

## Practice questions for Chapter 17 – Tortious defences and remedies

### Problem question

Discuss the imposition of liability and the availability of any defences in the following situations:

- Gabrielle, a five year-old girl, is riding the new bicycle she received for her birthday. She is being supervised by her father, but she is not wearing a helmet. Lawrence, a drunk-driver, sees Gabrielle on the road, but is slow to administer the brakes. The car, whilst moving at around 5 mph, collides with Gabrielle. Unknown to Lawrence, Gabrielle suffers from Osteogenesis Imperfecta, a rare medical condition that causes her bones to be extremely brittle. As a result, the injuries she suffers are much more serious than would normally be the case for a collision at so low a speed. Had she been wearing a helmet, she would still have sustained the same level of injury.
- Hannah has spent an evening with friends at the Student Union bar. She has been drinking and, although she is not drunk, she could be described as 'merry.' Not wishing to walk home in the rain, she accepts a lift with Hywel, whom she knows has drunk a considerable amount of alcohol. Hannah does not put on her seat belt. Whilst driving home, the car collides with another vehicle and Hannah is rendered paralyzed. Would your answer differ if Hannah was extremely drunk?
- Matthew was the getaway driver for an armed robbery. Whilst driving away from the bank, Matthew's car is involved in an accident with another vehicle, being driven by Amy. Although Matthew was driving quickly, the accident was the result of Amy's negligent driving. Matthew and his fellow criminals sustain severe injuries.

- In many cases involving tortious defences and remedies, it will almost be a foregone conclusion that a tort has been committed, but do not neglect to establish that a tort has committed and which tort has been committed. Remember, the vast majority of tortious defences only apply to certain torts.

**Gabrielle, a five year-old girl, is riding the new bicycle she received for her birthday. She is being supervised by her father, but she is not wearing a helmet. Lawrence, a drunk-driver, sees Gabrielle on the road, but is slow to administer the brakes. The car, whilst moving at around 5 mph, collides with Gabrielle. Unknown to Lawrence, Gabrielle suffers from Osteogenesis Imperfecta, a rare medical condition that causes her bones to be extremely brittle. As a result, the injuries she suffers are much more serious than would normally be the case for a collision at so low a speed. Had she been wearing a helmet, she would still have sustained the same level of injury.**

- There case concerns the tort of negligence. Two questions are important:
  1. Does the existence of Gabrielle's medical condition affect the liability of Lawrence? This is an issue of remoteness (which was discussed in *Card & James'* in chapter 12). Do not assume that questions will only focus on one topic. Very often, questions relating to tort will require you to determine liability, discuss any defences and determine what remedy will be awarded.
  2. Does Lawrence have a defence that can eradicate or reduce any liability he might face?

### Remoteness

- The problem that arises here is that Gabrielle's injuries are such more severe than would normally be the case due to her medical condition. The question is is Lawrence liable for the injuries she sustained, or only for the injuries that she would have been likely to sustain. In other words, are Gabrielle's more severe injuries too remote?

- It is almost certain that Lawrence will be liable for the full extent of Gabrielle's injuries. This is due to what is known as the 'eggshell skull' rule, which provides that, where the injury suffered by the claimant is greater than could be expected (usually due to some defect or condition of the claimant), then the defendant is fully liable for the injury sustained. You may wish to provide a case by way of example (e.g. *Smith v Leech Brain & Co*).<sup>1</sup>

