OXFORD CAMBRIDGE AND RSA EXAMINATIONS

ADVANCED GCE

G158/RM

LAW

Law of Torts Special Study

PRE-RELEASE SPECIAL STUDY MATERIAL

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JANUARY AND JUNE 2010

SUITABLE FOR VISUALLY IMPAIRED CANDIDATES

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G158 LAW OF TORTS

SPECIAL STUDY MATERIAL

SOURCE MATERIAL

SOURCE 1

EXTRACT FROM THE OCCUPIERS' LIABILITY ACT 1957.

SECTION 2

(1) An occupier of premises owes the same duty, the "common duty of care", to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) (a) an occupier must be prepared for children to be less careful than adults; and

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)–

(a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and

(b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor ….

EXTRACT FROM THE OCCUPIERS' LIABILITY ACT 1984.

1 DUTY OF OCCUPIER TO PERSONS OTHER THAN HIS VISITORS

(1) The rules enacted by this section shall have effect, in place of the rules of common law, to determine –

(a) whether any duty is owed by a person as occupier of premises to persons other than his visitors in respect of any risk of their suffering injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them; and

(b) if so, what the duty is.

(3) An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) above if –

(a) he is aware of the danger or has reasonable grounds to believe that it exists;

(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case, whether the other has lawful authority for being in the vicinity or not); and

(c) the risk is one which, in all the circumstances of the case, he may be reasonably expected to offer the other some protection.

(4) [T]he duty is to take such care as is reasonable in all the circumstances of the case to see that he does not suffer injury on the premises by reason of the danger concerned.

SOURCE 2

EXTRACT ADAPTED FROM THE JUDGMENT OF LORD DENNING IN *WHEAT V E LACON & CO. LTD* [1966] AC 552.

LORD DENNING:

I ask myself whether the brewery company had a sufficient degree of control over the premises to put them under a duty to a visitor. Obviously they had complete control over the ground floor and were 'occupiers' of it. But I think that they had also sufficient control over the private portion. They had not let it out to Mr Richardson by a demise. They had only granted him a license to occupy it, having a right themselves to do repairs. That left them with a residuary degree of control … They were in my opinion 'an occupier' within the meaning of the Act of 1957. Mr Richardson, who had a license to occupy, also had a considerable degree of control. So had Mrs Richardson, who catered for summer guests. All three of them were, in my opinion, 'occupiers' of the private portion of the 'Golfer's Arms'. There is no difficulty in having more than one occupier at one and the same time, each of which is under a duty of care to visitors.

What did the common duty of care demand of each of these occupiers towards their visitors? Each was under a duty to take such care as 'in all the circumstances of the case' is reasonable to see that the visitor will be reasonably safe.

I can see no evidence of any breach of duty by the brewery company. So far as the handrail was concerned, the evidence was overwhelming

that no one had any reason before this accident to suppose that it was in the least dangerous. So far as the light was concerned, the proper inference was that it was removed by some stranger shortly before Mr Wheat went down the staircase. Neither the brewery company nor Mr and Mrs Richardson could be blamed for the act of a stranger.

SOURCE 3

EXTRACT ADAPTED FROM THE JUDGMENT OF DEVLIN J IN *PHIPPS V ROCHESTER CORPORATION* [1955] 1 QB 450.

DEVLIN J:
The law recognises … a sharp difference between children and adults. But there might well, I think, be an equally marked distinction between 'big children' and 'little children'. When it comes to taking care of themselves, there is a greater difference between big and little children than there is between big children and adults, and much justification for putting little children into a separate category… the [occupier] is not entitled to assume that all children will, unless they are allured, behave like adults; but he is entitled to assume that normally little children will be accompanied by a responsible person and to discharge his duty of warning accordingly.

I think that it would be an unjustifiable restriction of the principle if one were to say that although the [occupier] may in determining the extent of his duty have regard to the fact that it is

the habit, and also the duty, of prudent people to look after themselves, he may not in that determination have a similar regard to the fact that it is the habit, and also the duty, of prudent people to look after their little children.

