baroness Tanni Grey-Thompson's recent and impressive 'Duty of Care in Sport: Independent Report to Government' (DoC in Sport Report) convincingly recognises that:

Winning medals is, of course, really important, but should not be at the expense of the Duty of Care towards athletes, coaches and others involved in the system. ... it feels timely for the sport sector to consider Duty of Care in its fullest sense. ... Questions are being asked about the price being paid for success.<sup>2</sup>

The DoC in Sport Report adopts 'a deliberately broad definition of "Duty of Care" -- covering everything from personal safety and injury, to mental health issues, to the support given to people at the elite level'.<sup>3</sup> Moreover, high profile controversies about a breach of duty of care in various sports, and accusations of a culture of bullying, continue to come to light.<sup>4</sup> The growing number of athlete complaints of this nature has also resulted in coaches being made to feel 'vulnerable', prompting leading coaches in Britain to form an association to protect their interests.<sup>5</sup> In these circumstances, practical reasoning determining coaching

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<sup>1</sup> See, for instance, Baroness Tanni Grey-Thompson, 'Duty of Care in Sport: Independent Report to Government', Department for Digital, Culture, Media & Sport, 21 April 2017 (DoC in Sport Report) 4; D Roan, 'Was 2017 the year British sport lost its way?' (BBC News, 29 December, 2017) <<https://www.bbc.com/news/uk-42353175>> accessed 9 January 2019.

<sup>2</sup> DoC in Sport Report (n 1) 4. In December 2015, as part of the Sporting Future strategy, the Minister for Sport asked Baroness Grey-Thompson to conduct an independent review into the Duty of Care sport has towards its participants.

<sup>3</sup> Ibid.

<sup>4</sup> J Anderson and N Partington, 'Duty of care in sport: time for a sports ombudsman?' (2018) 1 *International Sports Law Review* 3, 7-8.

<sup>5</sup> M Dickinson, 'Coaches unite over bullying', *The Times*, Wednesday 21 November 2018 <<https://www.thetimes.co.uk/article/coaches-unite-over-bullying-by-forming-new-group-c7wp7jnx>> accessed 9 January 2019.

conduct, performance goals, and what sort of person or coach to be may be shaped by both law and morality. This is the case because ‘both law and morality are about right and wrong, good and bad, virtue and vice. These contrasts are “normative”: they express value judgments’.<sup>6</sup>

Problematically, whilst it has been suggested that ‘[t]he law and morality are inextricably interwoven’,<sup>7</sup> Hart’s seminal jurisprudential discussion of the nature of morality<sup>8</sup> contends that ‘there is no necessary connection between law and morals’.<sup>9</sup> At first glance, this appears somewhat contradictory and confusing, not least, for non-lawyers making repeated value judgements about what might constitute reasonable coaching practice. For instance, is a coach’s duty of care, derived from the tort of negligence, plainly informed by law, essentially informed by morality or, informed by a combination of both law and morality? At present, legal scholarship tends to approach the issue of a coach’s duty in broad terms,<sup>10</sup> often with an emphasis on school sport,<sup>11</sup> thereby offering only limited detailed analysis of the extent of a coach’s duty of care. The intersection between the law of negligence and sports coaching also appears less-often highlighted in the extant academic literature of sports coaching.<sup>12</sup> This misses significant emerging complexities that

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<sup>6</sup> P Cane, ‘Morality, law and conflicting reasons for action’ (2012) 71(1) *CLJ* 59, 60.

<sup>7</sup> *Smith New Court Securities Ltd v Scimgeour Vickers (Asset Management) Ltd* [1997] AC 254 (HL), 280 (Lord Steyn); T Honoré, ‘The Dependence of Morality on Law’ (1993) 13 *Oxford J Legal Stud* 1, 3.

<sup>8</sup> P Cane, *Responsibility in Law and Morality* (Oxford, Hart Publishing, 2002) 6.

<sup>9</sup> HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1959) 71 *Harvard Law Review* 593, 601 (footnote).

<sup>10</sup> E.g., J Anderson, *Modern Sports Law: A Textbook* (Hart, 2010) 248; M James, *Sports Law* (2nd ed., Palgrave-Macmillan, 2013) 92-97; S Greenfield et al, ‘Reconceptualising The Standard Of Care In Sport: The Case Of Youth Rugby In England And South Africa’ (2015) 18(6) *Potchefstroom Elec. L.J.* 2183.

<sup>11</sup> E.g., M Beloff et al, *Sports Law* (2nd ed., Hart, 2012) 146-48; D Griffith-Jones, ‘Civil Liability Arising Out of Participation in A Lewis and J Taylor, *Sport: Law and Practice* (2nd ed., Tottel, 2008) 737-42; E Grayson, *Sport and the Law* (3rd ed., Tottel, 1999) 190-99; N Cox and A Schuster, *Sport and the Law* (Firstlaw, 2004) 230-47; H Hartley, *Sport, Physical Recreation and the Law* (Routledge, 2009) 55-63.

<sup>12</sup> N Partington, ‘Sports Coaching and the Law of Negligence: Implications for Coaching Practice’ (2017) 6(1) *Sports Coaching Review* 36, 37.

can only be understood via an analysis that highlights the importance of separating legal and moral duties of care, most significantly, when the notion of the duty of care assumes an extra-legal meaning. In order to achieve this, this article's analysis is set within the context of the classic jurisprudential debate surrounding the relationship between law and morality. By drawing on some of that scholarship, existing gaps in the duty of care in sport literature can be filled, with the nuanced arguments developed also being of more general application and relevance, not least, in the mainstream field of professional negligence.

The article begins by discussing the context in which the concepts of law and morality, broadly applied, will be critically explored. In cautioning against conflation of the legal and moral duties of coaches, since these vary in scope and content, the article next conducts a more detailed consideration of the concepts of duty of care and standard of care. A more precise understanding of this area of the law, since the seminal case of *Donoghue v Stevenson*,<sup>13</sup> allows distinctions between legal and moral duties of care to be better understood and critiqued. Following this, in considering the subsequent development of the law of negligence, its modern application reveals a significant shift away from its origins as a general moral principle. Accordingly, the no-duty-to-assist a stranger in distress at common law is posited as a forceful illustration of the crucial distinction between moral and legal duties of care. The intricacies and interrelationship between these respective duties is then subjected to sustained treatment in the specific circumstances of sports coaching, reinforcing how the doctrine of assumption of responsibility has the potential to bring what might otherwise ought to be distinct moral duties, within the confines of the standard of care required of coaches, thereby creating legal obligations. Ultimately, this unique vantage point

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<sup>13</sup> *Donoghue v Stevenson* [1932] AC 562.

proves instructive in uncovering original insights that are suggested to be of importance not merely in the context of sport but, given the apparent tendency for duty of care terminology to be increasingly employed in contemporary society, are likely to be of much more widespread significance and application. By revealing somewhat concealed and unintended potential repercussions likely to result from an uncritical conflation of legal and moral duties of care, the implications uncovered appear to be of considerable relevance in areas including: (i) other sectors largely reliant upon volunteers, since the ‘neighbour principle’ appears peculiarly susceptible to influence by moral and social considerations in such contexts (i.e., education sector; recreation and leisure sector); (ii) the broader sphere of professional negligence, not least, given instances of professional liability ‘must be viewed against a background of constant change’;<sup>14</sup> and (iii) by government departments, most notably, the UK’s Department for Digital, Culture, Media & Sport (DCMS), with the Minister of Sport having tasked Baroness Tanni Grey-Thompson with looking ‘into issues surrounding the so-called “Duty of Care” that sports have towards their participants’.<sup>15</sup>

## **Context**

Modern sports coaches appear to be faced with a multitude of moral, legal and ethical duties, with the degeneration of the moral standards of some coaches fuelling contemporary interest in the ethics of sport.<sup>16</sup> For present purposes, morality might broadly be regarded as the ‘rules, guidelines, mores or principles of living ... that exist in

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<sup>14</sup> R Jackson, ‘The professions: power, privilege and legal liability’ (2015) 31(3) *Professional Negligence* 122, 122-23.

<sup>15</sup> DoC in Sport Report (n 1) 4.

