Video Two: Exploration

Nettleship v Weston was a case within the tort of negligence. A man was injured while giving informal driving lessons to a friend because that friend crashed the car into a lamppost. The core question was whether the friend, a learner driver, had taken the appropriate amount of care when driving. To answer this question the court had to apply the general standard of care, the care of a *reasonable person* to the situation of a learner's driver. A learner driver cannot show the level of care of an experience driver, so the case also asked a more fundamental question about the role of failure to take care in making someone liable in tort law. Tort law uses failure to take care as an example of liability for fault. Fault is used as one of the reasons for making one person pay compensation for the harm he or she does and the case asks important questions about what fault is, what its relationship with other parts of tort law is and what other reasons there might be for making someone pay for the harm they have done. From here, it would be useful if you have already read the case and have a copy of it to hand.

Let's start by thinking about the facts. Lord Denning, the Master of the Rolls, had a habit of giving very accessible, homespun descriptions of the facts when he began his judgments. Picking out some of the more important facts, we can see:

i. Mrs Weston was a learner driver, she had her provisional license to drive for 18 days before the accident and had had three driving sessions in that time.
ii. Mr Nettleship was her friend and he agreed to help her learn to drive but only after asking and having it proven that Mrs Weston was fully insured and that he would be covered in case of injury.
iii. Mrs Weston's car was a normal vehicle, not a dual-control car that professional instructors use now. That meant that Mr Nettleship could not control the pedals but he could assist with the gear stick and the handbrake, he also very occasionally assisted with the steering.
iv. The incident occurred at a junction with a clear road. They wanted to turn left. Mrs Weston stopped at the stop sign. Mr Nettleship instructed her to pull away slowly, round the corner and with Mr Nettleship on the gear stick, Mrs Weston put the car in the correct gear and pulled away smoothly, at a walking pace, turning the steering wheel down.
v. The trouble was, having completed the turn, she did not straighten the steering wheel. She froze. Mr Netttleship immediately applied the handbrake with his closer hand and reached over to the steering wheel with his left hand in order to straighten the car's direction of travel. He almost succeeded but just before he did, the car went over the kerb and hit a lamp on the side of the road. Mr Nettleship's left knee was broken.
vi. We found out later in the judgment that Mrs Weston's son, perhaps of 21 years of age, was also in the car.

? After understanding the facts, what was your initial reaction? What do you think about any harm that Mr Nettleship has suffered? Should he have to bear that loss, or should someone else bear some or all of it? If someone else, who should bear the loss?

Having understood the facts, we can look to the law. One small matter we should note straight away is that Mrs Weston's actions constituted the criminal offence of driving without due care and attention. She was fined £10 and her driving license was endorsed. According

to the Bank of England, inflation has been roughly 6% a year since then, so £10 in 1968 is equivalent to about £155 today. Note that the criminal law was very clear that the standard of care expected of Mrs Weston was that of a competent driver. According to earlier decisions going back to the 1930s, where it was made clear that the criminal law uses a purely objective standard of care “impersonal and universal, fixed in relation to the safety of other users of the highway.”

- ? Do you think the *criminal law* sets the right standard, and the right penalty, for the kind of thing that Mrs Weston did?

We now turn to the claim Mr Nettleship brought. It was a claim in tort, specifically the tort of negligence, claiming damages for the personal injury Mr Nettleship suffered. He was claiming for a little over £1000 worth of damages at the time, which in today’s money would be a little over £14,000 once you have taken inflation into account. The trial judge dismissed, Thesiger J, dismissed the claim. All three judges in the Court of Appeal agreed that the appeal should be allowed, and the claim succeed, but only for half the amount claimed, that is, about £7000: before going further, do you think that was the right decision? If so, why?

Lord Denning, being the most senior of the three judges, spoke first. He set out that the following four stages:

