Video Three Exploration

So, you've read *Nettleship v Weston* and watched the first two videos, now we have the chance to think about some tangents from the main issues in the case, which is what this video will briefly do.

1. What did you think about the way the court reasoned through the case? Did you notice how important it was to how the judges reasoned that the implications of any one idea should be tested across the law? The level of care owed to the pedestrian, the passenger and the instructor were all considered. Megaw LJ considered the driver as opposed to the young surgeon or newly qualified solicitor. What comparisons with other activities or professions do you think are most important to how the standard of care expected of the learner driver should be and why?
2. What do you think is the best way to decide who should compensate another for harm caused? Is fault a good place to start everywhere? If the obligation to pay is actually going to be met by an insurance company, should it matter whether the defendant was at fault? If you think about it, fault is usually the most complex fact to prove in a case of negligence:
    a. The fact of a duty to take care of others is normally simple. Some exceptional and difficult situations remain, and others will come up in the future, but for most of daily life we have already established when one person owes a duty to another to take care.
    b. Causing harm to another is also normally clear. Yes, there are exceptional and complex cases in causation, but for the most part of normal events, we are willing to say that, as a matter of law, x event caused y result.
    c. The forms of damage that the law recognises are largely settled. The core of these rules are pretty clear, and certainly personal injury and property damage are covered very clearly.
    d. Thus, the issue left normally for detailed evidence in a negligence claim is what the defendant did that was below the standard of care of a reasonable person. That is, we must prove what the defendant did *and* we must prove that what he did showed care below what a reasonable person would have done. This requires detailed investigation into the facts and events and proving them in court, followed by proving what a reasonable person would have done. That requires a lot of time and money.
3. Even if you think fault is a good reason to require compensation, or one of the right reasons, is it right in all situations? When should a different reason apply? We might wonder whether road traffic situations are special, particularly because the risks of road traffic are, by now, well known. Yes, there are some people who deliberately hurt others through using the road, but most incidents happen without fault or through negligence, not intentionally. We know that across the country a certain number of people are going to be killed, a certain number injured and a lot of property damaged each year. We know that insurance for such incidents is obligatory, and has been since 1930, though we also know that some people brake that law so we require a back-up body, in England's case, the Motor Insurers Bureau, a body made up of the insurance companies, who, by agreement with the Government, provide cover for uninsured and untraced drivers.
4. Once we know about the risks and the certainties of accidents, and we know about compulsory insurance here whereas insurance is not normally compulsory for most daily activities, should we really require fault to be proven? The costs in time and money are high. This means money is spent on lawyers' fees and factual evidence

when it could be spent on compensating victims of torts, or on preventing them, or simply in staying in the pockets of private or public parties. So, what are the benefits of using fault as our reason to make one person pay another, particularly in road traffic cases?

   a. One benefit is that our reason for imposing liability seems clear, fault, but we know there could be other reasons.
   b. Another benefit is that we can say to the defendant that he was at fault, and should have done better. As we know from *Nettleship v Weston*, it may be that the defendant could not have done better, so what are we really saying to defendants? Perhaps most defendants could have done better, but for those who could not take the care of a reasonable person, we can only assume that the message is slightly different, that they are at fault not because they could do better but because fault in their case is not about them personally.

5. Let's consider what other reasons for compensating we might use. We could decide that liability should be based on risks, not on fault. We would not blame the defendant for the harm done, but the defendant would still have to pay. The question might be whether the defendant benefitted from this risk or it was a risk society as a whole should bear. In road traffic cases, one could argue that a no fault compensation system is more appropriate.
   a. That was what a Royal Commission argued in England in 1978, but it was never implemented. It's also what Germany has done for over a hundred years and essentially what France has done for ninety years.
   b. Under such a system, when one driver causes harm to a non-driver, the driver's insurer just compensates the victim without the fault of the driver having to be proven. The same is often true whether the person is a passenger, a pedestrian or a cyclist.
   c. This saves time and money, it makes the system of compensation simpler and avoids the blame associated with describing someone as negligent. The main cost in the system is not related to work in court, but some administration costs for handling the paperwork and some checks to prevent fraud.
   d. That said, there are some problems with this system. Where two drivers are involved, with two different insurance policies and perhaps even two different insurers, fault might still be relevant in deciding how much each should pay. Similarly, such a system might make an exception intentionally inflicted harm or grossly negligent driving. What do you think of an alternative system where compensation for road traffic accidents is based primarily on the risks inherent in motor accidents, not the fault of the defendant driver?

6. Having a system of no fault liability, sometimes called strict liability, for road traffic, is very common in Europe, England is one of the exceptions in not having a system like that. It relies on compulsory insurance of drivers to make sure there is the money to compensate when harm occurs. You have to be insured in case you harm others. This is called third party insurance, because you (the first party) have a contract with the insurer (the second party) in case you harm someone else (the third party). The insurance could be handled by private companies or by a state body. Some countries go further though, and in Sweden and New Zealand they have a much wider system of personal insurance. In New Zealand, you are insured for your own interests, such that if someone harms you, you claim on the insurance, rather than sue the other person in tort. There could be exceptions where you might still bring a tort claim, or the insurance body might bring one in your place after compensating you. Do you think a first party insurance system like the one in New Zealand, where you insure

yourself against harm happening to you is a better system of compensation? It certainly appears to be more efficient, much more of the money in the system goes to victims rather than to pay the costs of running the system. But does it do all of what you think the law should do? Perhaps it does. Why then do so few countries operate such a system?

7. Finally, you may recall that Mrs Weston had been convicted of a criminal offence, of driving without due care and attention. This criminal offence had used a complete objective standard of care. That is, the law did not look at Mrs Weston specifically, just at a driver of a car, and asked what standard this particular driving offence would require. This is not the place to discuss in any detail the criminal law, nor the relationship between tort law and criminal law, even though that is a particular passion of mine. What is interesting is that normally the criminal law is more interested in *subjective* assessments of fault, particularly the choices a defendant makes. We can see this in the norm, for serious offences, of only making defendants who *intended* or who were *subjectively reckless* (i.e., the defendant foresaw the risk of harm and unreasonably proceeded to take the risk anyway). The use of an *objective* standard for this and other offences under the Road Traffic shows that the criminal law also views low level traffic offences as not being in quite the same class even as cases of criminal damage, under the Criminal Damage Act 1971. The other interesting tit-bit of information from the criminal trial was that under the Civil Evidence Act 1968, section 11, the conviction in the criminal court would be evidence of what happened at the time of the accident. This could potentially make proving a civil claim easier, since the claimant would not have to prove all the facts of the incident from scratch. In this particular case, the facts did not appear to be significantly in dispute. Lord Denning went slightly further, and cited a case of his own, *Stupple v Royal Insurance Co* heard just a few months before, suggesting that the criminal conviction would actually be admissible as evidence of negligence, not just of the facts which might amount to negligence. If the criminal law had found *negligence*, specifically, as a part of a criminal offence, what would you think of a civil court deciding that *on the same facts the tort of negligenc*e had not been satisfied? Consider carefully, because the answer might be more complex than you might have thought. In particular, there could be new evidence or other reasons the original conviction was not sound; in road traffic cases, it may well be that the defendant to a criminal charge just accepted a fine and points on his or her license because he or she thought it more effort to contest the case but in a civil trial, for potentially thousands of pounds worth of compensation to pay to another, he or she, or his or her insurers, might have thought different and found new evidence, spent more time on the legal argument and so on.