<sup>16</sup> M McNamee and S Parry, *Ethics & Sport* (E & FN Spon, 1998), xvii; H Appenzeller, *Ethical Behavior in Sport* (Durham: Carolina Academic Press, 2011) xi.

time and space', with 'the systematic reflection upon them' referring to ethics.<sup>17</sup> This is entirely consistent with Honoré's submission that morality concerns 'conduct that has a significant impact on other people ... and with the restraints on behaviour that we should accept because of this. Moral criticism assesses behaviour in the light of its impact on others'.<sup>18</sup> Given the interdependent relationship between a coach and athlete, and not least, in view of recent investigations and controversies, there has rightly been moral criticism of some non-recent and contemporary coaching conduct. Moreover, viewed through the prism of descriptive or empirical sports ethics,<sup>19</sup> the terms ethics and morality appear to sometimes be used interchangeably and might be regarded 'to mean that aspect of human concern related to the incidence of good and evil in people's lives, and thus too the moral duties ... that affect such outcomes'.<sup>20</sup> Indeed, research in the field of sports ethics, including moral issues encountered when coaching sports, makes frequent reference to notions of morality, justice, righteousness and virtue.<sup>21</sup> More specifically, in contemporary sports coaching scholarship it has been suggested 'that care should not be limited to the minimum legal requirement, but ... coaches should embrace a more aspirational and holistic caring ethic'.<sup>22</sup>

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<sup>17</sup> M McNamee (ed.), *The Ethics of Sport: A Reader* (Routledge, 2010) 3.

<sup>18</sup> Honoré (n 7) 2

<sup>19</sup> McNamee (n 17) 3.

<sup>20</sup> R Scott Kretchmar, 'Soft metaphysics: a precursor to good sports ethics' in R Simon, *The Ethics of Coaching Sports: Moral, Social, and Legal Issues* (Westview Press, 2013) 20.

<sup>21</sup> Appenzeller, (n 16) xi.

<sup>22</sup> S Roberts et al, 'Lifting the veil of depression and alcoholism in sport coaching: how do we care for carers?' (2018) *Qualitative Research in Sport, Exercise and Health*, 2: DOI: 10.1080/2159676X.2018.1556182. See further, R Jones, 'Coaching as Caring (The Smiling Gallery): Accessing Hidden Knowledge' (2009) 14(4) *Physical Education and Sport Pedagogy* 377; C Cronin and K. Armour, "'Being" in the Coaching World: New Insights on Youth Performance Coaching from an Interpretative Phenomenological Approach' (2017) 22(8) *Sport, Education and Society* 919.

In contrast, and more discretely, when conceptualising law, Lucy succinctly recognises that:

law is a more formal and detailed body of standards for conduct than morality, dealing with bad outcomes rather than good and which, broadly speaking, maintains minimal rather than aspirational standards for conduct. Given such differences between law and morality, it would be folly to assume that legal and moral liability-responsibility are synonymous, yet equally wrong to think that they never overlap.<sup>23</sup>

Curiously, whilst highlighting important suggested distinctions between law and morality that will be subsequently further explored, this passage reaffirms the elusive nature of attempts to clearly demarcate the potential overlap between law and morality. Indeed, if we employ the concepts of a morality of duty (i.e., legal liability-responsibility), and a morality of aspiration (i.e., moral liability-responsibility), it has been suggested that ‘there is neither occasion nor warrant for drawing a clear line between the[se] two moralities’.<sup>24</sup>

This article argues otherwise, submitting that a coach’s legal liability and moral responsibility vary significantly in scope and content. Simply applied, a deeper understanding of the intersection between the tort of negligence and modern sports coaching cautions against conflation of the concepts of legal and moral duties of care. This distinction is of immediate importance and significance when the concept of the duty of care is employed in a general manner which fails to appreciate and acknowledge the limits set by legal standards of care. Nonetheless, and as will be argued, this blurring of boundaries has the potential to give rise to legal obligations in circumstances where coaches assume responsibility for what might otherwise be more accurately regarded as moral duties. It will be contended that this may include duties that should be categorised, from a

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<sup>23</sup> W Lucy, *Philosophy of Private Law* (Clarendon Law Series, OUP, 2007) 47.

<sup>24</sup> L Fuller, *The Morality of Law* (Revised edition, London: Yale University Press, 1969) 10.

purely legal standpoint, and prior to the assumption of responsibility for such duties by the coach, as falling beyond the direct responsibility of coaches lacking the necessary specialist skill, competence, training, qualifications and experience (e.g., administering basic first aid; decisions regarding return-to-play following participant injury). So, whilst courts are no doubt alive to distinctions between legal and moral duties of care -- with determination of the standard of care in all the circumstances allowing further mitigation of such differences by the judiciary, even in situations where the duty test is met -- many sports coaches, officials and administrators appear unlikely to be aware of these control measures or nuances. However, and somewhat curiously, a coach sued in negligence for breach of what without more might more aptly be viewed as a moral duty of care, and so typically extending beyond the reasonable standards ordinarily expected of coaches, may well be vulnerable to liability in negligence should the actions of the coach create a legal obligation. It is contended that adopting a broad definition of duty of care, as an expression of best practice in an extra-legal context, may unwittingly promote the widening of such legal obligations and limits. This scenario appears problematic, not least, since the courts would then be tasked with defining the standard of care in the particular circumstances where a conflation of moral and legal duties has already essentially been established in law. Put simply, there appears limited recourse in this context for judges to distinguish between moral and legal duties of care, for instance, by defining the content of the duty imposed (i.e., standard of care) narrowly in order to avoid setting unrealistic standards. Moreover, despite being intended to provide reassurance to volunteers functioning to promote desirable activities, including sport, engagement of s.1 Compensation 2006 '[i]s not concerned with and does not alter the standard of care, nor the circumstances in which a

duty to take care will be owed'.<sup>25</sup> In this context, the impact of s.1 Compensation Act 2006 therefore appears to be limited.<sup>26</sup> Accordingly, since conflation of legal and moral duties may potentially transform moral duties of care into legal obligations, there appears limited room for judicial manoeuvre or discretion in order to guard against associated unintended and undesirable outcomes. To more fully develop this point, it proves necessary and instructive to examine the doctrinal foundations at the root of this submission.

### **Duty of Care or Standard of Care?**

Despite both law and morality serving to channel our behaviour,<sup>27</sup> moral guilt may play little or no role in many cases of liability in negligence.<sup>28</sup> A legal rule might be thought to be morally desirable, but it in no way follows from this mere fact that it should be regarded as a rule of law.<sup>29</sup> Lord James made this abundantly clear in *Cavalier (Pauper) v Pope*,<sup>30</sup> when stating, '[b]ut moral responsibility, however clearly established, is not identical with legal liability'. Conversely, when determining a case concerning the legal

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<sup>25</sup> Explanatory Notes to the Compensation Act 2006, [11] <<http://www.legislation.gov.uk/ukpga/2006/29/notes>> [Accessed 16 April 2019]. Interestingly, this note speaks to both the imposition of a duty of care, and a further control mechanism within the law of negligence, the standard of care. Arguably, this is perhaps somewhat indicative of the limitations of pigeonholing and conclusively separating issues of whether to impose a duty and, the standard of reasonable care and skill expected in all the circumstances: see generally, *Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd* [1973] QB 27, 37, per Lord Denning MR. No doubt, this has the potential to create considerable conceptual confusion in this context, most particularly, when duty of care terminology attracts a non-legal meaning but, with clear potential legal implications.

<sup>26</sup> See further, N Partington, 'Beyond the "Tomlinson trap": analysing the effectiveness of section 1 of the Compensation Act 2006' (2016) 37(1) *Liverpool L Rev* 33. Recent enactment of the Social Action, Responsibility and Heroism Act 2015 would appear not to alter this view. For sustained treatment of the SARAH Act 2015, see J Goudkamp, 'Restating the Common Law? The Social Action, Responsibility and Heroism Act 2015' (2017) 37 *Legal Studies* 577.

<sup>27</sup> S Shavell, 'Law versus Morality as Regulators of Conduct' (2002) 4(2) *American Law and Economics Review* 227, 257.

<sup>28</sup> S Deakin et al., *Markesinis and Deakin's Tort Law* (7th ed., OUP, 2013) 43.