1. First, Lord Denning spoke of the responsibility of the learner driver towards persons on or near the Highway was simple: an objective test which was not adjusted for the skill or lack of skill of the defendant. He did not elaborate on this, but thought it was largely the result of the Road Traffic Acts, mentioning specifically the obligation to be insured if driving on the road. The insurance fund was linked to liability: a victim could only get access to the fund if the defendant was held liable. Lord Denning therefore concluded “So the Judges see to it that he is liable, unless he can prove care and skill of a high standard.” For him, this was a shift in the role fault was playing in the law of tort. He said “Thus we are, in this branch of the law, moving away from the concepts – ‘No liability without fault’. We are beginning to apply the test: “On whom should the risk fall?” Morally the learner-driver is not at fault but legally she is liable to be because she is insured and the risk should fall on her.” Do you think the availability of insurance should affect the decision about whether someone was at fault within the tort of negligence? Is it any different to whether the defendant is rich? Should wealth be a reason to make a defendant liable? Looking at the standard of care another way, what is the role of the ‘L’ plates that learner drivers must display on the car they drive?
2. Second, Lord Denning spoke of the responsibility of the learner-driver towards passengers in the car. He discussed an Australian case about a passenger getting into a car with a drunk driver which suggested that there was no breach of duty by the drunk driver’s drunken driving. Lord Denning argued that the level of care expected of a learner-driver was the same if a passenger knew the driver was still learning to drive: do you agree? In particular, Lord Denning wondered how you could set the standard of care? What level, precisely, did the passenger have to think the driver was at? One might imagine a long spectrum of skills, from a first lesson through to the moment before starting a driving test after years of practice. Lord Denning was sure mere knowledge of a lower ability was insufficient for a lower standard of care or no standard at all: do you agree?
3. Third, Lord Denning considered the responsibility of a learner-driver towards his instructor. He thought that the driving instructor was owed the same standard of care as anyone else. The only issue was whether Mr Nettleship had consented to run the risk of being injured and if he was injured, not to be able to sue Mrs Weston for it.

This is sometimes known as the defence of *volenti non fit iniuria*, that is, that the existence of consent does not make a wrongful act. Lord Denning was very clear that merely knowing of the lower standard of the driver was not the same as accepting that that risk might lead to you being harmed an unable to claim. Other than where there is a contract for services, such as a professional driving-instructor teaches for reward, where there might be a contractual waiver of such a claim, a driving instructor did not automatically consent to the risks of being injured while teaching. Do you agree with Lord Denning that a driving instructor does not automatically consent to the risk of being injured? What evidence was there about Mr Nettleship's view of the risks of being insured?

4. As a result of the first three points, Lord Denning found that Mrs Weston should be liable, and thus that the appeal should be allowed. The fourth question was how much of Mr Nettleship's claim should be allowed. Lord Denning had two routes to consider Mrs Weston's liability. On the one hand, he thought the trial judge had been right that Mr Nettleship was partly responsible for his injuries in not intervening sooner and more effectively, so Mr Nettleship was *contributorily negligent* for half the damages he claimed. On the other hand, Lord Denning considered that the two, learner and non-professional instructor, were *jointly driving the car* and as such, each was half responsible for any half. The result of considering Mr Nettleship as contributorily negligent for half the injury or Mrs Weston and Mr Nettleship as each responsible as co-drivers is the same, Mr Nettleship only recovers half the damages, but which analysis do you prefer?

Lord Justice Salmon agreed with Lord Denning on the outcome of the case. He also agreed that "a learner-driver is responsible and owes a duty in civil law towards persons on or near the highway to drive with the same degree of skill and care as that of the reasonably competent and experienced driver." However, unlike Lord Denning, Lord Justice Salmon saw the reason for this duty in a slightly different light. He said that:

> "The duty in civil law springs from the relationship which the driver, by driving on the highway, has created between himself and persons likely to suffer damage by his bad driving. This is not a special relationship. Nor, in my respectful view, is it affected by whether or not the driver is insured. On grounds of public policy, neither this criminal nor civil responsibility is affected by the fact that the driver in question may be a learner, infirm or drunk."

Lord Justice Salmon took a slightly different view about the potential complications for a driving instructor. That is, he was slightly more receptive to the idea that if you get into a car with someone you know cannot drive at the standard of a reasonably competent driver you are not owed the standard of care of a reasonably competent driver. He pointed out that it was not clear what someone in the car would have done to show not only that he *knew* of the risks associated with a lower ability to drive, but also that he *accepted* that risk. That is, to show not just that he was *scienter*, aware, but also *volens*, or consenting, in the Latin tags that were slightly more common in the 1970s. It is true that that the passenger did get into the car, that is, acted, on his knowledge of the driving weaknesses. His analogy was of getting into a car with a drunk driver, though he acknowledged that this was not a perfect analogy. He also makes an analogy with contract law, suggesting that a contract would not normally set out any duty on the learner driver to exercise any skill in learning to drive. Salmon LJ would have dismissed the appeal except for one vital piece of factual evidence that Lord Denning also found vital and he quoted from the factual evidence to prove it:

? Why did that piece of evidence persuade Lord Justice Salmon do you think?

