Application Number 99002965

Resit Coursework.

Obligations II.

Having established that the defendant owes the plaintiff a duty of care (and in this case it is assumed that this has been established), it will next be necessary for the courts to decide whether the defendant has breached that duty. This first involves an assessment by the court of how, in the circumstances, the defendant ought to have behaved; what standard of care should he have exercised.

This standard is that of the ordinary and reasonable citizen and not that of the defendant himself: an especially careful defendant will not be held liable because he fell short of his own high standards, however, a defendant whose personal conception of what is reasonable fails to match that of the court will have no defence based on his belief that he acted carefully. Although the concept of the reasonable man is well developed and accepted in tort law it is nevertheless a general and sweeping statement. Sir Alan Herbert said:

'the reasonable man is .. devoid of any human weakness, with not one single saving vice'

Although this is not quite true, it is difficult for the courts to create a reasonable, fictional man and I believe it important for them to take into account social and moral change when comparing the defendant to this fiction. In practice 'reasonable care' can be manipulated to produce standards ranging from the very low to the very high. What is reasonable conduct will always depend on the circumstances of the case and it is a mistake to rely on previous cases when deciding this standard.

The standard of care expected of the reasonable man is objective. It does not take into account the particular weaknesses of the defendant. This point is well illustrated by *Nettleship v Weston [1971] 2 QB 691* where the defendant the defendant was a learner driver who crashed into a lamppost, injuring the front-seat passenger. The Court of Appeal held that the standard of care required of a learner driver was the same as that required of any other driver, namely that of a reasonably competent and experienced driver. The defendants level had fallen below this standard and it was irrelevant that this was due to her inexperience. The result of this view is that it dilutes the idea of fault based on individual responsibility. In this case a learner driver was held responsible for the consequences of a lack of care when driving which was, in the circumstances, probably all that could have been expected of her. How can a person be liable for an act if that person was performing to the best of their ability. Megaw LJ said that:

'It is irrelevant that this attributes liability to someone who is not morally blameworthy because tortious liability has in many cases ceased to be based on moral blameworthiness'

Salmon LJ dissented in *Nettleship v Weston [1971] 2 QB 691* on the standard of care a passenger can expect from a learner driver on the basis that the duty of care comes from the relationship between the parties involved. In a case such as this one the passenger (the instructor) knows full well that the driver does not possess the skill and competence of an experienced driver. This approach can be seen in the Australian case of *Cook v Cook (1986) 105 LQR 24* where the driver was both unlicensed to drive and experienced, facts known to the passenger. The potential harshness of the objective standard can also be seen, and is well illustrated, in *Wilsher v Essex AHA [1986] 3 All ER 801, CA.* Here it was stated that a young, inexperienced doctor is judged by the standards of a competent doctor even though, by definition, he is unable to attain that standard.

In the case of *Nettleship v Weston [1971] 2 QB 691* it is clear that the court is influenced by the fact that the driver was covered by third party insurance. A finding of negligence allowed the plaintiff to be compensated and the loss to be spread through means of insurance. This illustrates the tendency for negligence to verge towards strict liability in areas such as road traffic and employer's liability where the courts see the defendants (or their insurers) as better equipped than the plaintiffs to absorb or shift the losses in question. Where this is deemed not to be the case the attitude of the courts to liability can be considerably more restrictive, the best example being the cautious attitude to finding carelessness on the part of medical professionals as seen in *Bolam v Friern Hospital [1957] 1 WLR 582* and *Whitehouse v Jordan [1981] 1 WLR 246.* This seems incredibly unfair on the defendant. The fact that he or she is insured will actually act against them with relevance to the decision of liability. Once again the question of individual fault is diluted. However, if looked at from another perspective, it means that a plaintiff's personal injury claim will be compensated in most cases. Without insurance it could have been possible that the defendant would not be able to afford to pay anything, therefore placing the plaintiff in an incredibly harsh position.