<sup>29</sup> Hart (n 9) 626.

<sup>30</sup> [1906] AC 428 (HL).

liability of a learner driver in *Nettleship v Weston*,<sup>31</sup> Lord Denning in the Court of Appeal found that '[m]orally the learner driver is not at fault; but legally she is liable because she is insured and the risk should fall on her'.<sup>32</sup> Since taking all reasonable care in the circumstances appears to exonerate defendants from moral blame,<sup>33</sup> as noted by Stevens, the (legal) standard of care expected of the learner driver appears somewhat puzzling when contrasted with the submission that the law and morality are inextricably interwoven.<sup>34</sup> By analogy, the issue of coach negligence may be regarded as being of direct relevance to this tension. Should an amateur volunteer sports coach be sued in negligence, since the legal test applied would be informed by the principles of professional negligence,<sup>35</sup> there appears the possibility of a potentially serious disconnect between legal and moral blameworthiness.<sup>36</sup> This is a sentiment Lord Phillips appeared mindful in *Vowles v Evans* (albeit the defendant being a rugby union referee) when stating:

There is scope for argument as to the extent to which the degree of skill to be expected of a referee depends upon the grade of the referee or of the match that he has agreed to referee. In the course of argument it was pointed out that sometimes in the case of amateur sport, the referee fails to turn up, or is injured in the course of the game, and a volunteer referee is called for from the spectators. In such circumstances the volunteer cannot reasonably be expected to show the skill of one who holds himself out as referee, or perhaps even to be fully conversant with the laws of the game.<sup>37</sup>

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<sup>31</sup> [1971] 2 QB 691 (CA).

<sup>32</sup> *Ibid* 700.

<sup>33</sup> HLA Hart, *The Concept of Law* (3<sup>rd</sup> ed., Clarendon Law Series, OUP, 2013) 173.

<sup>34</sup> R Stevens, *Torts and Rights* (OUP, 2007) 97.

<sup>35</sup> N Partington, 'Professional liability of amateurs: The context of sports coaching' (2015) 4 *Journal of Personal Injury Law* 232. Discussed later.

<sup>36</sup> Partington (n 26) 48-54.

<sup>37</sup> *Vowles v Evans* [2003] EWCA Civ 318 at [28]. Problematically, this seems to conceal the fact that an individual assuming a duty requiring the exercise of a special skill would, in fact, be subject to the ordinary principles of the law of negligence if sued.

In this scenario described by Lord Phillips, whilst the question of possible legal liability appears to remain arguable,<sup>38</sup> it would be an altogether more difficult task to regard the actions of the volunteer referee (or coach<sup>39</sup>) as being morally at fault. Nonetheless, by identifying the standard of care, or control device of breach or fault, as the mechanism by which the volunteer will be adequately safeguarded from negligence liability, the existence of a duty of care seems incontrovertible. In which case, and as a point previously mentioned and subsequently further developed in this article, should assumption of responsibility for moral duties by volunteer coaches (and referees) limit the application of judicial discretion when defining the standard of care at a reasonable level, the possible scope of legal liability becomes materially wider.

The significant distinction between a duty owed in law, and actions deemed morally desirable/justifiable in a more general sense, appears to be blurred by the widespread modern-day usage of the notion of duty of care. Importantly, the words 'duty of care' are frequently 'used to characterise whatever the speaker thinks should or should not have been done by authorities or individuals in a particular set of circumstances'.<sup>40</sup> Peculiarly, should expressions of duties of care in sport encapsulate both legal and moral duties in this fashion, thereby potentially amalgamating what as a matter of legal principle would be separate enquiries regarding the duty of care *and* the standard of care, this may pose serious ramifications. Put simply, the implications of failing to more precisely frame these two respective duties, thereby potentially extending the scope of legal responsibility beyond

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<sup>38</sup> N Partington, "It's just not cricket". Or is it? (2016) 32(1) *Journal of Professional Negligence* 75, 79-80. See further, the approach adopted by HHJ Lopez in *Bartlett v English Cricket Board Association of Cricket Officials* (unreported), County Court (Birmingham), 27 August 2015.

<sup>39</sup> N Partington, 'Legal liability of coaches: a UK perspective' (2014) 14(3-4) *International Sports Law Journal* 232, 238.

<sup>40</sup> W Norris, 'A duty of care in sport: what it actually means' (2017) 3 *JPI Law* 154.

its current constraints,<sup>41</sup> may not be obvious to the ordinary reasonable person.

Accordingly, since it is in law that the notion of a duty of care originates and continues to evolve,<sup>42</sup> a more precise understanding of its legal roots and, subsequent development since the seminal case of *Donoghue v Stevenson*,<sup>43</sup> proves both necessary and fruitful in order to better understand distinctions between a coach's legal and moral duty of care towards their athletes.

*Donoghue v Stevenson* is best known for 'introducing into the law a general moral principle of "good neighbourliness"'.<sup>44</sup> In this House of Lords judgment, Lord Atkin stated:

The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa,' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. 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.<sup>45</sup>

In alluding to Lord Atkin's carefully chosen and extremely precise language, when formulating this said duty, Heuston recognises that '[i]t would be a very strange reasonable man who could comprehend all its implications and subtleties without instruction from a

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<sup>41</sup> Ibid 154-55.

<sup>42</sup> Ibid 154.

<sup>43</sup> *Donoghue v Stevenson* [1932] AC 562.

<sup>44</sup> M Lunney et al., *Tort Law: Text and Materials* (6th edition, Oxford University Press, 2017) 117.

<sup>45</sup> *Donoghue v Stevenson* [1932] AC 562, 580.

lawyer'.<sup>46</sup> Given the interdependent relationship between a sports coach and athlete, Lord Atkin's 'neighbour principle' is clearly relevant in the context of sports coaching.<sup>47</sup> Simply applied, the law of negligence's control mechanism of duty would tend to be straightforwardly satisfied in the circumstances of organised sporting activities led by coaches. But, also of central relevance to the application of this principle in a claim in negligence, are the associated restrictions that define the content or extent of the duty owed (i.e., standard of care). This endorses a central aim of this article, namely, unpacking and scrutinising the subtleties of a concept, where at first glance, legal and moral duties of care may intuitively appear to overlap and be inextricably interwoven. Moreover, given the apparent increasing tendency to refer to the concept of duty of care in order to create a 'vener of pseudo-legal authority',<sup>48</sup> it is submitted that greater consideration should be given to the seemingly concealed consequences of an uncritical and unwitting conflation of legal and moral duties of care. As indicated above, this poses curious and significant implications when the notion of the duty of care assumes both an extra-legal and legal meaning, thereby perhaps setting in motion a peculiar interplay between moral duties of care and legal standards of care.

### **A shift from moral standards**

Since the law of negligence is fluid and dynamic, reflecting variations in the prevailing 'social conditions and habits of life',<sup>49</sup> a more current consideration of its development and application reveals a significant shift from its origins as a general moral

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<sup>46</sup> R Heuston, 'Donoghue v Stevenson in Retrospect' (1957) 20(1) *Modern Law Review*, 1, 16.

<sup>47</sup> D Griffith-Jones and N Randall, 'Civil Liability Arising Out of Participation in Sport' in A Lewis and J Taylor, *Sport: Law and Practice* (3rd ed., Tottel, 2014) 1638-39; Beloff et al (n 11), 146.

<sup>48</sup> Norris (n 40).

