



ANU LAW STUDENTS' SOCIETY

LAWS1203 Torts 1st Semester 2007

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Question 1

80/100

A. Survivors Action

Nadia's estate will be able to claim for the loss she suffered if it can be established that she had an existing cause of action (s2 Law Reform Miscellaneous Provisions Act).

Nadia's claim: Negligence against the Western Sydney Rugby Club. This claim will only exist if Nadia can establish that the club owed her a DOC to take care not to cause her mental harm. As this is an exceptionally problematic duty issue (*Sullivan v Moody*) it is regulated by the CLA. [V]

DOC

Mental harm:

s32: N must establish that a person of normal fortitude could have foreseeably suffered a recognised psychiatric illness if reasonable care not taken. (Whether reasonable care was in fact taken will be discussed in Joe's claim).

Thus the question is: would a mother foreseeably suffer a recognised psychiatric illness if the club did not take care to minimise injury to her son.

Here the circumstances aiding this consideration include whether there was a sudden shock and the relationship between the plaintiff and the person injured- Joe (s32(2a, c)).

Arguably, whilst there may have been a shock to Nadia, it was via the radio broadcast- which cannot be part of the action the 'bearer of bad tidings' cannot be liable without intention to cause shock (*Mt Isa*).

Arguably the courts would find the normal fortitude test satisfied. Depression is a recognised psychiatric illness that could be foreseeably suffered by the family of a person suffering a football injury.

The relationship between Nadia is sufficiently close to Joe for her to have a possible claim for pure mental harm.

[V] Whether N can meet the requirements of such a claim for pure mental harm will depend on s30.

N must have witnessed at the scene, the victim being killed, injured or put in peril OR be a close members of family.

Clearly, J satisfies the second aspect of this requirement- s30(5) includes parents as close family members.

The psychiatric illness developed by N- namely clinical depression, is a recognised psychiatric illness s31.

Thus prima facie N claim is made out in the duty stage. [V]

BREACH

Is that of the Rugby club in appointing sub-standard referees. The specifics of whether they have breached their duty here will depend on whether the DOC to Joe was breached. SEE NEXT QUESTION FOR ANALYSIS.

Prima facie- breach.

The problematic issues in this case are causation and remoteness.

Causation

Did the appointment of sub-standard referees cause the mental harm of N?

s5D CLA- 'but for' their negligence would she have suffered mental harm?

Arguably, no. However, this is over inclusive (*March v Stramere*) and issues of scope must be considered.

It is significant to note that the courts have recognised that necessary preconditions are not causes (*March v Stramere*) therefore the fact that the radio broadcast ensured that N was present at the place where the injury occurred does not mean *it* caused the injury.

Scope of liability

s5D(1b):

Intervening events- none present in this case.

A voluntary human act does not include suicide- the case is clearly analogous to *Haber v Walker* in which it was explained that suicide as a result of depression, which is causally linked to negligence, does not represent a choice and is not voluntary.

This is also supported by the reasoning in *March v Stramere*; that where a defendant creates situation of risk of injury and the party contributes- no novus actus. i.e. the defendant here created risk of depression- suicide worsened situation etc.

[V] Therefore no intervening event.

[Divorce as intervening event?]

Policy considerations:

S5d(4) why or why not liability should be imposed. Here if there were any arguments to be made of the dangers of imposing heavy liability on small community clubs they may influence judgement. However the provision of the CLA are relatively clear and the judges must comply with parliamentary intention.

Remoteness- s5D(1b)

Club only needs to foresee the kind of harm suffered by N (*Wagon Mound*). This requires foreseeability of her developing depression or another recognised psychiatric illness. Depression is the most easily foreseeable type of mental illness likely to be suffered by N in this situation. Therefore highly likely that club will be found to have foreseen this kind of harm possible- and not 'far fetched or fanciful' (*Wagon Mound*).

The manner and extent of harm aren't required to be foreseen- thus death is not required to be in the contemplation of the club (*Haber, Chapman*). Further support for the claim can be found in an analogy with *kavanagh v Akhtar*. In that case the depression and 'disfigurement' of the plaintiff led to a breakdown of marriage and aggravation of marital life. It was held to be foreseeable that depression could contribute to breakdown of marriage and subsequent worsening of the illness.

[But death takes it one step further, especially since divorce is source of serious depression]

Thus highly likely that the courts will find N has a claim.

Similar general mental harm cases; *Tame* and *Annetts* are both distinguishable from this case but not detract from its strength because they are pre-CLA.

(i.e in this case; no 'prolonged suffering' as in *Annetts* and not an idiosyncratic overreaction as in *Tame*.)

Thus N has a claim and though her survivors will not be able to claim non-economic loss (s2 Law Reform Act), they will be able to claim any losses suffered as a result of loss of working capacity of N etc.

