Words

Reasonable: the keystone of negligence

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The concept of reasonableness is the golden thread which runs through the law of negligence, tying together all the disparate elements of duty, right, harm and injury into one coherent whole. It is the principle upon which the legal duty not to harm one's neighbour is based and it is the principle that ties that legal idea to particular fact situations. It is of fundamental import to the law.

A claim for damages based on negligence is a claim to be compensated for an injury caused unintentionally, and consequently the law must find some other justification for holding a person liable than that person's wrongful intent (which is the justification for intentional wrongs). That justification emerges from the concept of reasonableness. If a person injures another but does so unintentionally he can be held legally liable therefor if he has acted unreasonably. So a claim for negligence against the doctor is not an accusation that he or she has intentionally injured a patient but that he or she has caused injury by his or her failure to act reasonably.

Therefore, it becomes of fundamental importance to determine what the law demands in the way of reasonable behaviour. As a sort of judicial anthropomorphisation of the standard of behaviour expected and demanded, the law concerns itself with 'the reasonable man', that 'excellent', as A P Herbert describes him, 'but odious character'. The courts have been painting the portrait of this amorphous individual for over a century, and have produced divers and diverse descriptions therefor: *Quot iudices tot sententiae*.

The reasonable man is the man on the Clapham omnibus, or the man in the street, the man 'who takes the magazines at home and in the evening pushes the lawnmower in his shirt sleeves'. 'The reasonable man goes round in bogey because he plays the orthodox shots, is never in trouble and is not called upon to do the unexpected'(1). He is the ordinary normal man, the classic juryman of a previous age, middle-class, middle-management, middle-aged and invariably male.

But the reasonable man is much more than this. The concept of reasonableness, as J L Montrose pointed out in an eminent article (2) is an ethical rather than a sociological concept: 'the question of negligence is one of what *ought* to be done in the circumstances, not what *is* done in similar circumstances by most people or even by all people'. Negligence, through the standard of reasonableness, imports into the law an ethical *command* as an attempt to encourage certain types of safe ('reasonable') behaviour and discourage other types of unsafe ('unreasonable') behaviour.

It is often said that the standard of reasonableness objectivises the standard of care demanded by the law, but this, it is submitted, is not its most important consequence. The standard of reasonableness certainly 'eliminates the personal equation and is independent of the idiosyncracies of the particular person whose conduct is in question' (3), but it does so only in so far as it renders irrelevant the individual's own perception of his own actions. Rather the importance of the standard of reasonableness lies in the tension between its inherent ambivalence and its ethical input. The law demands what is to be done (or rather what should have been done) but at the same time takes into account all the individual facts and circumstances in which the actor found himself, and qualifies the standard accordingly. Consequently, 'nobody expects the man on the Clapham omnibus to have any skill as a surgeon, a lawyer, a docker or a chimneysweep unless he is one; but if he professes to be one then the law requires him to show such skill as any ordinary member of the profession or calling to which he belongs or claims to belong would display'(4).

The more knowledge, skill and experience a person has, the higher standard the law subjects that person to: what is reasonable to expect may vary depending upon the individual involved. In the field of professional competence, the fact that what is reasonable for one person may not be reasonable for another becomes especially apparent. In the medical profession, for example, a senior consultant with many years experience may make mistakes, but such mistakes will not be held to be negligent until they are unreasonable mistakes, taking account of his level of experience: the skill he must show is not that skill he possesses but that which it is reasonable to expect he possesses, given his

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level of training and experience. The law demands a high level of skill to be shown by a doctor, which level becomes yet higher as the doctor becomes more experienced. Likewise, the newly-qualified young doctor with only a few weeks experience may make mistakes and be liable for them if they are negligent; but these mistakes also must be unreasonable, and it may be less unreasonable for such a doctor, than for the senior consultant, for the former, lacking the latter's experience, to make such mistakes. This is by no means to say that the junior doctor is entitled to be careless, for he is not; rather it is simply suggested that by concentrating on the test of reasonableness the initially high standard of care demanded of a medically qualified person becomes even higher as that person acquires further experience and, therefore, further skill and knowledge. The law expects the experienced to show more skill than the inexperienced and the concept of reasonableness allows the court to reflect that expectation.

This may be seen in the case of *Condon v Basi* (5). Here the plaintiff and the defendant were opposing players during a local league football match in which the plaintiff suffered a serious leg injury as a result of a foul tackle by the defendant. The defendant was found liable for having acted negligently (ie unreasonably in the circumstances) and this important comment was made by Sir John Donaldson MR in the Court of Appeal: 'The standard is objective, but objective in a different set of circumstances. Thus there will of course be a higher degree of care required of a player in a First Division football match than a player in a local league football match' (6). It is reasonable to expect that the one will have more skill as a footballer than the other, and so the law demands that the former acts with more care than the latter.