- Would you have had the foresight to ask for such detailed proof before you helped a friend to learn to drive?

Lord Justice Megaw also agreed with Lord Denning on much of the detail of the case, perhaps more than Lord Justice Salmon. In particular, Lord Justice Megaw agreed with Lord Denning that it would be impractical to vary the standard of care owed by a learner driver to the level of care that driver could manage. He pointed out that one would vary not just the learner's standard of care, but also the care to be expected of the teacher. That is, the relationship was two-way and could only be fixed by both ends, not just one. An excellent and experience teacher would have to take more care of the *learner* than a weak novice teacher, just like an experienced learner would have to take more care of the *teacher* than someone on their first trip in the car. How practical do you think varying the standard of care for learner drivers is? Lord Justice Megaw thought it was impractical, and compared it to doctors and solicitors, who also learn their trade in part by having to practice it. Do you agree? Lord Justice Megaw went on to say that:

> "It is not a valid argument against such a principle that it attributes tortious liability to one who may not be morally blameworthy. For tortuous liability has in many cases ceased to be based on moral blameworthiness. For example, there is no doubt whatever that if Mrs. Weston had knocked down a pedestrian on the pavement when the accident occurred, she would have been liable to the pedestrian. Yet so far as any moral blame is concerned, no different considerations would apply in respect of the pedestrian from those which apply in respect of Mr. Nettleship."

- Do you see the same problem elsewhere in our daily lives other than through inexperience?
- What about someone who falls ill while driving, such as having a stroke or heart attack: a reasonable driver does not do that, so should the defendant be automatically liable?

To find out more, look at *Dunnage v Randall* a recent Court of Appeal decision: www.bailii.org/ew/cases/EWCA/Civ/2015/673.html.

There are a number of difficult issues, from the way the standard of care is set, to what defences, like contributory negligence and consent and even, briefly mentioned by Lord Justice Megaw, the possibility of a defence of that the claimant was encouraging illegal conduct, that is, that the claimant had an illegal claim or *turpis causa*.

- Having read through the case, and thought about the issues, do you still think the way you did at the beginning?

There are all kinds of fascinating questions we could consider further.
For instance, there are matters of regulation: should driving lessons, perhaps only the first few, have to take place in a dual-control car, such that the instructor can exercise more control to prevent accidents.

- Also, when can you effectively put yourself under a higher standard of care?
- What if you tell your passengers you are a very good driver, can they expect a higher standard of care?
- What if you are a lawyer, or a doctor, and you do the same?

There's an argument that holding yourself out as having a higher skill might make a difference. Of course, this case was not about having a *high* standard of care, but simply about a standard of care for all drivers to all potential victims. That standard was the standard of the reasonable person and here, that reasonable person was a driver.

Do you know how insurance works? Let me give you a necessarily simplified explanation of insurance. For the payment of a premium, the insurer agrees to cover the insured party against certain risks coming to pass in certain ways. The insurer seeks to make money by adding an amount to the total amount he expects to pay out and often he also invests the premiums to make money that way. He will commonly reinsure the risks he has insured, that is, pass on the risk to another person as well. It can get very complicated. However, at the end of the day, essentially what the insurer is doing is spreading the risk of harm from one member of society to all the people who get insurance. For car insurance, that's a lot of people. If lots of accidents happen and the insurer has to pay out, he will not simply lose money: by one way or another he will pass those costs on to others. So in the end, the question is not whether the insurer should pay or the victim, it is whether all those who have insurance will pay or just this individual victim. It is not the same as the state picking up the bill and then passing on the cost to everyone through higher taxes, but it is not far off.

- Does the way insurance works affect how you think about the case of *Nettleship v Weston*?
- How do you think the judges decide the case between themselves?

It is clear that there was some disagreement in the background, with Lord Denning being persuaded by the practical effect of insurance, but Lord Justice Salmon not being so persuaded and Lord Justice Megaw not speaking to that point in the same way. Lord Justice Salmon was to become Lord Salmon shortly after the case in fact, moving up to what was then the highest court in England a year later, the Appellate Committee of the House of Lords, where Lord Denning had been before he moved to be Master of the Rolls, the head of the civil division of the Court of Appeal.