(20/25)

B. JOE'S CLAIM

Here for Joe to claim negligence the strongest argument would be that the club was negligence in providing 'substandard' referees- framing the claim in this way avoids the problematic duty issues involved in omissions (*Sullivan v Moody*).

DOC

Though this is not a recognised duty case, there are analogies. [V]

As the game is being played by minors- (presumably- 'junior') analogous to teacher student duties (i.e. *State of Vic v Bryar*). [V]

However, to establish the case from scratch, the test of RF (*D v S*) of harm to a general class of plaintiffs as a result of negligence should be applied (*D v S, Chapman v Hearse*). [V]

It is clearly RF that a football clubs negligence could impact on safety of player- well known to be a dangerous sport, injury frequent, therefore care required. [V]

The relationship factors support this conclusion (*Sullivan v Moody*). There is a clear presence of control of the club in who is appointed as referee- there is no indication that they were restricted in their choice of who to appoint. Thus control over safety and regulation- distinguishable from *Agar v Hyde*- [V] involving a board separated from the direct administration of particular games and rules. Players as minors are vulnerable to decisions of club as to how best to regulate game (*Dorset*) [V]. Further, as/if players are minors the club has assumed responsibility for the rules and the safety [V] of players in adherence to rules (*Dorset*).

Thus DOC.

[Good duty discussion]

BREACH

No standard of care issue- thus that of a reasonable club owner (*Vaughan v Menlove*).

Here the act in question is providing sub-standard referees.

Was the risk of injury as a result of using these umpires RF through being a ‘not insignificant risk?’ (s5B).

Clearly this is satisfied, low threshold and nature of sport supports this finding. Factors to be considered in determining whether behaviour was reasonable include:

s5B(2):

Probability of harm occurring- here there is a relatively high probability of some injury occurring- injuries are regular in football games and the presence of unqualified referees exaggerated this risk.

Thus more than moderately probable.

Magnitude of risk – similarly the risks of neck injuries in football- where rules are not adhered to is widely known of and exceptionally serious- paraplegia etc.

Burden- there is no apparent burden.

Social utility- may be an argument for the benefits of training young referees, but it in no way counters the risks involved [V]

Therefore Breach.

CAUSATION

‘but for’ sub-standard referee would harm have occurred? (s5D)

Arguably no, the facts indicate it was unregulated and while there are chances of neck injury occurring in football the negligence allowed for the violence which caused the injury –according to the facts.

Therefore, arguably causation is prima facie established.
No intervening events, no remoteness issue.

[Dependents claim by J?]

PTO Question 2.

QUESTION TWO

The most likely successful claim that E should raise would be negligence for failing to rescue E.

DOC

Establishing a DOC in this situation is problematic as recognised by *Sullivan v Moody* as it is an omission. There is a presumption against DOCs for omissions (*Sutherland Shire*) [V]

As the railing was sufficiently high, the issue is whether a duty to rescue can be imposed on G.

The relationship factors are still clearly applicable. [...see below...]

Hardgrave v Goldman states that occupants are liable for consequences flowing from the state of his land to neighbours and passers by. While this is useful, *Zalunza* is more closely analogous because here there is a relationship of entrance onto occupiers land- not proximity to it. [V]

Zalunza: The fact that the plaintiff was a lawful entrant upon the land of the defendant established a relationship between them- which is enough to give rise to a DOC on the part of the defendant to take care to avoid a foreseeable risk of injury to the respondent [V].

Though there is a duty owed by occupiers as mentioned it may not extend to rescuing customers [V].

The exceptions to omissions need to be considered.

Here arguably G has assumed responsibility for customers by opening site to them (*Council of Waverly*)- however he has complied with safety regulations so something more is required.

As regulations have been complied with there is a weak argument for creation of risk in this situation (*Tikehurst v Skeen*). Further, there is no pre existing relationship either (i.e. *Czatyрко*).

Though E is vulnerable and G is in control, I believe that policy reasons would not allow a duty to be established here- they are firmly rooted in our system (i.e. *Stovin v Wise*). [V]

This case is analogous to *Romeo* in that the P is intoxicated- which frequently has an impact on culpability judgements (to be discussed in defences).

There is no other 'disability' being suffered by E which should establish onerous DOC or heighten standard of care- i.e. he is not a child (*State of Vic v Bryar*) etc and the prison officer cases acknowledge that a lower standard of care exists for duty to protect adults- they must take part of responsibility [V]

Therefore arguably no DOC.

As there is no standard of care issue, the standard required of G is that of a reasonable occupant (*Vaughan v Menlove*). The fact that E was intoxicated is barred from heightening DOC or standard owed (s49 CLA). [V]

However, the remaining factors will be considered incase the judge makes an alternate finding.