The concept of reasonableness allows the law to command that qualified people use more care in those actions in which they are qualified than the unqualified person (unless, that is, the unqualified person holds himself out as being qualified, in which case it becomes reasonable to expect the same degree of care) (7). So in *Philips v William Whiteley Ltd* (8), a woman suffered infection allegedly as a consequence of having her ear pierced by a jeweller. The jeweller had not attained the standard of sterility in his instruments that a surgeon would have achieved, but it was nevertheless held that the defendant had taken all reasonable precautions in the preparation of his instruments. Goddard J said that although the jeweller did not 'use the same precautions in procuring an aseptic condition of his instruments as a doctor or a surgeon would use, I do not think that he could be called upon to use that degree of care.... I do not think that a jeweller holds himself out as a surgeon or professes that he is going to conduct the operation of piercing a lady's ears by means of aseptic surgery about which it is not to be supposed that he knows anything' (9).

So, by concentrating on the standard of reasonableness the law not only sets the standard of

care it demands in any given situation, but it allows the courts the freedom to amend and arrange that standard for its own purposes. It is for the court and the court alone to set the standard of care demanded by the law (10) and this gives the court the power to vary the standard for the achievement of its own policy. This becomes clear if one compares the football case above with the case of *Nettleship v Weston* (11). In the football case the inexperienced player was held subject to a lesser standard than the experienced player, but in *Nettleship* the court held that the fact that a driver of a car which crashed was a learner driver, and the fact that the injured passenger (a driving instructor) knew this, did not diminish the standard of reasonable care which the law requires. Anyone who drives a car is subject to the same standard of care. The policy behind this case, which distinguishes it from cases like *Condon v Basi*, is to ensure a fair distribution of losses through the utilisation of the compulsory motor vehicle insurance system. There is an established and well-documented trend towards stricter liability in those areas in which insurance is either compulsory or widely held (12).

Policy considerations may also be apparent in the medical situation. In the United States of America, where the 'medical malpractice crisis' ought more correctly to be labelled the 'medical insurance crisis', a policy was apparent for many years of finding doctors liable in as many cases as possible. The reasons behind this policy were multifarious, but foremost amongst them was the fact that if a patient were injured in hospital that patient would normally have to pay out of his own pocket for the further necessary treatment; but if the doctor (ie his insurance company) could be made to pay then this would be avoided. So, by holding more and more mistakes of doctors to be unreasonable the American courts achieved their own policy of ensuring just compensation.

British courts too, by relying upon the concept of reasonableness, have also the potentiality for adopting such a policy. They do not do so for many reasons, foremost amongst which is a recognition that the injured patient does not need in the same way as his American counterpart financial compensation to pay for his further treatment (13). Even in the area of informed consent, which in many American jurisdictions proved particularly useful as a means of achieving the desired result, the British courts have resisted the pressure to alter the concept of 'reasonableness' in that particular field. So in *Sidaway v Bethlem Royal Hospital* (14), the House of Lords refused to make a distinction between the test of reasonableness in informed consent cases and the test of reasonableness in any other medical negligence case.

It can therefore be seen that the concept of reasonableness, at the heart of the action of negligence, performs a dual function. It allows the law to import an ethical command into the law to say what ought to be done rather than simply reflect what is done; and it allows the court to vary that standard of care which is demanded by taking into account all such

circumstances as the actor's qualifications, his experience and his knowledge. It is the court which moulds the reasonable man to achieve the desired aim, and in the United Kingdom it is to be hoped that the courts may be trusted to utilise the concept of reasonableness in an acceptable, and, indeed, a reasonable manner.

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References

- (1) Lord Justice-Clerk Thomson in *Blaikie v British Transport Commission* 1961 S C 44 49.
- (2) Montrose: Is negligence an ethical or a sociological concept? (1958) 21 Mod L R 259.
- (3) Lord Macmillan in *Glasgow Corporation v Muir* [1943] A C 448, 457.
- (4) Winfield & Jolowicz, *Tort* (12th ed.): 47.
- (5) [1985] 1 W L R 866.
- (6) [1985] 1 W L R 868.
- (7) See, for example *Dickson v Hygienic Institute* 1910 S C 352.
- (8) [1938] 1 All E R 566.
- (9) [1938] 1 All E R 568/569.
- (10) See the author: Medical negligence: who sets the standard? *Journal of medical ethics* 1985; 11: 135.
- (11) [1971] 2 Q B: 691.
- (12) Fleming on *Torts* (5th ed): 121/122.
- (13) That British judges are fully aware of the dangers of the American 'malpractice crisis', and that they consider it unrealistic to fear its rise in this country, is clear from various statements, such as those of Denning L J in *Hatcher v Black*, *The Times* 1954 Jul 2 and in Denning *The discipline of law*, 1979: 242-244; and also Lord Scarman in *Sidaway v Bethlem Royal Hospital* [1985] 2 W L R 480: 492.
- (14) [1985] 2 W L R 480.