

CRIMINAL LAW

SUGGESTED ANSWER

J and K went into a jeweller's shop in order to have their ear pierced. The sixteen year old assistant, L employed by M, the owner of the shop, failed to sterilize the needle before J's ear and between piercing and was seriously ill for three months. Subsequently, K, after a blood test, was found to have become HIV positive. J had known that she, J was HIV positive when she went into the shop.

Advise the parties of their criminal liability. What difference, if any would make the answer if J had died.

SUGGESTED ANSWER :

The issues here are:

1. L's liability for piercing J's ears resulting in illness.
OAPA S 18, 20, 47, 23 & 24.
2. L's liability for piercing K's ears and passing the HIV.
OAPA S 18, 20, 47, 23 & 24.
3. L's liability if J died
Homicide: manslaughter
4. M's liability for any of the above – secondary parties
- vicarious liability

1. Liability for piercing J's ear resulting in illness

L's liability as regard to J would center on 2 issues. Firstly, the piercing of the ear itself and for the passing of infection (blood poisoning). As regards to the piercing clearly this would involve a breaking of the skin *JJC v Eisenhower* and therefore can be classified as a wound and this the requirement for S 18 and 20 of the OAPA. However, S 18 would be largely irrelevant since there is no intention to cause GBH but for S 20 the requirement are more likely to be met.

For S 20 the must be malicious as to the act which had been interpreted to mean that there is an intention or Cunnig ham Reckless as to the act of the piercing. On the facts L intended t pierce J's ears, the next requirement is however that for S 20 although GBH need not be intended there must be actually some foresight of physical harm *R v Mowatt*. Clearly physical harm would be foreseeable for ear piercing, therefore S 20 is likely to be made out. However, L could argue that J had consented to have her ears pierced. However, the act of ear piercing is done in private between consenting adult. Therefore, defence of consent should apply, however reference should be made to the case of *R v Brown* in the House of Lords where it was decided even if activities which lead to injuries in private between adults the defence of consent was not available. However, it must be noted that in *R v Brown* the subject matter was immoral sexual activities which was clearly unusual and offensive to ordinary people but the same cannot be said about ear piercing which is a normal expected practice. Therefore, it is submitted in these facts that *R v Brown* will not apply therefore defence of consent is allowed.

Therefore, the piercing of ear itself may not amount to a criminal liability but since the needle was not sterilized L could still be liable under S 23 or S 24 of OAPA. If thee was infection, it would com eunder the definition of poison, noxious substance destructive thing with S 23 and S 24 (it would include germs, virus, bacteria etc). However, for both S 23 and S 24 there is a requirement for

administering which has been interpreted in *R v Gilland* as to when the substance take effect. On the facts this would happen the moment the piercing is done. However, the problem would be whether L was malicious in infecting J. Malicious here means intended or Cunningham Reckless as to infecting. On the facts it did not suggest that she intended to infect but there is a likelihood of being reckless. Here, clearly there is an unjustified risk by using an unsterilized needle. If she can be said to be reckless then she is likely to be liable under S 23 whereby the victim's life was endangered or GBH was inflicted. There is no requirement that this must be foreseen.

2. L's liability for piercing K's ears and passing the HIV

- Same as the above-

3. L's liability if J died

Clearly there has been an unlawful killing of a person in the Queen's peace in the county of realm and death occurs within 1 year and 1 day. Therefore, the A>R of Homicide can be made out.

However L's liability would depend on her M.R on the facts L do not have intention to kill or cause GBH, therefore there is no murder. Therefore, L's liability if at all would be involuntary manslaughter. The first issue could be CMS where the requirement which is in the case of *DPP v Newbury* where there must be an intention to commit unlawful act in itself which is dangerous and likely to cause physical harm to another and in doing so incidentally causes the death of another. The unlawful act was the infection but the infection was not an act but failure to clean the needle. On the facts CMS is unlikely because commission could not amount to CMS. *R v Lowe*.

Since CMS may not apply the liability of L may now come either Reckless Killing (Caldwell) or killing by Gross Negligence (Adomako).

The HOL in R v Adomako decided that the proper test for manslaughter involving breach of duty was the test laid down earlier in R v Bateman i.e. gross negligence test. Therefore, in such circumstances Caldwell Reckless would not apply. However, in R v Adomako does not overrule the Caldwell Reckless test and test can still be used in situation where there is no breach of duty involving skill or profession arises. Adomako applies to situation where a person with skill or with professional expertise comes to a situation whereby such skills are required and in exercising those skills the person was grossly negligent. However, in matters involving ordinary activities of ordinary people then the test in Caldwell is more appropriate because Caldwell Recklessness uses the R.M standard. Another important distinction between these 2 test is that Caldwell applies where the accused created the risk whereas Adomako is a situation where the accused come to the risk but in trying to resolve was grossly negligent.

On the facts, the issue involves piercing of the ear and the liability here is related to that activity. Such activity cannot be done by ordinary person but only with a person who has got a particular skill in such matters. Therefore this would be a situation where the act or omission is done by a person who has skill in such matters. Therefore this would be a situation where the act or omission is done by a person who has skill in that matter. In the law of tort from where negligence come from the standard required would be that of a reasonably competent skill person, therefore it is irrelevant that she is 16, inexperience etc. Nettleship v Weston.

However another problem on this is consuming to the risk or creating the risk. In this situation when a person does ear piercing there is always an existing risk of infection which is why a competent ear piercer would sterilized the needle. Therefore it is a situation of consuming to the risk. It is submitted that the proper

test here would be gross negligence instead. To make out gross negligence there are 2 elements that have to be shown which is negligent and gross.

Negligence is a question of law of tort and what has to be shown here is a duty of care and breach of it. Clearly L owes J a duty of care and based on the standard of a reasonable skill person in ear piercing she would have breached this duty and therefore negligent. However, to attach a criminal liability in manslaughter negligence alone is insufficient unless the negligence is gross. Gross comes from the case of Bateman. There must be utter disregard of life and limb the actions of L falls far below the standard of a reasonable man, beyond a matter of mere compensation and that the matter is so serious that it amounts to an offence against a state. Although she is negligent it is unlikely that she would be in disregard of life and limb simply because she did not sterilize the needle.

4. M's liability for any of the above

M who is the employer can vicariously be liable for the tort committed by his employee (L). However, this is unlikely to be applied in criminal law.

Innocent agency and participation also do not apply.