<sup>49</sup> R Percy and C Walton (eds) *Charlesworth & Percy on Negligence* (9<sup>th</sup> ed., Sweet & Maxwell, 1997) [6-04].

principle. Interestingly, Lord Atkin himself was acutely aware of distinctions between law and morality, recognising prior to his speech in *Donoghue v Stevenson* that:

It is quite true that the law and morality do not cover identical fields. No doubt morality extends beyond the more limited range in which you can lay down the definite prohibitions of law; but, apart from that, the British law has always necessarily ingrained in it moral teaching in this sense: that it lays down standards of honesty and plain dealing between man and man.<sup>50</sup>

More recently, it has been argued that basing negligence liability upon a general public sentiment of moral wrongdoing 'takes a wholly exaggerated view of the degree to which the legal concept of carelessness is based on moral fault and pays no regard at all to the aims of loss shifting and accident prevention'.<sup>51</sup> Put simply, since Lord Atkin's celebrated dictum, there has been a 'transformation of the notion of negligence from a concept with strong moral overtones into a legal notion in which wider policy considerations determine the existence of a duty to take care, its breach, and even the extent of the consequences'.<sup>52</sup> This apparent general erosion of the weight afforded by courts to moral codes, when determining cases brought in negligence, has created a certain amount of conceptual confusion for lawyers.<sup>53</sup> Such a lack of clarity may also perhaps have contributed to a framing of the concept of the duty of care in a more general and overarching sense outside of the law by non-lawyers. Moreover, since the legal test of negligence concerns what *ought* to be done in the particular circumstances, presuming a duty of care is found to be owed, it may still be regarded as an ethical concept.<sup>54</sup> As such, it is little wonder that, for instance, Baroness Tanni Grey-Thompson, having been asked by the Minister of Sport to

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<sup>50</sup> Lord Atkin, 'Law as an Educational Subject' (1932) *J Soc'y Pub Tchrs* L 27, 30.

<sup>51</sup> Deakin et al. (n 28) 248.

<sup>52</sup> Ibid 50.

<sup>53</sup> Ibid.

<sup>54</sup> J Montrose, 'Is Negligence an Ethical or a Sociological Concept?' (1958) 21 *Modern Law Review* 259.

examine issues surrounding the ‘so-called “Duty of Care” that sports have towards their participants’, adopted a deliberately broad definition.

It appears uncontroversial to accept that engaging moral considerations may very well prove instructive in establishing what the law ought to be.<sup>55</sup> Conversely, in providing valuable reinforcement to morality,<sup>56</sup> law might be regarded as acting as a ‘moral educator’.<sup>57</sup> However, and in cautioning against conflating moral standards with legal requirements, Weir observes that whilst there may be an ‘understandable urge to bring legal standards up to those of delicate morality’ this ‘should be resisted, or there would be no room for generosity or for people to go beyond the call of legal duty’.<sup>58</sup> More bluntly, there remains no legal compulsion for individuals to display the excellences of which they might be capable when interacting with others, requiring the law to turn to ‘its blood cousin, the morality of duty’ (as distinct from the previously mentioned morality of aspiration) for workable standards of judgement (i.e., defining the standard of care).<sup>59</sup> Crucially, this speaks to the fact that law may in actual fact often represent the lowest denominator of behavioural standards, whereas morality establishes higher behavioural standards.<sup>60</sup> Conversely, it is not always necessary, in order to satisfy widely accepted moral requirements, to do what is legally required.<sup>61</sup> Such a ‘separation thesis’<sup>62</sup> has important ramifications for the duty of care incumbent upon modern sports coaches. For instance,

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<sup>55</sup> Cane (n 8) 14; Law Reform Commission of Ireland, *Civil Liability of Good Samaritans and Volunteers* (LRC 93, 2009) [2.07].

<sup>56</sup> *Ibid* 15.

<sup>57</sup> J Braithwaite, ‘Negotiation versus Litigation: Industry Regulation in Great Britain and the United States’ (1987) *American Bar Foundation Research J* 559, cited in Cane (n 8) 15.

<sup>58</sup> J Weir, *An Introduction to Tort Law* (2nd ed., Clarendon Law Series, Oxford University Press, 2006) 1.

<sup>59</sup> Fuller, (n 24) 9.

<sup>60</sup> J Herring, *Medical law and ethics* (5<sup>th</sup> ed., OUP, 2014) 3.

<sup>61</sup> Honoré (n 7) 17.

<sup>62</sup> Cane (n 6) 60.

should the deliberately broad definition of the concept of the duty of care in the DoC in Sport Report gain unquestioning traction, the contended (moral) aspirations with regard to issues including the transition of athletes through the system (i.e., entering and leaving top-level sport), education (i.e., in football academies), mental welfare concerns and, of most present concern, safety, injury and medical issues, appears likely to extend the scope of the duty of care incumbent upon modern sports coaches.<sup>63</sup>

### **No-duty-to-assist**

Perhaps the strongest illustration of the distinction between moral and legal duties concerns the void of a legal duty to rescue a stranger in distress at common law.<sup>64</sup> This is despite whatever moral decency may require, the seriousness of the emergency or, the ease in which effective assistance may be rendered.<sup>65</sup> In *Stovin v Wise*,<sup>66</sup> Lord Nicholls provided a number of classic examples to illustrate this point that are worth recalling in full:

The classic example of the absence of a legal duty to take positive action is where a grown person stands by while a young child drowns in a shallow pool. Another instance is where a person watches a nearby pedestrian stroll into the path of an oncoming vehicle. In both instances the callous bystander can foresee serious injury if he does nothing. He does not control the source of the danger, but he has control of the means to avert a dreadful accident. The child or pedestrian is dependent on the bystander: the child is unable to save himself, and the pedestrian is unaware of his danger. The prospective injury is out of all proportion to the burden imposed by having to take preventive steps. All that would be called for is the simplest exertion or a warning shout.

Despite this, the recognised legal position is that the bystander does not owe the drowning child or the heedless pedestrian a duty to take steps to save him. Something more is required than being a bystander. There must be some additional

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<sup>63</sup> See generally, Norris (n 40) 155, noting that in this context there is a need to be careful what we wish for.

<sup>64</sup> J Barr Ames, 'Law and Morals' (1908) 22 *Harvard Law Review* 97, 109; Q Bu, 'The Good Samaritan in the Chinese Society: Morality vis-à-vis Law' (2017) 38 *Liverpool Law Review* 135, 144.

<sup>65</sup> K Williams, 'Doctors as Good Samaritans: Some Empirical Evidence Concerning Emergency Medical Treatment in Britain' (2003) 30 *Journal of Law & Society* 258, 258-59.

<sup>66</sup> [1996] AC 923, 931.

reason why it is fair and reasonable that one person should be regarded as his brother's keeper and have legal obligations in that regard. When this additional reason exists, there is said to be sufficient proximity.

A further widely cited example of this nature is provided in *Yuen Kun Yeu and Others v Attorney-General of Hong Kong*,<sup>67</sup> where Lord Keith makes plain that there would not be liability in negligence should an individual refrain from shouting a warning to a stranger about to walk over a cliff with his head in the air.<sup>68</sup> No matter how grievous the consequences may be to others, individuals are fully entitled to do nothing in the absence of a legally recognised duty.<sup>69</sup> Simply applied:

When a person has done nothing to put himself in any relationship with another person in distress or with his property mere accidental propinquity does not require him to go to that person's assistance. There may be a moral duty to do so, but it is not practicable to make it a legal duty.<sup>70</sup>

Clearly, UK courts take the view that the general no-duty-to-assist rule in English common law makes 'good sense',<sup>71</sup> it being 'one thing to disapprove of and criticise failure to rescue but another to impose legal liability and to award monetary compensation for failing to rescue'.<sup>72</sup> In echoing the sentiments of Lord Reid in *Dorset Yacht Company v Home Office*, it is contended that it is both impracticable and undesirable to equate the moral duties of sports coaches with their legal duties of care. Defining and subjecting a coach's duty of care to detailed scrutiny illustrates the importance of this fundamental distinction.

### **Duty of Care of Modern Sports Coaches**

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<sup>67</sup> [1988] AC 175.

<sup>68</sup> Ibid 192. Also see, Norris (n 40) 155.

<sup>69</sup> Heuston (n 47) 18.

<sup>70</sup> *Dorset Yacht Company v Home Office* [1970] AC 1004, 1027 (Lord Reid).

<sup>71</sup> *Kent v Griffiths* [2001] QB 36 (CA) [18]-[19]; R Mulheron, *Principles of Tort Law* (CUP, 2016) 99.

<sup>72</sup> Cane (n 6) 74.

