

Dunnage v Randall
[2015] EWCA Civ 673, [2016] QB 639

Summary

Vincent ('Vince') Randall was a paranoid schizophrenic. Vince began to develop fantasies that his nephew – Terry Dunnage, the claimant in this case – and Terry's partner, Natasha Butler, were conspiring against him and had played a part in Vince's stepson being imprisoned. Vince visited Terry at Natasha's home to make these accusations which, of course, Terry found bewildering and vehemently denied. At some point in the confrontation, Vince went outside to get something from his car. He came back with a can of petrol and started threatening Terry that he would set the petrol alight unless Terry confessed to what he had been doing to harm Vince. When Terry continued to plead his innocence, Vince poured the petrol over himself and made to light it with a cigarette lighter that he was holding. A struggle ensued, with Terry trying to grab the lighter, and in the course of the struggle, the lighter ignited. Vince was killed in the ensuing conflagration; the claimant managed to escape it by jumping from a balcony but still suffered severe burns.

The claimant sued Vince's estate in negligence for damages to compensate him for his injuries. The proceedings were complicated by the prospect that if Vince's estate were held liable in negligence, Vince's widow would make a claim against UK Insurance Ltd, which had provided the widow with household cover, under the terms of which it provided the widow with liability insurance: 'We will indemnify...your family against all sums which you become legally liable to pay as damages for...accidental bodily injury.' In light of this potential liability, UK Insurance Ltd was entered as a defendant to the claim against Vince's estate and took over the defence of the case, arguing: (1) that Vince's mental incapacity meant that he was not liable in negligence for Terry's injuries, and (2) that if they lost on point (1), UK Insurance Ltd was not liable under its insurance policy with Vince's widow to indemnify Vince's estate against the damages it would have to pay Terry as the Terry's injuries did not count as 'accidental'.

The first instance judge accepted argument (1) (and, for the sake of completeness, considered and rejected argument (2)). He held that while it was obvious that Vince had owed Terry a duty of care not to pour petrol on himself and set himself alight, Vince had not breached that duty of care as he was not acting voluntarily when he did all of those things. In making his finding, the judge relied heavily on the advice of medical experts who said that Vince was not acting voluntarily when he confronted Terry, as he was not in 'rational' control of his mind. The Court of Appeal reversed the first instance judge's finding on argument (1) (while affirming that the injuries in this case did count as 'accidental' with the result that UK Insurance Ltd *was* liable to indemnify Vince's estate against its liability to pay compensatory damages to Terry: [156] (per Arden LJ)).

The three members of the CA each gave separate judgments, but they were all agreed that the fact that Vince was not acting *rationally* did not entitle the first instance judge to find that Vince was not acting *voluntarily*: [111]-[112] (per Rafferty LJ), [135] (per Vos LJ), [145] (per Arden LJ). This was not akin to a case where a 'defendant suffers some entirely unheralded, unexpected and unforeseen incapacitating attack' ([127], per Vos LJ) which by virtue of 'entirely eliminating any fault or responsibility [on the part of the defendant] for the injury...[means that the defendant has] not actually broken [his] undoubted duty of care' ([131], per Vos LJ); see also Arden LJ at [147], considering 'the case of a driver who gets into his car or lorry cab mentally and physically fit for the journey but then has an unforeseen episode during the journey which causes him to lose control of the vehicle. It cannot be said that he was negligent because he was acting with due care when he started to drive.'

The members of the CA were also agreed that the fact that Vince's mental incapacity may have meant that he found it difficult to avoid breaching the duty of care that he owed Terry not to pour petrol all over himself and set himself on fire was no reason to moderate the standard of care that he was expected to live up to. While the standard of care that a defendant is expected to live up to will be moderated if the defendant is a child, but that exception 'should not...be extended. People with physical and mental health problems should not properly be regarded as analogous to children' ([130], per Vos LJ); see also [107] (per Rafferty LJ) and [149] (per Arden LJ).