BREACH:

Was it RF that a person would be at risk of harm if G failed to rescue them? (s5B) And was this a not insignificant risk? Arguably this low threshold test is satisfied- it is RF that failure to rescue will result in injury. [V]

Was his failure to do so reasonable?

s5B factors:

Probability of harm being incurred if D doesn't rescue- this is moderate knowing that customers in cold water etc could be likely to result in serious injury especially if ambulance delayed.

Probability of injury occurring moderate [V]

Magnitude this is also moderate- depends on circumstances.

Burden substantial- however given the information that G can swim arguably not an overwhelming burden- further the presence of burden does not preclude liability (*Vairy*). [V]

Therefore on balance I would argue if a DOC owed it was breached. [V]

CAUSATION

S5D: but for test easily satisfied. No intervening event (s5D 1b). Policy (s5D(4)) as mentioned, policy is against liability here.

REMOTENESS (s5D1b)

Was it foreseeable that the kind of harm could be suffered (*Wagon Mound*). Arguably this doesn't require foresight of loss of led- that is the extent which is not required (*Stevenson v Tileman*). Therefore kind of harm- physical harm associated with cold temperatures- thus including consequences of hypothermia.

Not too remote [V]

DEFENCES

There are several continuing defences available to G. S5H if the risk was obvious he would be exempted from having to warn of it- however as negligence relates to duty to rescue this will not have a significant impact on claim (though the court may consider obviousness in breach – s5B(2) etc).

[but here about negligence of failure to rescue- obviousness plays no part]

The strongest defence is that of intoxication- which is a presumption of contributory negligence. S50(1): 'Drunkenness' means a person's capacity is effected re- reasonable care and skill. Though facts aren't detailed- we know E has drunk a lot. Therefore arguably within section. [V]

s50: If this is to be a complete defence, the plaintiff's intoxication only needs to have contributed to injury this is a very low threshold and is arguably satisfied. Though E jumped as a result of the bang- he was presumably off balance or may not have been so close to the edge if not intoxicated.

This harsh approach is in line with CLA and judges interpretation in *Russel v Edwards* involving teenagers injury from jumping into a pool whilst intoxicated.

Therefore I would argue G would be free from having to pay damages s50(2) [V].

However, if not and injury was likely to happen despite drunkenness- there will still be a presumption of 25% contributory negligence unless P can show that drunkenness in no way contributed to injury (s50 (3),(4)). This is an exceptionally high burden, therefore likely to be reduced by 25% if not completely [V].

DAMAGES

As noted above, it is unlikely any damages will be awarded and if they are they are likely to be reduced by 25%. [V]

Possible damages:

The general principles of damages will ensure that E is given a 'once and for all' lump sum (Todorovic).

The damages recoverable up until the time of trial will be easily calculable by evidence regarding previous earnings, medical bills etc (e.g. *Sharman*) [V].

The more difficult to calculate damages will be those future damages. These include future loss of earning capacity and non-economic harm, future needs etc.

Future earning capacity- given that E was previously working long hours in a reputable post (!) he was presumably earning a substantial amount of money. As these hours have already and will be likely to continue to be restricted E will be able to claim the difference- but will have the onus of proving what he is likely to earn in the future (s13) [V]

The future needs of E must be demonstrated to have been created by injury- as they relate to gratuitous care (s15).

However, E will not be able to claim for this as on the facts, the gratuitous care provided to him will not meet the requirement of being provided for at least 6 hours and 6 months (s15(3)).

Therefore no gratuitous care award available- despite common law (*Griffiths v Kerkemyre*) [V]

There is a cap on the possible recoverable economic damages- s12, 3 times average weekly earnings.

Further heads of damages may be loss of enjoyment of life. Maximum on non-economic damages- \$427,000 subject to inflation etc.

It is clear that E had an active and busy life which is considered when determining loss of enjoyment of life (e.g. *Woolworths v Lawlor*). He will no longer be able to ski or pursue sporting activities [V]

When assessing amount to be calculated, court will determine what percentage of a most extreme case E is in- s16.

Here it is not 'the most' extreme case- but 'a'. Thus consider most extreme amputee case- presumably this would involve loss of all limbs.

Therefore I would argue 35% of most extreme case.

Thus damages 35% of maximum.

The damages for loss of earning capacity will not be reduced for cost of care (Sharman) because no cost of care awarded.

There will be a reduction on total damages for vicissitudes of life (s13(2)). This includes consideration of likelihood of promotion, time in jail etc (Wynn v Insurance). No specific, therefore likely to be around 15% (Wynn). S14 general discount rate set at 5% to be assessed with reference to facts. [V]

[excellent]