Modern sports coaches are under a legal duty of care to adopt objectively reasonable coaching practice, in the prevailing circumstances, so that athletes are reasonably safe and not exposed to unreasonable risk of personal injury.<sup>73</sup> In view of the specialist skill required of coaches, and consistent with the legal principles established in instances of professional negligence,<sup>74</sup> this duty demands a standard of care and skill consistent with the ordinarily competent coach occupying the same role and/or coaching at the same level.<sup>75</sup> When defining this said duty, or more precisely, the required standard of objective reasonable coaching practice, considerable weight would be attached to regular and approved coaching practices advocated by a responsible coaching organisation or National Governing Body (NGB).<sup>76</sup> There is also a corresponding requirement for such endorsed practice to be logically justifiable.<sup>77</sup> The most recent reported judgment regarding coach negligence in the UK proves informative and helpful in illustrating the practical application of these principles in context.

In *Shone v British Bobsleigh Limited*,<sup>78</sup> the essence of the claim was that the British Bobsleigh and Skeleton Association (BBSA), essentially through the actions of its coaches:<sup>79</sup>

owed the claimant a duty to take reasonable care for her safety, and that it negligently allowed the claimant to ride as brakeman in a two-man bobsleigh which had not been customised for her, or at least which did not enable her to brace herself adequately within the bobsleigh by holding on to handles and by pressing her

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<sup>73</sup> Partington (n 12).

<sup>74</sup> Partington (n 35).

<sup>75</sup> *Wilsher v Essex Area Health Authority* [1987] QB 730.

<sup>76</sup> *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. For instance, coaching manuals and guidelines published by Sports Governing Bodies.

<sup>77</sup> *Bolitho v City of Hackney Health Authority* [1998] AC 232.

<sup>78</sup> *Shone v British Bobsleigh Limited*, Swindon County Court, 11 May 2018.

<sup>79</sup> *Ibid* at [67]: It being accepted 'on behalf of the BBSA that the level of control which it exercised over the bobsleigh teams was sufficient to impute liability to it for the actions of its coaches, especially Mr Woolley'. Mr Woolley the GB Performance Coach (at [43]) had 'been involved in training the claimant at Bath and in managing her training and performance' (at [50]).

feet against foot pegs or against the back of the driver's seat, as a result of which she suffered injury in the crash.<sup>80</sup>

With specific regard to the scope of the BBSA's duty of care, developed through discussions between experienced counsel during the trial, it was held 'that it owed a duty of care to the claimant to take all reasonable actions to ensure she was reasonably safe in the course of her activities on the bobsleigh run, in accordance with the prevailing standard of reasonable practice in the sport of national bobsleigh'.<sup>81</sup> In defining the required standard of care of the coach in the prevailing circumstances, and ultimately finding a breach of duty by the BBSA, HHJ Parkes ruled:

It seems to me quite clear, on my findings of fact, that the BBSA, through Mr Woolley [GB Performance Coach], breached its duty to the claimant by allowing a frightened novice to go down the run from the top start when (to his knowledge) she could not brace with either hands or feet and felt unsafe to slide.<sup>82</sup>

Put simply, and as illustrated in *Shone v British Bobsleigh Limited*, the duty of a coach is premised on the notion of reasonableness. As such, the duty of a coach is to adopt *reasonable* coaching practice so that *reasonable* care is taken to ensure the *reasonable* safety of athletes. This reasonableness standard is strikingly fact-sensitive,<sup>83</sup> and as a legal test, reasonableness may be regarded as an elusive, vague and somewhat woolly notion which fails to provide much by way of guidance when attempts are made to define the standard of care.<sup>84</sup> Indeed, as succinctly noted by the Court of Appeal when determining a sports negligence case, 'the issue of negligence cannot be resolved in a vacuum. It is fact

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<sup>80</sup> Ibid at [2].

<sup>81</sup> Ibid at [4]. The prevailing standard of reasonable practice in the sport of national bobsleigh being indicative of the *Bolam* test and reflective of an instance of professional negligence.

<sup>82</sup> Ibid at [68]. For a further framing of the legal test for breach of duty in cases of coach negligence, see *Morrow v Dungannon and South Tyrone BC* [2012] NIQB 50 at [20].

<sup>83</sup> W Norris, 'The duty of care to prevent personal injury' (2009) 2 *JPI Law* 126.

<sup>84</sup> R Clancy, 'Judo Mats, Climbing Walls, Trampolines and Pole Vaulters' (1995) 3(1) *Sport and the Law Journal* 28.

specific'.<sup>85</sup> Moreover, since sports coaching involves a 'continua of highly complex, context-dependent and historically situated behaviours',<sup>86</sup> ascertaining precise moral and ethical duties of coaches also appears somewhat problematic. Further, given the assumption that ethical considerations regarding coaching practice will be understood and grasped intuitively by coaches,<sup>87</sup> by analogy, the DoC in Sport Report's broad definition of duty of care may similarly promote intuitive expectations of coaches. As an aspirational expression reflective of best practice, it appears incontrovertible that the Report's terminology in relation to duty of care is geared towards an improvement in coaching standards and practice. However, as this article argues, should such implicit assumptions fail to reflect and account for the more subtle nuances between moral and legal obligations, this may unwittingly expose coaches to a greater risk of legal liability by potentially extending the scope of legal responsibility beyond its current limits. Most obviously, it may result in coaches assuming duties which may not presently be expected of them. Should this be the case, it appears likely there would be a legal expectation for such duties to be discharged properly, regardless of coaches being categorised as amateur, professional, 'professional amateur', qualified, (in)experienced or accredited by a National Governing Body of sport.<sup>88</sup>

### **Standards of Care in Coaching**

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<sup>85</sup> *Caldwell v Maguire and Fitzgerald* [2001] EWCA Civ 1054 at [30]. This echoes Lord Steyn's earlier submission that '[i]n law context is everything' (*Regina (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at [28]).

<sup>86</sup> AR Hardman and CR Jones, 'Sports coaching and virtue ethics' in A Hardman and C Jones, *The Ethics of Sports Coaching* (Routledge, 2011) 78.

<sup>87</sup> H Telfer, 'Coaching practice and practice ethics' in J Lyle and C Cushion (eds), *Sports coaching: professionalisation and practice* pages (Churchill Livingstone Elsevier, 2010) 210-11.

<sup>88</sup> Partington (n 35) 242

Although terminology associated with ‘specific (legal) duties’ may be regarded as technically misleading,<sup>89</sup> since the precise degree and scope of responsibilities owed by coaches more accurately defines the standard of care, as noted by Clerk and Lindsell on Torts, this can be useful in a descriptive way.<sup>90</sup> So whilst the standard expected of sports coaches is fixed conceptually as the duty to take reasonable care, specific duties required of coaches have evolved.<sup>91</sup> As a result of advances brought about by factors including those in the field of sports science, technical developments in certain sports, and societal expectations, such legal duties appear to be broadening.<sup>92</sup> Importantly, such advances may increase the scope and degree of the duty of care owed by progressively placing more responsibilities on coaches.<sup>93</sup> Correspondingly, as athletes progress to elite and excellence levels the required emphasis on more specialised training programmes creates new risks requiring coaches to ensure that they possess the necessary competence and expertise to operate safely in these amended circumstances.<sup>94</sup> Moreover, there may also be general improvements in the standards of skill and care provided by particular professions, regardless of associated advances in knowledge, similarly heightening the standard of the reasonably competent practitioner.<sup>95</sup> Accordingly, as the principles of coaching are constantly assessed and revised,<sup>96</sup> so too is the legal standard of care required of coaches.<sup>97</sup>

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<sup>89</sup> The duty remains that of reasonable care to ensure the reasonable safety of athletes.

<sup>90</sup> MA Jones and AM Dugdale (eds) *Clerk and Lindsell on Torts* (20th ed., Sweet and Maxwell, 2010) [8-137].

<sup>91</sup> A McCaskey and K Biedzynski, ‘A Guide to the Legal Liability of Coaches for a Sports Participant’s Injuries’ (1996) 6 *Seton Hall J. Sport L.* 7, 15.

<sup>92</sup> R VerSteeg, ‘Negligence in the Air: Safety, Legal Liability, and the Pole Vault’ (2003) 4 *Tex. Rev. Ent. & Sports L.* 109, 113.

<sup>93</sup> J Labuschagne and J Skea, ‘The Liability of a Coach for a Sport Participant’s Injury’ (1999) 10 *Stellenbosch Law Review* 158.

<sup>94</sup> *Ibid* 166.