Since what is reasonable varies with the circumstances, the fact that a police driver was in pursuit of a stolen car may indicate that the level of care he could reasonably be expected to demonstrate for the safety of the occupants of the car would not be as great as ordinary traffic, this can be seen in *Marshall v Osmond [1983] QB 1034.* An inexperienced driver must meet the standard of the reasonably competent and experienced driver in relation to a claim by other road users, passengers and pedestrians as is the principle laid down in *Nettleship v Weston [1971] 2 QB 691.* Following this, it can be queried what standard would be applied if a bystander were injured by a police officer in pursuit of an offender. Could the policeman be liable? Would he owe a lower duty of care to pedestrians as he would to his passengers? The policeman would be insured and hence the outcome could well be that, although the policeman may not have been hugely at fault given the circumstances, he would be found to be liable partly due to the policy considerations contained in *Nettleship v Weston [1971] 2 QB 691.*

The courts will assess the foreseeability of harm. If the particular damage could not have been anticipated, the defendant has not acted negligently because a reasonable man would not take precautions against unforeseeable consequences, as seen in *Roe v Minister of Health [1954] 2 QB 66.* If the damage was foreseeable then a defendant is negligent. In *Bolton v Stone [1951] AC 850* Lord Oaksey commented that it may be reasonable not to take precautions against some foreseeable risks. The magnitude of the risk plays a vital role in this balancing exercise. The greater the risk, the more precautions should be taken. In *Bolton v Stone [1951] AC 850* the plaintiff was struck by a cricket ball hit from the defendants ground on to a quiet road. It was very rare for balls to be hit out of the ground and was said to have only happened about 6 times in 30 years. The risk of the ball leaving the ground was foreseeable, but it was held that the risk was so small that precautions need not have been taken. This case can be contrasted with *Miller v Jackson [1977] QB 966* where cricket balls were frequently hit out of the defendants ground. The court held here that the defendant was negligent, as the risk was such that precautions should have been taken. The court did not say however, that the defendant could not play cricket on the ground again. It could be said that if it is reasonable to play cricket at all it can hardly be unreasonable conduct for a batsman to attempt to hit the ball for six, which is one of the objects of the game. In this case it seems that the courts have found the defendant liable, but have not put a stop to the cause of the liable action.

The severity of the damage is also taken into account by the courts. The more serious the potential damage, the greater the precautions that should be taken, as seen in *Paris v Stepney Borough Council [1951] AC 367.* Another factor considered by the courts is the defendant's purpose. The social utility of the defendant's activity may justify taking greater risks than would otherwise be the case. This does not mean though, that the purpose of saving life and

limb justifies taking any risk as seen *in Giffin v Mersey Regional Ambulance [1998] PIQR P34,* where the plaintiff motorist crossing a junction on a green light collided with an ambulance crossing against a red light, but was held 60% contributorily negligent.

Some risks are unavoidable. Others can only be reduced at great expense. The question that has to be addressed by the courts is at what point does the cost of precautions enable the man not to take them. In *Latimer v AEC Ltd [1953] AC 643* the defendants covered a wet factory with flaw with sawdust to prevent their employers slipping. However the plaintiff did slip and injure himself. The house of Lords ruled that the test was, remedial steps not being possible, would a reasonably prudent employer have closed down the factory rather than allow his employees to run the risks involved in continuing work? Could it not be asked however, at what point would a reasonable employer choose to loose profit instead of subjecting his employees to additional risk? Here, the idea of the reasonable and prudent man in the circumstances can be questioned. A businessman needs to make a profit and so he could be classed under a slightly different idea of the reasonable man.

When the courts are dealing with professionals they judge them not by the standard of a reasonable man but by the standards of his peers. The classic test of negligence in such a situation is contained in *Bolam v Friern Management Committee [1957] 2 All ER 118, 121*:

'The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent.....it is sufficient if he exercises the ordinary skill of an ordinary and competent man exercising that particular art'

Negligence 'means failure to act in accordance with the standards of reasonably competent medical men at the time' provided that it is remembered that there may be one or more perfectly proper standards. McNair J referred to professional practice in the case saying:

'A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art'

The question of how many experts constitutes a body of opinion that can be characterised as a 'reasonable body of professional opinion was raised in *Defreitas v O'Brian [1995] 6 Med LR 108.* The test became known as the Bolam test and has been approved and followed in several subsequent cases including *Whitehouse v Jordan [1981] 1 All ER 267* and *Maynard v West Midlands Regional Health Authority [1984] 1 WLR 634.*

Where professional opinion is divided it is not surprising that the judges normally consider themselves in no better position than the professionals to decide the matter. If one body of opinion is against a technique but another, which is sizeable and respectable, is for it, the normal finding is one of no negligence. Here the question of what is reasonable can come under critical scrutiny. When experts disagree as to what is reasonable in certain situations then it is clear that it is unknown and unclear what is, in fact, reasonable in the circumstances. For the judge, who has no expert experience in the situation, to then have to decide what is reasonable is surely an unfair asking and one that he should not be asked to do. However, if the judge does not decide, who will?