No doubt there are places where little children go to play unaccompanied. If the [occupier] knows or ought to anticipate that, he may have to take steps accordingly. But the responsibility for the safety of little children must rest primarily upon the parents; it is their duty to see that such children are not allowed to wander about by themselves, or at the least to satisfy themselves that the places to which they do allow their children to go unaccompanied are safe for them to go. It would not be socially desirable if parents were, as a matter of course, able to shift the burden of looking after their children from their own shoulders to those persons who happen to have accessible bits of land.

SOURCE 4

EXTRACT ADAPTED FROM *STREET ON TORTS*. JOHN MURPHY. 11TH EDITION. 2003. LEXIS NEXIS. PP343-4.

Given that section 2(4)(b) [of the 1957 Act] is important both per se and by extension, its terms warrant further analysis. First, … the courts must consider whether, initially, it was reasonable for the occupier to engage an independent contractor to undertake the construction, maintenance or repair work. It is not obvious what this entails for it is difficult to envisage a situation in which the court

would expect the occupier to have performed construction work himself in preference to an independent contractor. Thus it will be presumptively reasonable for an occupier to engage a contractor wherever, as in *Haseldine v C A Daw & Son Ltd* [[1941] 2 KB 343 CA] the work to be done necessitates special skill or equipment not possessed by the occupier ….

Secondly, the … Act … stipulates that the occupier *may* have to check the competence of the employee. Here it would seem that if the work is of a fairly routine nature the contractor may be trusted. Where, however, the work entrusted to a contractor is of a kind that, after its completion, necessarily involves a risk to future visitors if it has been carelessly executed, the occupier *will* be under a duty to check the competence of the contractor. Thirdly, the occupier may need 'to take such steps as he reasonably ought in order to satisfy himself that the work had been competently done'. It is unclear from the statute whether this involves a subjective test or an objective one. If the former were adopted, limited financial resources might provide a sufficient reason for not engaging, say, an architect to assess the quality of the work. If an objective test were used, the only relevant factor would be the degree of risk inherent in the kind of work done.

[S]ection 2(4)(b) provides only an example of how the common duty of care might be discharged. Thus, in some circumstances, it may be expected [that] the occupier … will have the contractor's work supervised. In *AMF International Ltd v Magnet Bowling Ltd* [[1968]

2 All ER 789] … it was said that if the occupier was going to invite a third party, the claimant, to bring valuable timber onto the site during construction, then to escape liability he may have to employ a supervising architect to ensure that the contractors had made the premises sufficiently safe for that timber safely to be brought there.

SOURCE 5

EXTRACT FROM THE JUDGMENT OF LORD HOFFMANN IN *TOMLINSON V CONGLETON BOROUGH COUNCIL* [2004] 1 AC 46

LORD HOFFMANN:
The judge found that there was 'nothing about the mere at Brereton Heath which made it any more dangerous than any other stretch of open water in England.' … There were no hidden dangers … Nor was the Council doing or permitting anything to be done which threatened a danger to persons who came to the lake. No power boats or jet skis threatened the safety of either lawful windsurfers or unlawful swimmers. … Lord Phillips …MR expressed the same opinion … :

> **"[I]t seems to me that Mr Tomlinson suffered his injury because he chose to indulge in an activity which had inherent dangers, not because the premises were in a dangerous state."**

[T]he Master of the Rolls was identifying a point which in my opinion is central to this appeal.

Mr Tomlinson was a person of full capacity who voluntarily and without any pressure or inducement engaged in an activity which had inherent risk. The risk was that he might not execute the dive properly and so sustain injury. Likewise, a person who goes mountaineering incurs the risk that he might stumble or misjudge where to put his weight. In neither case can the risk be attributed to the state of the premises. Otherwise any premises can be said to be dangerous to someone who chooses to use them for some dangerous activity ….

It follows that … there was no risk to Mr Tomlinson due to the state of the premises …I shall nevertheless go on to consider the matter on the assumption that there was.