<sup>95</sup> J Powell and R Stewart, *Jackson and Powell on Professional Liability* (7th ed., Sweet and Maxwell, 2012) [2-135].

<sup>96</sup> T Cassidy et al, *Understanding Sports Coaching: The Social, Cultural and Pedagogical Foundations of Coaching Practice* (2nd ed., Routledge, 2009) 130-31.

<sup>97</sup> See generally, Powell and Stewart (n 95) [2-135].

This is due to reasons both devoid (i.e., sport scientific and technical developments) and inclusive (i.e., societal expectations) of social and moral considerations. In general, the emerging case law in the UK reveals that the specific duties of coaches when managing the risk of injury to athletes predominantly relates to the reasonableness of supervision, training and instruction.<sup>98</sup> With this in mind, the following example offers a stark illustration of possible unintended consequences when conflation of legal and moral duties of care blurs the distinction between duty of care and standard of care considerations.

Volunteering is commonplace and generally ‘expected’ in the provision of community and recreational sport.<sup>99</sup> The vast majority of sports coaches in the UK are volunteers,<sup>100</sup> this being reflective of the bulk of countries in the world.<sup>101</sup> Individual volunteers at community sports clubs may willingly embrace a social or moral duty to support and assist other club members by organising, for instance, practice sessions for junior or less experienced players. In such a situation, it appears highly probable that such volunteers will on occasion assume the responsibility for not only arranging the practice session but also supervising it and, if competent and experienced players (as opposed to coaches) themselves, providing some level of instruction. In such a scenario, and following

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<sup>98</sup> E.g., *Shone v British Bobsleigh Limited*, Swindon County Court, 11 May 2018; *Ahmed v MacLean* [2016] EWHC 2798 (QB); *Morrow v Dungannon and South Tyrone BC* [2012] NIQB 50; *MacIntyre v Ministry of Defence* [2011] EWHC 1690 (QB); *Davenport v Farrow* [2010] EWHC 550 (QB); *Anderson v Lyotier* [2008] EWHC 2790 (QB); *Brady v Sunderland Association Football Club Ltd* 17 November 1998 (CA); *Fowles v Bedfordshire CC* [1996] ELR 51 (CA). See further, Partington (n 39). Given the close analogy, cases from the context of Physical Education teaching also prove instructive in determining the specific duties of sports coaches. See, for instance: *Goulding v Doherty* [2017] NIQB 47; *Murray v McCullough* [2016] NIQB 52; *Hammersley-Gonsalves v Redcar and Cleveland BC* [2012] EWCA Civ 1135; *Mountford v Newlands School* [2007] EWCA Civ 21; *Van Oppen v Clerk to the Bedford Charity Trustees* [1989] 3 All ER 389 (CA).

<sup>99</sup> C Nash, ‘Volunteering in Sports Coaching – A Tayside Study’ in M Graham and M Foley (eds), *Volunteering in Leisure: Marginal or Inclusive?* (LSA, 2001) 44.

<sup>100</sup> sports coach UK, ‘Coach Tracking Study: A four-year study of coaching in the UK’ (2012) 17.

<sup>101</sup> P Duffy et al., ‘Sport coaching as a “profession”: challenges and future directions’ (2011) 5(2) *International Journal of Coaching Science* 93, 94.

*Fowles v Bedfordshire CC*,<sup>102</sup> the existence of an *assumption of responsibility* by the volunteer ‘coach’, and *reliance* on this supervision and/or instruction by the younger or more inexperienced players, would most typically give rise to a common law duty of care. Simply applied, the initial social or moral duty assumed by the volunteer ‘coach’, perhaps underpinned by altruistic motivations<sup>103</sup> and an associated aspirational and holistic caring ethic,<sup>104</sup> would appear to be transformed into a more formal legal duty of care should ‘specialist’ advice be offered and acted upon. As noted by Gardiner, since the volunteer ‘coach’ would provide ‘gratuitous advice on a matter within his particular skill or knowledge, and knows or ought to have known that the person asking for the advice will rely on it and act accordingly’, a duty of care at common law would be established.<sup>105</sup> Consequently, the standard of care required of the volunteer ‘coach’ in these amended circumstances would be commensurate with that of the ordinarily competent coach. Put bluntly, the original social or moral duty is extended to become a more formalised duty to adopt *reasonable* coaching practice so that *reasonable* care is taken to ensure the *reasonable* safety of players (i.e., fellow club members). For the average reasonable club member, player and/or parent,

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<sup>102</sup> *Fowles v Bedfordshire CC* [1996] ELR 51 (CA), and most notably, the judgment of Millett LJ, P60-P64. This proposition was endorsed by the Court of Appeal in the later decision of *Poppleton v Trustees of the Portsmouth Youth Activities Committee* [2008] EWCA Civ 646 at [17], per May LJ. Also see, Norris (n 40), 157. More recently, this line of reasoning was adopted by counsel for the claimant in *Petrou v Bertonecello* [2012] EWHC 2286 (QB) at [22] and [27].

<sup>103</sup> See, for instance, Law Reform Commission of Ireland (n 55) [2.79], noting that ‘in the main, volunteers usually act for altruistic reasons and because they have a moral, rather than legal, duty ...’.

<sup>104</sup> Roberts et al (n 22).

<sup>105</sup> J Gardiner, ‘Should Coaches Take Care?’ (1993) 143 *NLJ* 1598. Interestingly, this principle derived from *Hedley Byrne & Co Ltd v Heller & Partner Ltd* [1964] AC 465 rests on an assumption of responsibility by the defendant towards the claimant and is coupled by the claimant’s reliance on the exercise by the defendant of due skill and care. The principle has been applied by the courts to a range of scenarios extending beyond mere negligent misstatements. In recently reiterating this ‘underlying wider principle’, Lord Toulson in the Supreme Court in *Michael v Chief Constable of South Wales Police* [2015] UKSC 2 at [67] repeated that ‘[t]he principle that a duty of care could arise in that way was not limited to a case concerned with the giving of information and advice (Hedley Byrne) but could include the performance of other services’. See further, S Peyer and R Heywood, ‘Walking on thin ice: the perception of tortious liability rules and the effect on altruistic behaviour’ (2019) *Legal Studies* 1–18, 6. <https://doi.org/10.1017/lst.2018.39>.

without up-to-date training or a coaching qualification, this may well represent a surprising exposure to legal liability, and an unusual instance of professional negligence, should the duty of care be breached. More fundamentally, it signifies a realistic and important illustration of the necessity to explicitly distinguish between legal and moral/social duties of care in the context of sports coaching. On more searching examination of the context of sports coaching, appreciation of this crucial distinction becomes even more pronounced.

### **Sports Coaching Practice**

Protecting the health and safety of athletes poses coaches with legal, moral and ethical obligations.<sup>106</sup> For instance, bullying coaches violate their moral duty, both to treat athletes with respect and dignity and, safeguard athletes' welfare, health and safety.<sup>107</sup> Correspondingly, the dividing line between training intended to maximise sporting potential, as contrasted with abuse or exploitation of athletes, appears to be a thin one.<sup>108</sup> A significant ethical dilemma facing modern sports coaches, not least when working with young athletes, concerns determination of training intensity levels.<sup>109</sup> This is generally a judgement call left to the discretion of individual coaches, based on the specific circumstances, and an area where coaches have to be trusted to make the right (or

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<sup>106</sup> R Simon, 'Coaching, Compliance, and the Law' in Simon (n 20) 188; M Mitten, 'The Coach and the Safety of Athletes: Ethical and Legal Issues' in Simon (n 20) 232.

<sup>107</sup> M Hamilton, 'Coaching, Gamesmanship, and Intimidation' in Simon (n 20) 144.

<sup>108</sup> P David, 'Sharp practice: Intensive training and child abuse' in McNamee (n 17) 426.