### Defences

- It would appear that two defences might be available to Lawrence, namely contributory negligence and *volenti non fit injuria* (meaning 'to a willing person, no harm is done').
- Gabrielle was not wearing a helmet, when he crashed into her, and so it might be thought that the defence of contributory negligence might serve to reduce the damages that Lawrence might be required to pay. However, for two reasons, it is unlikely that this defence will succeed here:
  1. Although the defence can technically be pleaded against a child of any age, the Court of Appeal in *Gough v Thorne*<sup>2</sup> indicated that the courts will not find a very young child to be contributorily negligent.
  2. In order for contributory negligence to succeed, Lawrence will need to show that Gabrielle's conduct (that is, not wearing a helmet) contributed to the damage suffered. As the question indicates, had she been wearing a helmet, she would still have sustained the same level of injury.
- Accordingly, the defence of contributory negligence looks like it will fail. However, it should be remembered that contributory negligence is a partial defence only. Lawrence also has access to a full defence, namely *volenti non fit injuria*, which occurs where the claimant assumes the risk of being injured without having any subsequent legal redress.
- However, establishing *volenti* is not easy and, from the case of *Nettleship v Weston*,<sup>3</sup> Lawrence will need to show three things:
  1. That Gabrielle knew of the risk. Given that this requirement is subjective and taking into account Gabrielle's age, it is likely that Lawrence will find it difficult to satisfy this requirement. If the courts are not willing to find a young child contributorily negligent, it is unlikely that it will find that such a child has assumed the risk of injury.
  2. That Gabrielle assumed the risk of injury and assumed the risk of having no legal redress. Again, given Gabrielle's age, it will be extremely difficult to establish that this requirement is met.
  3. Gabrielle must expressly or impliedly waived any claim for the injury that befell her. This requirement is a severe restriction on the availability of the defence, and, given that many parties will have given the issue no thought, the court often has to resort to fiction to find such an agreement. It is highly unlikely that such an agreement could be found here.
- Accordingly, it would appear that neither contributory negligence nor *volenti* will succeed. Accordingly, the issue now is to what extent is Lawrence liable.

**Hannah has spent an evening with friends at the Student Union bar. She has been drinking and, although she is not drunk, she could be described as 'merry.' Not wishing to walk home in the rain, she accepts a lift with Hywel, whom she knows has drunk a considerable amount of alcohol. Hannah does**

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<sup>1</sup> [1962] 2 QB 405 (QB).

<sup>2</sup> [1966] 1 WLR 1387 (CA) 1390 (Lord Denning MR).

<sup>3</sup> [1971] 2 QB 691 (CA).

**not put on her seat belt. Whilst driving home, the car collides with another vehicle and Hannah is rendered paralyzed. Would your answer differ if Hannah was extremely drunk?**

- Again, this question involves the tort of negligence. There is little doubt that the requirements will be met to impose liability upon Hywel. The question is whether he has access to any defences that could serve to eliminate or reduce the liability he faces.
- Two defences appear to be relevant:
  1. By accepting a risk with a drunk driver, Hannah has assumed the risk of injury (that is, the defence of *volenti*)
  2. By failing to wear a seat belt, she has acted in a contributory manner.

#### *Volenti*

- *Volenti* will provide a complete defence for Hywel if he can satisfy the three requirements set out in *Nettleship v Weston*, namely:
  1. That Hannah knew of the risk. As Hannah is not drunk, but merely 'merry,' it is likely that she was aware of the risk of getting a lift with Hywel, and voluntarily consented to having a lift from him. Accordingly, this requirement will likely be satisfied.
  2. That Hannah voluntarily consented to the risk of injury and having no legal redress. That Hannah consented to the risk of injury is likely, but whether she consented to having no legal redress is impossible to determine based on the facts provided.

In *Nettleship*, the claimant had not consented to having no legal redress by ensuring that the defendant was suitably insured. Hannah has not, as far as we are told, engaged in a similar act.
  3. That Hannah expressly or impliedly agreed to waive any claim for the injuries that befell her. Clearly, the case of *Morris v Murray*<sup>4</sup> is relevant here and you should point out the distinction the courts have drawn between accepting a lift with a drunken pilot compared to accepting a lift with a drunk driver. The courts tend to hold that the latter will not meet the third requirement.
- Although it cannot be stated with certainty, it is likely that the defence of *volenti* will fail, as Hywel has most likely not met the third requirement. Accordingly, Hywel will be required to pay damages, but he may be able to reduce the damages payable by pleading the defence of contributory negligence.

