



ANU LAW STUDENTS' SOCIETY

LAWS1203 Torts 1st Semester 2007

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Question 1

81/100

JOE V WESTS [23/25]

(not dependence action – this is discussed later)

DUTY:

The West Rugby Club (West) owes a duty to Joe as an occupier of land, in that he is a lawful entrant (and given that they own the oval) (Neindorf v Jankovic). Their duty to him, however, is stronger than this. They have significant control [✓] over the organisation of the match (far more than in Agar v Hyde) through their ability to determine who it is officiated by [✓]. This means that Joe is vulnerable (Dorset Yacht) as both a player and a child, and relies specifically on West.

This duty is owed irrespective of whether this is an act or an omission. [✓ Good] The club have assumed responsibility for the match (Waverly v Bloom) and this gives rise to a duty to act positively. Even if this were not found to be the case, the relationship factors outlined above provide that West should act positively (Heyman). [✓]

BREACH:

The breach could be treated as a failure to provide a proper referee (an omission) or the appointing of a junior player as referee (a positive act). These are essentially the same thing.

There is a reasonably foreseeable (CLA 5B (1)(a)) and indeed, not insignificant (5B(1)(b)) risk that in providing an unqualified referee, players can be injured. [✓] Indeed, this is the very basis for the training of referees for junior games.

A reasonable club would take precautions to avoid this risk (5B(1)(c)). This is given the high probability of it occurring (5B(2)(a)) – rugby scrums are highly technical and the game itself is very dangerous, even for juniors, its high gravity (5B(2)(b) – neck injury), and the low burden of taking precautions in simply appointing a qualified referee (5B(2)(c)).

The only justification with regard to social utility [✓] is that the club could provide is that a junior ref. could get experience. This is not sufficient social utility (5B(2)(d)) – it risks the safety of all the players for the benefit of a single individual. [✓]

This would therefore constitute a breach of West's duty.

CAUSATION:

There are no serious issues of causation or remoteness here. 'But for' West's negligence (5D(1)(a)), the scrum would have been properly regulated. [✓] While regulated scrums still result in injuries, West materially increased the risk of Joe being injured (McGhee). This principle helps us to overcome the evidentiary gap and proves the scientific causation. [✓]

A neck injury in a scrum is reasonably foreseeable (Wagon Mound) and so not too remote. [✓]

CONCLUSION:

West would be liable in negligence to Joe

NADIA'S ESTATE V WESTS: [20/25]

In order to claim for her depression and subsequent suicide, Nadia's estate, in a survival of actions claim, would have to overcome the threshold requirement in s30 CLA, is this is pure, secondary mental harm. [✓]

Nadia's illness is recognised (s31), and she could overcome the threshold under s30(2)(b) as a parent (s30(5)(a)). [✓]

DUTY:

For Wests to owe Nadia a duty to protect against pure mental harm as a consequence of their negligence towards Joe, this harm would need to be foreseeable for a person of normal fortitude (s32(1)). [✓]

Nadia is an ordinary mother with no pre-existing conditions, and so there is no reason to suggest that she is not of normal fortitude [She doesn't need to be, however]. Mental harm to her is foreseeable given the sudden shock she suffered upon hearing the news (s32(2)(a)), combined with her close relationship with Joe, as his mother (s32(2)(c)).

Moreover, having placed her child under the control of Wests, Nadia relies upon their acting reasonably (*Batchelor v Tasmania*). Her class of plaintiff is both foreseeable, and not indeterminate (*Sullivan v Moody*). On this basis, Wests owes Nadia a duty of care which is of such scope as to protect against pure, secondary mental harm.

BREACH:

The breach here is the same as that to Joe, [✓] and has been proven above.

CAUSATION:

'But for' (5D(1)(a)) Wests' negligence, Nadia would not have suffered the initial mild depression that she did – it was a result of the shock and not of any other known cause.

Applying this same test to her subsequent marriage breakdown and suicide, these were consequences of the initial injury in terms of scientific causation, [✓] and would not have happened otherwise.

The main issue, under 'scope of liability' (5D(1)(b)) is whether this chain of causation was broken by firstly, her marriage breakdown, and secondly, her suicide. [✓]

Her marriage breakdown was not a coincidence (*Canterbury v Rogers*) – on the facts, it was due to the considerable strain created by her illness. It is not a voluntary act either (*McKew v Hollis*) – indeed, we do not know who terminated the marriage, [✓] but the breakdown of the relationship is something that Nadia could not really have a say in. Perhaps more significantly, even had they stayed married yet had a poor relationship she still could have developed severe depression [✓] due to the relationship itself. The divorce, therefore, does not break the chain of causation.

Nadia's suicide is not the conscious act of a sane person (*Haber v Walker*), given her state of depression at the time. The 18 month time period is not important here – her suicide was no coincidence as it was a likely outcome of getting depression, of which Wests' negligence was the cause.

On the question of remoteness under 5D(1)(b) [✓], mental harm to Nadia is a reasonably foreseeable (*Wagon Mound*) outcome of Wests' negligence. The egg shell skull rule (*Stephenson v Waittileman*) tells us that plaintiffs must be taken as they are, while *Kavanagh v Akhtar* tells us that this can extend to social, and indeed, marital circumstances. The nature of Nadia's marriage, therefore, does not mean its breakdown was unforeseeable – foreseeability is limited, after all, to the initial harm suffered [No!] (*Nader v UTA*). Mental harm to Nadia as a consequence of negligence to Joe was foreseeable. [But is death foreseeable?]