<sup>109</sup> See, for instance, A Miles and R Tong, 'Sports Medicine For Coaches' in RL Jones and K Kingston (eds) *An Introduction to Sports Coaching: Connecting Theory to Practice* (2nd ed., Routledge, 2013) 188-89; J Lyle, *Sports Coaching Concepts: A Framework for Coaches' Behaviour* (Routledge, 2002) 240. Also see, *Davenport v Farrow* [2010] EWHC 550 (QB) at [59], where based on the defendant's training log, the intensity of training expected of the claimant was found to be within the range of acceptable coaching (level 4) for an athlete of his ability and aspirations. Interestingly, Norris (n 40, 158) notes that '[w]hat may be perfectly acceptable treatment of a seasoned professional may be wholly inadequate when dealing with a vulnerable teenager. ... it is commonplace that coaches or clubs may expect their players to "go through the pain barrier" or "run off" an injury or to continue to play having taken pain-killing injections or drugs but without much regard for the harmful long-term consequences'.

reasonable) decisions.<sup>110</sup> Further contentious issues concern the scope of the duty of coaches to protect athletes from themselves,<sup>111</sup> and determination of what constitutes reasonable encouragement when reintroducing previously injured athletes into activities and training,<sup>112</sup> with the scenario of an injured star athlete desperate to compete a challenging dilemma frequently encountered by coaches.<sup>113</sup> Moreover, coaches are expected to deliver ‘cutting edge’ guidance and advice to athletes,<sup>114</sup> potentially challenging the threshold between harm and reasonable endeavour when pushing the human body to its physical and emotional limits within training and performance.<sup>115</sup> Viewed from a legal perspective, this provides a clear illustration of the need for coaches to have regard to ‘the likely boundary between coaches forging champions or committing a tort’,<sup>116</sup> and moreover, the requirement for coaching practice and behaviours to be reasonable. The DoC in Sport Report appears to be acutely aware of such tensions in coaching when stating:

While a concentration on qualifications is important it should be noted that being qualified to teach a technical skill does not always mean having the appropriate skills to work with athletes (of any age) in sport. Having the responsibility for safeguarding participants’ emotional, psychological and physical well-being means that those individuals require continuous professional development in these areas. There should be a greater focus on behaviours and keeping up to date with relevant information.<sup>117</sup>

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<sup>110</sup> Cassidy et al (n 96) 154-55.

<sup>111</sup> Hartley (n 11) 89.

<sup>112</sup> A Hecht, ‘Legal and Ethical Aspects of Sports-Related Concussions: The Merril Hoge story’ (2002) 12 *Seton Hall J. Sports L.* 17, 40-41.

<sup>113</sup> D Healey, *Sport and the Law* (4th ed., UNSW Press, 2009) 156.

<sup>114</sup> C Mallett, ‘Becoming a high performing coach: pathways and communities’ in Lyle and Cushion (n 87) 119.

<sup>115</sup> Telfer (n 87) 214. As noted by Telfer, this is certainly an enduring debate, particularly in relation to the coaching of young performers.

<sup>116</sup> T Hurst and J Knight, ‘Coaches’ liability for athletes’ injuries and deaths’ (2003) 13 *Seton Hall J. Sports L.* 27, 29.

<sup>117</sup> Doc in Sport Report (n 1) 21.

Clearly, this benchmark of reasonable, ethical, or morally justifiable coaching conduct and practice, and associated tensions and difficult borderline cases, remain a constant source of enquiry and curiosity which coaches have a responsibility to be mindful of.<sup>118</sup> Interestingly, in the same way in which it may be acceptable to use the terms ethics and morality interchangeably, a coach's moral and ethical obligation not to expose athletes to unacceptable levels of risk is '[c]onsistent with the legal duty of reasonable care established by the negligence standard'.<sup>119</sup> However, and of absolutely crucial relevance, is the fact that the moral and ethical obligations incumbent upon coaches are *broader* than the legal standard of care.<sup>120</sup> Consistent with what Raz labels the 'semantic thesis', in the context of the duty of care owed by a sports coach to those under the coach's charge, the term duty 'cannot be used in the same meaning in legal and moral contexts'.<sup>121</sup>

It has been suggested that, technically speaking, this is not so much a difference of meaning but, 'a difference between formal, institutionally recognised duties and rights [i.e., legal context] and their informal, non-institutional equivalents [i.e., moral context]'.<sup>122</sup> Herein lies the fundamental and dangerous pitfall which appears likely to pose significant unintended repercussions unless it is made more explicit and transparent. Certainly, when adopting a deliberately broad expression in the DoC in Sport Report, and in much of the subsequent and continuing media coverage in this field,<sup>123</sup> the crucial distinction between formal and institutionally recognised legal duties, as contrasted with informal and non-institutional moral duties, is not made plain. But, in elaborating on the earlier caveat

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<sup>118</sup> Partington (n 12).

<sup>119</sup> Mitten (n 106) 216.

<sup>120</sup> Ibid 232; Lucy (n 23) 47

<sup>121</sup> J Raz, 'Legal Positivism and the Sources of Law' in J Raz, *The Authority of Law. Essays on Law and Morality* (Oxford: Clarendon Press, 1979) 38

<sup>122</sup> T Honoré, 'The Necessary Connection between Law and Morality' (2002) 22(3) *Oxford J Legal Studies* 489.

<sup>123</sup> E.g., D Roan, 'Player welfare: How big a problem is football facing? And what is being done?' (BBC News, 10 August 2018) <<https://www.bbc.co.uk/sport/football/45171563>> accessed 17 July 2019.

alluded to by Heuston, when exposed to sustained scrutiny from a legal perspective, the critically informed reasonable coach may be somewhat surprised and alarmed when the potential ramifications of associated inferences is revealed. Indeed, in emphasising the significance of this distinction in the context of sport, Norris convincingly cautions against framing policies in terms of expressions of 'duty of care', given the possible associated enhanced exposure to negligence liability claims.<sup>124</sup> In this regard, perhaps ministers and sports bodies need to be alerted to the importance of employing more precise terminology, given the important dividing line between legal and moral duties of care.

## Implications

As already mentioned, the vast majority of the volunteer coaches in the UK have limited training,<sup>125</sup> with approximately half of the coaches in this jurisdiction not holding a coaching qualification.<sup>126</sup> Previous experience as players and enthusiasm are often regarded as sufficient prerequisites for volunteer coaches.<sup>127</sup> Further, there is evidence to suggest that some parents volunteer as coaches to assist their children, thereby ensuring that opportunities to participate continue.<sup>128</sup> This commitment and desire to help by former athletes and parents at the entry level is representative of the motivations widely held in voluntary activity.<sup>129</sup> In short, the sports coaching 'workforce' may be regarded as largely

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<sup>124</sup> Norris (n 40) 155.

<sup>125</sup> G Nygaard and T Boone, *Coaches' guide to sport law* (Human Kinetics, 1985) 13.

<sup>126</sup> sports coach UK (n 98) 17. The national average of coaches holding a coaching qualification in 2012 being around 53%.

<sup>127</sup> Healey (n 113) 159.

<sup>128</sup> Nash (n 99) 51. Also see, R Groom et al, 'Volunteering Insight: Report for Sport England' (Manchester Metropolitan University, 2014) 6. In addition to child involvement, other motivating factors for volunteers (not necessarily coaches), included: love of sport, giving something back to sport, social connection, career aspirations, and education/employment based volunteering.

<sup>129</sup> A Lynn and J Lyle, 'Coaching workforce development' in Lyle and Cushion (n 87) 206.

unregulated and absent of a 'validated threshold level of expertise or a commonality of occupational practice and expectations'.<sup>130</sup> Despite this, it appears axiomatic that coaches are driven by social and moral considerations, this being at the very core of the notion of the volunteer ethic.<sup>131</sup>

Importantly, as the principal supervisors of organised sporting activities, coaches must appreciate that participation in sport frequently leads to injury.<sup>132</sup> Theme 7 of the DoC in Sport Report concentrates on 'Safety, injury and medical issues'. Recommendations from Theme 7 include:

- Development of a standard first aid course specifically for sport.
- Sports to provide guidance to clubs with understanding their health and safety obligations.
- NGBs (National Governing Bodies of Sport) to provide and promote online access to basic first aid guidance (which should include CPR and concussion protocols).
- Consideration should be given to the development of a training module including content about Sudden Cardiac Arrest (SCA) symptoms.
- NGBs to work together on improving awareness of cardiac screening at community sport level. Consideration should be given to producing online materials and also inclusion in coaching courses or participant inductions.
- All sports (even those who may not be readily thought susceptible to concussion) need to be aware of concussion protocols and work together to ensure they have something in place and communicate with other organisations.
- All contact sports to consider pre-season concussion awareness courses.<sup>133</sup>

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<sup>130</sup> Ibid 205.