#### *Contributory negligence*

- Unlike *volenti*, contributory negligence does not provide a complete defence, but merely reduces the damages awarded. Hywel will try to argue that Hannah contributed to the injuries she sustained by:
  1. Getting into the car with a driver she knew to be drunk, and
  2. Failing to wear a seat belt.
- In both cases, you will need to discuss that, in order for the defence to succeed, both the claimant and defendant need to be at fault. Establishing this will be straightforward. Hywel will also need to show that Hannah's alleged contributory negligence led to the damage she suffered.

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<sup>4</sup> [1990] 2 QB 6 (CA).

- While accepting a lift with a drunk driver will not usually amount to *volenti*, there is little doubt that accepting a lift with a drunk driver can amount to contributory negligence. The case of *Owens v Brimmell*<sup>5</sup> provides a good example of this (in this case, damages were reduced by 20 per cent).
- There is little doubt that a failure to wear a seat belt will amount to contributory negligence. The extent that damages will be reduced will depend upon to what extent Hannah's injuries would have been lessened had she worn a seat belt (e.g. if her injuries would have been 20 per cent less severe, damages would be reduced by 20 per cent). In *Froom v Butcher*,<sup>6</sup> Lord Denning MR suggested that where wearing a seat belt would have resulted in no injury being sustained, damages should be reduced by 25 per cent. Where wearing a seat belt would have resulted in the injuries being less severe, damages should be reduced by 15 per cent. While Lord Denning's suggestions are not binding, the Court of Appeal in *Capps v Miller*<sup>7</sup> has indicated that they should usually be followed.

**Matthew was the getaway driver for an armed robbery. Whilst driving away from the bank, Matthew's car is involved in an accident with another vehicle, being driven by Amy. Although Matthew was driving quickly, the accident was the result of Amy's negligent driving. Matthew and his fellow criminals sustain severe injuries.**

- A claimant may be denied on remedy on the ground that he was engaged in an illegal act when the injury was sustained. This is a result of the application of the defence *ex turpi causa non oritur actio*, meaning 'an action does not arise from a base course.' Whilst Amy is negligent, she will argue that no liability should arise as, whilst Matthew was injured, he was engaged in a criminal act.
- When determining whether or not the defence should succeed, the court will ask itself 'was the loss sustained by the claimant the result of his own crime.' If the answer is 'yes,' the defence will likely succeed (as in the case of *Clunis v Camden and Islington Health Authority*).<sup>8</sup> If the answer is 'no,' the defence will likely fail (as in the case of *Revill v Newbury*).<sup>9</sup>
- Given this, it is likely that the defence will fail. Whilst Matthew and his fellow criminals did sustain their injuries whilst engaging in an armed robbery, they did not sustain their injuries due to their criminal activities, but as a result of Amy's negligent driving.

### Problem question

Les is getting a lift to work from his friend Steve. Steve negligently crashes the car and Les is seriously injured. The results of the crash are as follows:

- One of Les' arms has to be amputated and he has lost an eye. As a result of this, he can no longer go fishing. The injury that caused him to lose the use of the eye also caused severe scarring on Les' face. This results in Les' wife leaving him.
- As a result of the accident, Les is unable to work for two years. His annual wage amounted to £35,000, but he believed that he would have been promoted in that time.
- As a result of the accident, Les will require medical care for the next ten years. This medical treatment can be extremely painful. The cost of this treatment is estimated at £6,000 per year.
- At the time of the accident, Les was holding his laptop. The accident caused the laptop to become damaged beyond repair. At the time of the accident, the laptop could be purchased for £1,500, but, at the date of the trial, the same model laptop could be purchased for £700.

<sup>5</sup> [1977] QB 859 (QB).

<sup>6</sup> [1976] QB 286 (CA).

<sup>7</sup> [1989] 1 WLR 839 (CA).

<sup>8</sup> [1998] QB 978 (CA).

<sup>9</sup> [1996] QB 567 (CA).

It transpires that Les was not wearing a seat belt at the time of the crash and, if he had worn a seat belt, his injuries would have been much less severe. Based on the facts provided, discuss the amount of damages that Les would be entitled to and the relevant heads of damages that Les would be seeking to recover.