Other factors have lead the courts to take a broadly pro-defendant line in medical malpractice cases. Possibly the most important is the fear of 'defensive medicine' and the frequent complaints by the medical profession that the threat of legal liability and the cost of insurance coverage is inhibiting the advancement of new surgical techniques. The courts have said that in cases for medical negligence, a 'mere' error in judgement is unlikely to amount to carelessness, despite the potentially grave consequences of the error. This is another area where a balancing act must be maintained by the courts. I feel though that the sacrifices

which have to be made in order to 'advance the medical profession' are rather harsh on the plaintiffs who have been injured or damaged as a result of the 'mere' error in judgement that a doctor has made.

The Bolam test was considered and broadly confirmed by the House of Lords in *Sideway v Bethlem Royal Hospital [1985] AC 871.* This concerned the question of informed consent and the extent of the doctors obligation to inform the patient of the risks which may be involved in an operation. In the case there was a 1-2% chance that the patient would be left partially paralysed by the operation, this the doctor omitted to tell the patient. The operation was carried out with due care and attention but the plaintiff was left paralysed. The court ruled that the non-disclosure was concurrent with practice accepted by a responsible body of neuro-surgical opinion and hence the defendant was not liable. I would disagree with this decision (as does the Australian High Court in *Rogers v Whittaker (1992) 67 ALJR 47*), in that a 1-2% chance, that is a 1in 100 – a 1 in 50 chance of being paralysed for life is in fact a large enough chance to warrant a warning from the doctor. Surely the patient should be informed of all the risks and hence make up his or her own. In *Sideway v Bethlem Royal Hospital [1985] AC 871* Lord Scarman thought it relevant to ask what the reasonable patient would have expected to have heard by way of information. In the case of many hospital treatments the patient may not have known the correct question to ask, or may expect to be informed without asking about specific risks. In subsequent cases *Sideway v Bethlem Royal Hospital [1985] AC 871* has been interpreted as giving general support to the Bolam test. If this is correct however, the degree to which the courts review professional standards objectively is extremely limited; those standards are simply rubber stamped for the purposes of defining carelessness. In *Bolitho v City and Hackney Health Authority [1998] AC 232* it was confirmed that the general position is that while the Bolam test is still good law, there remained some scope for the judges to depart from the standard set by general professional practice when setting the relevant legal standard.

A question to which no clear answer has yet emerged is whether a defendant who is particularly experienced or eminent who practises in a highly specified field within his profession must exercise greater care than an ordinarily competent man. In *Maynard v Regional Health Authority [1984] 1 WLR 634* Lord Scarman said that 'a doctor who professes to exercise a special skill must exercise the ordinary skill of his speciality. However, in *Matrix-Securities Ltd v Theodore Goddard (1997) 147 NLJ 1847* a lawyer advising in tax matters must exercise the standard of care appropriate to that sector of the profession specialising in tax matters.

The ides of special standards does not simply apply to the medical profession. If it is accepted that a referee can potentially owe a duty of care to the participants in the sport that is being refereed (as seen in *Smoldon v Whitworth [1997] PIQR P133* where it was held that a referee of a colts rugby match owed a duty of care to a player injured due to a collapsed scrum), then the standard of care will, presumably, be that of a reasonably competent referee in the circumstances. Nonetheless, in practice referees may face some difficult judgements about when precisely to intervene.

As with all areas of law the courts face difficult decisions when dealing with all forms of breach of duty. The effect of the objective standard rule is, in some cases, to dilute the idea of individual responsibility, especially where decisions of policy are evident in a case. However, to apply a different, variable standard to each individual would be almost impossible. It is clear that a special standard is needed when dealing with professionals but in certain cases it is clear that the true reason behind a finding in favour of the medical professional is not due to his lack of negligence, but to that of policy, an idea which is to be found (sometimes unfairly) in many decisions concerned with breach of duty.

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