<sup>131</sup> See, for instance, Study on Volunteering in the European Union (2010), Report for DG EAC submitted by GHK, 149 <[http://ec.europa.eu/citizenship/pdf/doc1018\\_en.pdf](http://ec.europa.eu/citizenship/pdf/doc1018_en.pdf)> accessed 3 January 2019. The report notes that the desire to help others is a key motivating factor amongst volunteers.

<sup>132</sup> Miles and Tong (n 109) 178.

<sup>133</sup> DoC in Sport Report (n 1) 25.

Coaches generally operate in isolation,<sup>134</sup> without immediate access to the services of a doctor or physiotherapist, this being a common situation in amateur sport.<sup>135</sup> Moreover, there is no requirement in the UK at present for coaches to have first aid or life-support training,<sup>136</sup> despite the coach frequently being the first person to attend to an injured athlete.<sup>137</sup> Understanding the health and safety obligations of coaches demands a clear distinction between duties maintaining minimal rather than aspirational standards for conduct. Should all coaches be required to attend a standard first aid course specifically for sport (and appropriately supported in order to do so), the standard of care required when dealing with safety, injury and medical issues involving athletes may, quite deliberately and understandably, become explicitly heightened. For instance, using the analogy of sport managers, should the use of automated external defibrillators (AEDs) continue to become more commonplace, 'the bar will continue to be raised regarding the standard of care that organizations and facilities are expected to provide'.<sup>138</sup> Put simply, formalised standard first aid training should equip coaches with an ordinary level of competence that satisfies a 'basic level of awareness among those on the scene about what immediate action to take, whether that be calling for further assistance or administering basic first aid'.<sup>139</sup> Significantly, by providing appropriate and mandatory training, the extent of the coach's duty of care would be extended in confined situations in a deliberate, informed and incremental fashion. However, whilst it appears strongly desirable for coaches to be

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<sup>134</sup> P Trudel et al, 'Coach education and effectiveness' in Lyle and Cushion (n 87) 141.

<sup>135</sup> M McNamee et al, 'Concussion in Sport: Conceptual and Ethical issues' (2015) 4 *Kinesiology Review* 190, 199.

<sup>136</sup> Miles and Tong (n 109) 189. In this scenario, it would be reasonable for the coach to have contingency plans in place for the management of foreseeable risk, and make appropriate and timely referral to a qualified medical practitioner or nominated first aider.

<sup>137</sup> See, for instance, S Broglio et al, 'Concussion occurrence and knowledge in Italian football (soccer)' (2010) 9 *Journal of Sports Science and Medicine* 418, 419-20.

<sup>138</sup> J Spengler et al, *Risk Management in Sport and Recreation* (Human Kinetics, 2006) 64.

<sup>139</sup> DoC in Sport Report (n 1) 26.

educated on CPR, concussion and SCA symptoms and protocols, at present, and very much depending upon the particular circumstances (i.e., professional v amateur sport; type of sport), this does not always appear to be the case. As such, and reflective of the more general necessity for (volunteer) coaches to only assume legal obligations commensurate with their level of competence, a number of the DoC in Sport Report Recommendations should be regarded as 'good practice – an expression of a moral, but certainly not a legal, duty'.<sup>140</sup>

Consequently, when defining the duty of care incumbent upon sports coaches, it is imperative that a distinction is drawn between a legal duty of care, as opposed to, broader moral, ethical and aspirational considerations. Failing this, and consistent with the volunteer ethic, it appears feasible that intuitively moral and social duties may be transformed from aspirational standards of conduct, into legal ones, in a somewhat haphazard and informal manner. Clearly, this would result in the unintended consequence of potentially exposing coaches to a greater risk of negligence liability. In principle, extending the scope of a coach's duty of care should be done in more systematically planned and explicit manner. At the very least, this should involve a process of informed dialogue,<sup>141</sup> coach education and qualification, continuing 'professional' development and corresponding support so that such provision and measures are accessible for all coaches. Moreover, the DoC in Sport Report recognises that '[a]n understanding of Duty of Care should be included in any leadership training in sport, in order to help and support a new diverse generation of leaders'.<sup>142</sup> Accordingly, the necessity for such training to address and

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<sup>140</sup> Norris (n 40) 154.

<sup>141</sup> For instance, between NGBs, sports coach UK, coaching organisations, coach educators and coaches.

<sup>142</sup> DoC in Sport Report (n 1) 16.

unpack distinctions between legal or moral duties of care, by perhaps emphasising and discussing the significance of coaches only assuming duties for which they are ordinarily competent for, appears compelling. More fundamentally, an aim of such training should be to proactively ensure that all of the sport's stakeholders are aware of the danger of conflating moral and legal duties of care. Appropriate strategies could then be adopted to prevent coaches from being compromised in this regard.

## **Conclusion**

Critical analysis of a sports coach's duty of care reveals a context where the law and morality are not necessarily inextricably interwoven. Failure to appreciate this subtly, blurred by connotations that likely flow from the pseudo-legal gloss of duty of care terminology, may unwittingly expose (mainly volunteer) coaches to an unreasonable future risk of legal liability. Whilst this submission is in no way intended to detract from the extremely worthwhile recommendations of the DoC in Sport Report, or a commitment to the highest standards in athlete safety and welfare, it is intended to make a valuable contribution to Baroness Tanni Grey-Thompson's hope of stimulating further discussion on the application of duty of care principles in the specific context of sport. Moreover, the original insights revealed by scrutinising distinctions between legal and moral duties of care in a somewhat novel context is submitted to be of significance beyond the confines of sport. So whilst the concerns highlighted in this article may also be of immediate and direct relevance to the duties of care incumbent upon sports referees and officials, this also

representing an area with developing and recent case law in the UK,<sup>143</sup> the important implications discussed are likely to be of more widespread relevance. For instance, given the considerable reliance on volunteers in the EU – most notably in the sectors of sport; social, welfare and health activities; religious organisations; culture; recreation and leisure; and education, training and research<sup>144</sup> -- in view of the likely relevance and application of the ‘neighbour principle’ in these contexts, explicitly distinguishing between legal and moral duties would appear both prudent and necessary. More specifically, since the issue of breach of duty by coaches represents a distinctively nuanced issue of professional liability, this article’s uncovering of distinctions between legal and moral duties of care appears likely to be of relevance and merit in the area of professional negligence more generally. This appears a particularly convincing submission since moral and ethical considerations may become indicative of the prevailing ‘social conditions and habits of life’ that impact upon standard of care enquires,<sup>145</sup> and which regardless of associated advances in knowledge, may similarly heighten the standard of the reasonably competent practitioner.<sup>146</sup> Further, given what appears to be the increasing propensity for the concept of the duty of care to be employed in order to create a gloss of pseudo-legal authority, ordinary reasonable persons, recognised bodies, and indeed government departments (i.e., DCMS), should be advised to be acutely aware of the potential implications should legal and moral duties of care become regarded as being one and the same. Whilst concentrating on some of the unintended consequences of failing to appreciate the differences between legal and moral duties of

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<sup>143</sup> E.g., *Bartlett v English Cricket Board Association of Cricket Officials* (unreported), County Court (Birmingham), 27 August 2015; *Allport v Wilbraham* [2004] EWCA Civ 1668; *Vowles v Evans* [2003] EWCA Civ 318; *Smoldon v Whitworth* [1997] PIQR P133 (CA); See further, Partington (n 38).

<sup>144</sup> Study on Volunteering in the European Union (n 131) 9. See further, N Partington, ‘Volunteering and EU Sports Law and Policy’ in J Anderson, R Parrish and B Garcia (eds), *Research Handbook on EU Sports Law and Policy* (Edward Elgar, 2018) 98-119.

<sup>145</sup> Percy and Walton (n 49) [6-04].

<sup>146</sup> See further, Powell and Stewart (n 95) [2-135].

care in the specific context of sport, the insights revealed here appear likely to be of much more widespread contemporary significance and interest.

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