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Torts - Problem Solving

Breach of Duty

I Would a reasonable person foresee the risk? -- Wyong Shire Council v Shirt & Doubleday v Kelly

Q: who is the reasonable person? (obj/sub)

1. Children: (McHale)
   - A reasonable child of def’s age and experience. → lower SoC
   - CA: not boy/the same age as McHale.

2. Learner: (Imbree)
   - Inexperienced driver owes the same SoC as other normal licensed drivers.

3. Mental illness: (Carrier)
   - Same SoC as a normal person.

4. Professional (CLA s 5O +5P) Bolam Principle (Rogers)
   - An ordinary skilled person possessing that special skill. → higher SoC
   - Professionals include doctors/engineers/solicitors etc; may extend to other skilled laborers gaining accreditation. → not a closed list.

   (1) Step I: is def a professional? (CA: not a traditional profession)
   (2) Step II: is def “providing services”?
   (3) Step III: is the service “widely accepted” by peer professional opinion?
      - The coexistence of different PPOs doesn’t prevent any one of those being relied on.
      - The opinion of another member of the profession is insufficient.
      - PPO doesn’t have to be universally accepted.
   (4) Step IV: is the peer professional opinion irrational?
      - If it is irrational, it cannot be relied upon.

McHale v Watson

[12 year old boy attempted to hit a post with a piece of metal; dart missed the post and hit girl in the eye]
- The conduct is symbolic of tastes and simplicity of boyhood; a 12 year old didn’t have enough maturity of mind to foresee that the dart would hit girl.

Imbree v McNeilly

[M was a learner driver and not licensed to drive; overturned the vehicle and passenger I injured]

Carrier v Bonham

[mental patient jumped in front of a bus; bus driver unavoidably hit him and suffered mental shock]

Reason for not imposing different SoC:
- Not a stage of life development experienced by all;
- Unsoundness comes in different varieties and is hard to devise a universal SoC.

Rogers v Whitaker

- The plaintiff had cosmetic surgery over a defective eye. In the process of the surgery, the defendant injured the plaintiff’s good eye, thereby blinding her completely.

II the risk of harm is RF and not insignificant (CLA s 5B)
- In exam: A test not so demanding. Can conclude in one sentence.

III whether a reasonable person in def’s position would take precautions against the risk of harm? (CLA s 5B)

1 CA= Counter argue
Consider among others:

1. Probability that the harm would occur. *(RTA v Dederer)* – More likely, more protective measures.
2. Likely seriousness of the harm; *(Paris v Stepney)*- More serious, higher standards (more methods).
3. Burden of taking precautions; *(Woods v Multi-Sport Holdings)*
   - Ie: whether expensive or inconvenient to take precautions.: More expensive, lower standards.
4. Social utility of the activity that creates the risk of harm. *(E v Red Cross)*. Cost outweighs utility, no duty.

**RTA v Dederer**

[D jumped off bridge managed by RTA and became paraplegic due to a shifting sandbank. Other factors: D climbed onto platform using horizontal bars as steps which are required to be replaced by vertical bars by new regulation; D had done this the day before and lots people jumped without sustaining harm]

- Seriousness was significant, burden of precautions is minor.
- However, the determining factor is the unlikelihood of the risk of harm b/c lots of people jumped without sustaining harm. —**Unlikeliness** means the protective method of the presence of a **sign** is sufficient.

**Paris v Stepney**

[P work in def’s garage; P already one-eye blinded; injured by a chip of metal during work which rendered him totally blind; def failed to provide safety goggles]

- The harm is sufficiently serious given the particular **vulnerability** (ie totally blinded) of P.

**Woods v Multi-Sport Holdings**

[blinded in one eye during indoor cricket(game); Def failed to provide helmets and adequate warning of risk of eye damage]

- Provision of headgears may be inconvenient for the operation of the game + no rules of headgear designed → too much burden on def

**E v Red Cross**

[receive transfusion of blood which was contaminated with HIV virus; RC took precautions against this harm such as donor screening, yet decided not to use anti-HBc testing on blood]

Issue: social utility of testing (or blood donation without testing).

- Introduction of anti-HBc testing would result in wastage of 5% of donated blood in a time when demanding for blood is increasing while blood donation is declining.
- The court claims the reasonableness on the balance between protecting wider public interests and ignoring the minority safety.

**Romeo v Conservation Commission of The NT**

- The plaintiff was drinking and socializing around the cliff. Because of his careless, he was injured.
- Lower possibility, grievous risks, expensive cost---No breach…
Jeremy Waldron, *Moments of Carelessness and Massive Loss*

- Insurance is ignored in the current discussion
  - Insurance makes Fate’s predicament easier to accept and blur the discussion of fairness
  - Either insurance transforms an unacceptable system of liability into an acceptable one
    - Or it represents a set of privately negotiated deals that enable individuals to cope better with the demands placed on them by a system of liability

- Desert in tort law
  - Two question: relationship between tort liability and what individuals *deserve*: comparative desert
  - Individual **moral desert** has to be taken into account in tort liability. [CA/50 not in proportionate to 5m+ both same negligence but not same outcome]

- Inadequacy of annulment theory
  - Annulment theory: the aim of tort law is to **annul wrongful gains by transferring money from injurer to plaintiff** [*Distributive Justice*]
  - However, defendant’s *gain* is often **not** plaintiff’s *loss*. **Another tortfeasor gain without loss**
  - It is more **appropriate** to say that the role of tort law is to **annul wrongful loss**

- The basic injustice of the tort system
  - Tort law is unjust either to plaintiff or defendant, maybe both [P: no gain or receiving D: suffering loss or without compensation]
  - It is **less unfair** to allocate the loss suffered from the plaintiff to the defendant, because plaintiff is totally innocent
  - NZ system: some individuals are required to contribute to compensating losses for which they bear absolutely no causal responsibility

- **Differential of liability purely based on causation is arbitrary, since sometimes it is just a matter of luck—fortuitous connection**—**Unfairness**

- Liability as a lottery
  - Outcome of fault is irrelevant to the degree of culpability
  - **We can use the very mechanism of the lottery that the defendant imposed upon the victim**
  - The **lottery rate of for careless drivers are all the same**

- However, the role of tort law is not to punish, but to compensate
  - No-fault scheme: levying a charge on all negligent drivers, because realistically everyone will have moments of carelessness
  - The no-fault scheme subject people to the same levy, while tort liability subject people to the same risk
  - The scheme can adjust the levy to correlate with driving records
  - A few hundred dollars per year v huge amount if they lose