Given these two points, the CA thought it was obvious that Vince had breached the duty of care that he had equally obviously owed Terry not to pour petrol over himself and set it alight.

Comments

(1) *Metaphysics*. *Dunnage v Randall* gives rise to some nice points about the metaphysics of personal identity. In that case, *someone* – call him X – *knew* that pouring petrol over himself and setting it alight was very dangerous both to himself and Terry (the fact that X said to Terry, 'Tell me the truth or we are all going to go up' is proof positive of that), and in that knowledge *decided* to pour the petrol over himself and try to set it alight. The question that the courts had to deal with was: Was X Vince, or not Vince? The first instance judge found that X was not Vince as Vince was not in 'rational control of his mind'. All three judges in the Court of Appeal simply assumed or asserted that X was Vince: 'Did Vince do an act, when he doused himself in petrol? Of course he did' ([106], per Rafferty LJ), 'The fire and the injuries were undoubtedly caused by Vince's own actions' ([136], per Vos LJ), 'Vince clearly knew that he had a can of petrol and a lighter. From what he said, he also was aware that his actions would create a risk of fire and injury' ([143], per Arden LJ).

How do we determine whether X was Vince, or not Vince? Some will be tempted to rely on the dread word 'policy' in reaching a conclusion on this issue; but I don't think we need to take refuge in that. The truth is that taking the position that X was not Vince would involve one in a host of difficulties and contradictions. Two can be pointed out immediately.

First, if X was not Vince, then what basis could we have for saying that the person who was married to the holder of the insurance policy in this case *was* Vince and not X, and that the person who owned the property that made up the estate that was the defendant in this case *was* Vince and not X, and that the person who was married to the widow in this case *was* Vince and not X? If Vince wasn't 'there' when X was confronting Terry, then what basis can we have for saying that Vince was 'there' in any other walk of his life? And if Vince wasn't 'there' in those other walks of life, then what objection can be had to holding the person who *was* 'there' – X – liable for what happened to Terry?

Secondly, if X was not Vince, then for whose or what's sake would any medical professional have been acting in treating X for paranoid schizophrenia and trying to return X to a state of mental health? If X was not Vince because X was a paranoid schizophrenic, then trying to cure that paranoid schizophrenia would have amounted to killing X. So such efforts at a cure cannot be said to have been undertaken for the sake of X. Could they be taken for the sake of a future Vince – the Vince that would exist again and occupy the body currently occupied by X once the paranoid schizophrenia was banished from that body? Maybe – but the idea that it would be good, or even morally urgent, to kill X so as to bring future Vince into existence does have implications, for example, for the questions of (i) whether whether we would think it good, or even morally urgent, to kill X to harvest his body organs for the sake of saving other people's lives, or (ii) whether we would think it good, or even morally

urgent, to deny a woman an abortion for the sake of the future human being that will come into existence if that abortion does not take place. The more straightforward view, surely, is that in treating X for paranoid schizophrenia we would have been doing so because X *is* Vince – someone who was suffering from (in the most literal sense of that term) paranoid schizophrenia and would still have existed, and would have enjoyed a more flourishing existence, had we managed to cure his paranoid schizophrenia.

The truth is that in metaphysics, as in most other things, you cannot have your cake and eat it. You cannot ask to be regarded as ‘you’ in some contexts, and ask to be regarded as ‘not you’ in other contexts if there is no rational distinction between those different contexts. If Vince did not ‘own’ his paranoid schizophrenia – if he attempted to argue that he no longer existed in his paranoid schizophrenic state – then he would have been in danger of losing grip in all aspects of his life of his sense of who he was. It is puzzling how medical professionals – who could in other contexts be expected to encourage people to taking ownership of their conditions to incentivise them to do something about them – were in this context happy to disassociate Vince from ‘his’ paranoid schizophrenia.