### Introduction

- Clearly, this question involves a discussion of the awarding of damages in tort. In tort, the basic aim of damages is to put the claimant in the position he would have been in before the tort was committed (known as *restitutio in integrum*).

**One of Les' arms has to be fully amputated and he loses an eye. As a result of this, he can no longer go fishing. The injury that caused him to lose the use of the eye also caused severe scarring on Les' face. This results in Les' wife leaving him.**

- These losses will be classified as non-pecuniary losses. Les will clearly seek damages for the significant injuries he has sustained as well as damages for pain and suffering. Damages for personal injury are determined based upon a tariff system, which is laid down by the Judicial Studies Board.<sup>10</sup>
- Les has sustained other losses as a result of his injuries, which would come under the heading of loss of amenity. In *Moeliker v A Reyrolle & Co Ltd*,<sup>11</sup> the claimant recovered damages for loss of amenity of £3,000 with part of this amount compensating him for the fact that he could no longer enjoy going fishing due to his injuries. Accordingly, Les will likely be able to recover a sum for the loss of amenity caused by being unable to continue his hobby.
- In the case of *Oakley v Walker*,<sup>12</sup> the court awarded the claimant a sum after his wife left him due to the disfigurement he had suffered as a result of the defendant's actions. Les would also be able to recover such damages.

**Les is unable to work for two years. His annual wage amounted to £35,000, but he believed that he would have been promoted in that time.**

- In determining loss of future earnings, the court will first determine the claimant's annual income. This will take into account tax and NI contributions, but will also take into account future events, such as the possibility of promotion. This figure, once reached, will constitute the multiplicand.
- The multiplicand is then multiplied by the period of time that the claimant will be unable to work (this is the multiplier). In this case, Les is unable to work for two years, so the multiplicand will be multiplied by two.

**As a result of the accident, Les will require medical care for the next ten years. This medical treatment can be extremely painful. The cost of this treatment is estimated at £6,000 per year.**

- The cost of medical treatment is a pecuniary loss. This will be calculated by working out the cost of such treatment (£6,000 per year – this will constitute the multiplicand) and multiplying it by the period of time that such treatment will be required (ten years – this will constitute the multiplier). Accordingly, Les will be able to recover £60,000 under this head.
- The pain and suffering caused by such medical treatment will constitute a non-pecuniary loss. Les can also claim damages for the pain and suffering caused by any medical treatment he undergoes.

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<sup>10</sup> Judicial College, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (13<sup>th</sup> edn, OUP 2015).

<sup>11</sup> [1977] 1 All ER 9 (CA).

<sup>12</sup> (1977) 121 SJ 619.

**At the time of the accident, Les was holding his laptop. The accident caused the laptop to become damaged beyond repair. At the time of the accident, the laptop could be purchased for £1,500, but, at the date of the trial, the same model laptop could be purchased for £700.**

- This loss will fall under the head of special damages, as it results from the particular facts of the case and is not a loss that inevitably flows from the accident.
- Where property is destroyed or damaged beyond repair, damages are normally awarded based on the market value of the goods at the time they were destroyed or damaged beyond repair.<sup>13</sup> Accordingly, Les will be able to recover £1,500.

#### **Les' failure to wear a seat belt**

- The above discussion indicates that Les is likely to receive substantial damages. However, in failing to wear a seat belt, there is little doubt that Les has been contributorily negligent and, as a result, his damages are likely to be reduced.
- In *Froom v Butcher*,<sup>14</sup> Lord Denning MR suggested that where wearing a seat belt would have resulted in the injuries being less severe, damages should be reduced by 15 per cent. While Lord Denning's suggestions are not binding, the Court of Appeal in *Capps v Miller*<sup>15</sup> has indicated that they should usually be followed. Accordingly, it is likely that Les' damages would be reduced by 15 per cent.

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<sup>13</sup> *Liesbosch Dredger v SS Edison* [1933] AC 449 (HL).

<sup>14</sup> [1976] QB 286 (CA).

<sup>15</sup> [1989] 1 WLR 839 (CA).