CONCLUSION:

Nadia's estate could sue Wests in negligence in that she could have carried out an action if not for her death. [✓]

JOE V WESTS – DEPENDENT'S ACTION

Joe could claim as a dependent under s4(1)(d) of the compensation to relatives act.

Nadia's death, as proven above, was caused by Wests' negligence (s3(1)) – see breach and causation.

Remoteness of damage, while satisfied, need not be proven (Haber v Walker). [✓]

Q2) [38/50]

ERIC V GEOFF

DUTY:

Geoff owes a recognised duty to Eric – that of a business owner to land user (Safeway v Zaluzna). There is an issue as to whether this duty extends to omissions, if the breach is to be classified as a failure to rescue. [✓] There is no duty to rescue (Sth Shire Council v Heyman, in obiter) yet this does not apply if the would-be rescuer created that risk him/herself (R v Miller). [✓] Geoff has not created the risk to Eric, as will be discussed further at breach. As such, he could not be liable for his failure to rescue as he has no duty to do so. [✓] Nor is Geoff liable for an omission on the basis that the hazard occurred on his land (Goldman) [Not a Hargrave situation anyway]. Goldman v Hargrave tells us that we need to consider the available resources of the D. While Geoff could swim, he was not equipped with the ability or training required to rescue a man in water. It is not reasonable, on policy grounds, to expect him to risk his own safety in doing so. There are no issues of reliance or vulnerability that would give rise to a duty to take special care for Eric, as will be discussed under standard of care. On this basis, Geoff has a duty to Eric only with regard to positive acts; he has no duty to act positively (relationship factors authority = Sth Shire v Heyman). [✓]

BREACH:

The breach enquiry here is complex because there are multiple possible breaches, yet none, as it will be shown, can be proven to be negligent in carrying out the duty of care established above. In terms of not providing a higher fence as a potential breach, Geoff had complied with the required safety regulations. Indeed, he did what a 'reasonable' person in his position would have done (5B(1)(c)) in providing a fence of the recommended height. [✓] The next possible breach is in failing to save Eric. However, as discussed above, he has no duty to do so, and fulfilled his duty by calling the water police. [✓] Moreover, Geoff's standard of care towards Eric is not affected in any way by Eric's intoxication (s49(1)(c)), and his intoxication does not create a duty (perhaps to create a higher fence) where one would not normally exist if not for the vulnerable and intoxicated plaintiff (s49(1)(a),(b)). [✓] No breach can be proven. [✓]

CAUSATION AND REMOTENESS:

If a breach were proven, there would be no issue in satisfying 5D(1)(a) and 5D(1)(b). The damage would not be too remote (Wagon Mound).

DEFENCES:

No recovery by drunks

The CLA, under s50(1) states that people intoxicated to the extent that they cannot exercise reasonable care and skill cannot claim damages. [unless..] This injury would not have occurred if not for the intoxication (50(2)). [arguable]

DAMAGES (HAD RECOVERY BEEN POSSIBLE):

Eric could claim damages under the following heads:

1) Loss of Earnings

This is assessed on the basis of Eric's most likely future outcome (14(1) CLA). The evidence that Eric used to work longer hours, and thus used to earn higher wages, would mean that Eric would most likely be able to claim damages for the difference between what he used to earn and what he now earns. [✓]

From this would be deducted an allowance for the vicissitudes of life (s13(2) CLA) of around 15%, on the basis that as Eric went through life, he would most likely [?] fail to earn this previous wage due to illness/unfortunate circumstances even had the injury not occurred.

These damages would be capped at 3 times the average weekly wage in NSW (CLA s12(2)), and would be given as net earnings, after tax (Cullen v Trappel).

The collateral source rule would mean that his damages would be reduced by the sick pay he earned (Nat. Ins. Of NZ v Espagne). [✓]

2) Medical Costs

Eric could claim for all 'reasonable' (Sharman v Evans) medical expenses. [✓]

3) Griffith v Kirkemeyer damages

Eric could recover damages for the care provided by his mother, if he has a reasonable need (s15(2)(a)), that has arisen solely because of the injury (15(2)(b)). These services would not have been provided 'but for' the injury (15(2)(c)).

In order for these damages to be payable, the care must be provided for more than 6 hours a week and for more than 6 months (s15(4,5)). This would appear to be satisfied, yet we do not know how much care his mother provides after the initial 3 month period. [✓]

These G v K damages would be capped at the average weekly wage (if over 40 hrs/week – s15(4)) or hourly wage (s15(5)) of NSW. No interest would be payable on these damages (s18(1)(b)). [✓]

4) Pain + suffering, loss of amenity

These two heads of damages are normally dealt with together.

Damages are determined on a subjective basis, based upon the pain and frustration that the P is actually experiencing (Skelton v Collins).

Given Eric's penchant for skiing, his loss of a leg would be quite significant in terms of the frustration of being unable to participate. [✓]

These damages would need to be more than 15% of a most extreme case (s16(1)). [✓]

Calculation table, s16(3).

No interest (s18(1)(a)).

Apply 5% discount rate for all damages [for pecuniary loss] (s14(2)(b) ☹ 5%).