(2) *The objective standard of care.* The CA refused to take into account Vince’s paranoid schizophrenia in determining whether or not he had breached the duty of care that he owed Terry. For a good discussion of this point, you should see Goudkamp and Ithoma, ‘A tour of the tort of negligence’ (2016) 32 Personal Negligence 137, 138-43; they find the CA’s reasoning on this point ‘unconvincing’ but set out two possible arguments for why it might be difficult for the courts to take into account someone’s mental incapacity in determining whether they have breached a duty of care: (1) ‘imputing mental disabilities to the reasonable person is incompatible with the very concept of the reasonable person. A reasonable person acts, by definition, for reasons. He is capable of weighing the pros and cons of given courses of conduct. Persons who are sufficiently mentally disordered lack this ability. It is difficult to see how one can speak of the reasonable irrational person without contradiction’; (2) ‘the standard of the reasonable irrational person is in fact no standard at all because it would be impossible for any given defendant to sink beneath it. The idea of a standard of care necessarily implies...that it is possible to fall short of it.’ These arguments are vulnerable to the objection that they assume that a duty of care inevitably requires the person who is subject to it to take the sort of care that a reasonable person would have taken in the circumstances. But there is no reason why a duty of care cannot simply require a defendant to do *his* best to achieve some outcome or avoid acting in a particular way. Had *that* been the duty of care that Vince had owed Terry – a duty to do his best to avoid pouring petrol over himself and trying to set it alight, despite the demons inside him calling on him to do precisely that – would that have been so objectionable? I think the answer is, pretty clearly, ‘Yes, it would.’ In this sort of context, it would have been impossible to determine either what ‘doing his best’ would have meant for someone with Vince’s condition, or whether Vince actually did his best to fight the urges that his condition meant he was subject to. It is very hard to see how the duty of care that Vince owed Terry could have been ‘moderated’ to take into account the difficulties Vince’s condition would have created for him in trying to live up to that duty.

(3) *A defence of insanity?* The CA did not even consider whether Vince’s estate should be able to take advantage of a defence of insanity in this case. The omission illustrates a basic point about tort law – once the courts have found that you have committed a tort, it is very hard to escape being held liable for that tort. Pleading ‘But I only committed the tort because...’ does not really help. There is a big contrast here with the criminal law which recognises the existence some *excuses* which, if made out, allow a defendant who has

committed the *actus reus* of a crime with the *mens rea* for that crime to escape punishment on the basis that ‘You shouldn’t punish me for what I did, because had you been in my shoes you would have acted the same way.’ Why doesn’t tort law allow for the same kind of plea? Again, for a good discussion of this point, see Goldberg, ‘Inexcusable wrongs’ (2015) 103 California LR 467 (also, by the same author, ‘Tort law’s missing excuses’ in Dyson, Goudkamp, and Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015)). Goldberg argues that excuses don’t feature in tort law because tort law is concerned with providing means of recourse to those who have suffered a wrong. Once it has been established that the claimant has been the victim of a wrong, the fact that there may exist an excuse for that wrong is neither here nor there – the mere existence of the wrong entitles the claimant to some kind of recourse against the defendant. If a defendant wishes to escape being held liable in tort, all his efforts have to be devoted to showing (or preventing the court from finding, through whatever procedural arguments are open to him) that he did not wrong the claimant; trying to convince the court that he had his reasons for wronging the claimant, and that we would all have acted on those reasons if we had been in his shoes, is a waste of time.

(4) *Intention and negligence*. One paragraph in Arden LJ’s judgment ([150]) supports a point McBride & Bagshaw have been making since the first edition of their textbook on tort law – that there is absolutely no reason why a given defendant cannot be held liable in negligence for intentionally harming someone. Her example is a defendant who deliberately allows someone to use a path across his garden, knowing that he has put a trap on the path to catch strangers. Our example (5th edition, 95) – invented by Bagshaw – is someone who deliberately allows someone to go down some stairs in the hope that they will put their foot through a rotten floorboard on the stairs.

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