

Risk; are our lives over-regulated?

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- Desirable activities
 - *School field trips*
 - *Cheese rolling*
 - *Trains on time*
- What to make of
 - *Danger; the water from this tap is hot*
 - *The American experience*
 - *“if it only saves one life it will be worth it”.*
 - *“Sorry; Health and Safety”.*

The law; two branches

- Criminal regulation
 - *Health and Safety Executive*
 - *Other enforcement agencies*
- Civil actions for damages
 - *Developing common law*

The principles of negligence

- *Duty of care owed*
- *Breach of duty of care*
- *Causation*
 - *“reasonable foreseeability”*
 - *“reasonable care”*

The duty of care 1

- *Relationship*
 - Employer – employee
 - Occupier – visitor
 - Occupier – trespasser
 - Motorist – other road users
 - Highway authority – road users
 - Proximity
 - Strangers; very limited. Acts or defaults. (But note duty to the public at large in some cases).

Duty of care 2

- Is there a reasonably foreseeable risk of injury?
- If so, what is the extent of the duty?
- To take reasonable care “in all the circumstances”
 - Remoteness of the risk
 - Severity of consequences

Has there been a breach?

- Duty is to do all that is reasonable to protect against the perceived risk
- What is “reasonable in all the circumstances” will vary according to the case.
 - *The duty may be discharged by providing a warning notice*
 - *It may require protective equipment or more*
 - *It may require virtual insurance of safety*

The third step; causation

- Has the breach of the duty of care caused the injury?
- Would it have made any difference?
 - *Safety goggles; would the Claimant have used them?*
 - *Two competing causes of injury*
- Notion of “fault”

What to make of this?

Compensation Act 2006, s.1

A court considering a claim in negligence or breach of statutory duty may, in determining whether the defendant should have taken particular steps to meet a standard of care (whether by taking precautions against a risk or otherwise), have regard to whether a requirement to take those steps might--

(a) prevent a desirable activity from being undertaken at all, to a particular extent or in a particular way, or

(b) discourage persons from undertaking functions in connection with a desirable activity.

Tomlinson v Congleton BC

The defendants occupied a public park in which there was a lake, used for recreational purposes; windsurfing, canoeing, sub aqua diving and other regulated activities, including sitting and picnicking on the “beach” and paddling in the edge of the water.

The lake was in fact an old gravel pit which had been flooded; the edge of the lake was shelved

Swimming was prohibited; there had been previous mishaps and signs had been erected “Dangerous Water; swimming prohibited”. These signs were in abundance and visible. At busy times in the summer, rangers were employed to prevent unauthorised use.

The Defendants were well aware that the rule was honoured in the breach; and that there were risks of injury

The Claimant visited the lake. He ran into the water and dived in the shallow edge striking his head against the bed with sufficient force to drive his fifth cervical vertebra into the spinal canal, causing paralysis from the neck down

He had seen the signs and knew he was prohibited from swimming

He alleged that the shores of the lake should have been made inaccessible (as had occurred subsequently) by planting of shrubbery and other vegetation – if necessary protected by secure fencing.

? *Was the council negligently responsible?*

? *Was he himself to blame?*

? *Should liability be shared? Contributory negligence?*

The trial at first instance

- *Occupiers' Liability Act 1984*
 - Duty to trespassers; by diving he became a trespasser.
 - When you invite someone into your home, you do not invite him to slide down the banisters
 - Duty under the Act was to take such care as was reasonable in all the circumstances
- *Findings*
 - The Claimant was aware that he should not swim; he had seen the notices
 - The risk was obvious; there was no duty to protect him against himself
 - It was his choice. There were no hidden dangers of which he was not aware
 - The accident was his own fault

The Court of Appeal

- *Grave risk of injury; internal documents disclosed other injuries to swimmers*
- *The frequency of unauthorised use known to the Defendants*
- *Attractiveness of the location – “allurement”*
- *Sooner or later (as here) there would be a serious incident*
- *This accident was reasonably foreseeable*
- *Thus (i) a duty of care existed for it was reasonable to expect the Defendants to offer protection against the risk of entering the water*
- *And (ii) the duty had not been discharged by warning notices, as these were known to be ineffective*
- *Landscaping and planting to prevent access.*

The House of Lords (1)

- *Just because there may have been a foreseeable risk of injury, there was no duty upon a Defendant to do whatever was necessary to prevent it.*
- *The duty was to do what was reasonable, and it was important to recognise that people could judge the risk for themselves. (fence trees/ cliff edges/ etc)*
- *There was no hidden danger*
- *Balance of reasonableness included the ability of people to enjoy the beach and other amenities, which would be closed to them.*

House of Lords (2)

- I think there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. (Lord Hoffman)
- Does the law require all trees to be cut down because some youths may climb them and fall? Does the law require the coastline and other beauty spots to be lined with warning notices? Does the law require the attractive water side picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? (Lord Hobhouse)

House of Lords (3)

- Allurement point; per Lord Hoffman
- Ward LJ said that the water was “a siren call strong enough to turn stout men’s minds”. In my opinion this is gross hyperbole.
- The trouble with the island of the sirens was not the danger of the premises. It was that the sirens held mariners spell bound until they died of hunger. The island, give or take a fringe of human bones, was an ordinary Mediterranean beach. If Odysseus had gone ashore and accidentally drowned himself having a swim, Penelope would have had no action against the sirens for luring him there with their songs. Likewise in this case the water was perfectly safe for all normal activities.
- Gross hyperbole?

A thought – just one

- Balance safety against convenience
- Reduce motor fatalities at a stroke.

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