Section 1(3) has three conditions which must be satisfied. First, under paragraph (a) … the occupier must be aware of the danger or have reasonable grounds to believe that it exists … I accept that the Council must have known that there was a possibility that some boisterous teenager would injure himself by horse-play in the shallows … and that this was sufficient to satisfy paragraph (a). But the chances of such an accident were small.

[P]aragraph (b) presents no difficulty. The Council plainly knew that swimmers came to the lake and Mr Tomlinson fell within their class.

That leaves paragraph (c). Was the risk one against which the Council might reasonably be expected to offer the claimant some protection? The judge found that 'the danger and risk of

injury from diving in the lake where it was shallow were obvious'. In such a case the judge held, both as a matter of common sense and following consistent authority (*Staples v West Dorset District Council* [1995] PIQR 439; *Ratcliff v McConnell* [1999] 1 WLR 670 …) that there was no duty to warn against the danger. A warning should not tell a swimmer anything he did not already know ….

I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon the land … Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. […] He is entitled to impose such conditions as the Council did by prohibiting swimming. But the law does not require him to do so ….

[F]or these reasons … even if swimming had not been prohibited and the Council had owed a duty under section 2(2) of the 1957 Act, that duty would not have required them to take any steps to prevent Mr Tomlinson from diving or warning him against dangers which were perfectly obvious.

SOURCE 6

EXTRACT ADAPTED FROM 'AN OUTBREAK OF COMMON SENSE'. JEREMY PENDLEBURY. BARRISTER. NEW LAW JOURNAL. 27 APRIL 2007.

On a fine spring evening, a woman walked across an ostensibly well kempt village green to the adjacent pub … She placed her foot into a hole, hidden by the grass, and broke her leg so badly that six years on she still suffered considerable pain and disability. The hole was a purpose-built maypole hole which had become exposed.

Before the Court of Appeal decision in *Cole v Davis-Gilbert and the Royal British Legion* [2007] All ER (D) 20, a lawyer might have held the view that she had a decent case … under the Occupiers' Liability Acts of 1957 or 1984 against either the maker of the hole or the person responsible for the village green.

The press (and subsequent public) reaction to this decision was perhaps a surprise … 85 comments appear on the *Daily Mail's* website under the headline, *An Outbreak of Common Sense*. So why is this?

The answer may be that this case has demonstrated how the perceived compensation culture has arguably created a lawyer's subculture of assumption of liability, when on a proper analysis and an application of basic principles, there is none. As Lord Justice Scott Baker observed, in giving his judgment in *Cole*, sometimes accidents are just pure accidents ….

Cole's case against the owner [of the village green] was that, as occupier, he had a duty to ensure that visitors were reasonably safe; and her case against the [Royal British] legion was that it had failed in its neighbour's duty of care properly to fill in the maypole hole after the fete of 1999 or 2000 ….

Cole's case against the owner was that there was a duty to inspect the green; and the existence of the hole demonstrated a failure of that duty. President Sir Igor Judge asked:

- **how often should the owner inspect the green – every day, every week or every month; and**

- **assuming a failure to inspect, would proper inspection have revealed the hole?**

Those questions effectively sealed the fate of Cole's appeal against the owner, for there was no answer. Even a daily inspection would not ensure the absence of holes; this was a village green used by many for all sorts of purposes; children or animals might dig holes or leave piles of debris – both tripping hazards. Thus a morning inspection which had established reasonable safety might be rendered redundant by teatime.

Cole's argument [against the Royal British Legion] was that [it] had a duty to ensure that the making good [of the maypole hole] was such that it could not become exposed for the foreseeable future; it had become exposed, thus the legion was liable. The court asked whether

that duty should last one, five, 10, 20 or 100 years or more.

This question sealed the fate of Cole's appeal against the legion, for again there was no answer. Had the hole been dug out by someone or something the day after it was filled in, provided the legion had properly filled it in – thus fulfilling its neighbour's duty – there was no liability ….

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