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Tort LLB

Case Summary

The BBC held a charity event where a well-known rapper “HurriKane” was to make an appearance and perform live. By the end of his performance, it was proposed that he would disappear off the stage as part of the performance. Therefore, the equipment to create an optical illusion was used in particular smoke machines and mirrors. To help operate the stage, a Middlesex University student (Jess) was hired as an assistant. The BBC neglected to hold rehearsals where both Jess and HurriKane would practice the disappearing act. On the day of the performance, due to the lack of practice both HurriKane and Jess went in the wrong direction. This led to HurriKane falling off the stage, and Jess getting severe burns on her face and head as she walked into the smoke machines.

The Tort of Negligence

The scenario that is defined in the case study is one that can be taken into court under the tort of negligence. Negligence within UK tort law is defined as a breach of the “*duty of care*” leading to damages sustained by the plaintiff. To determine whether a defendant is guilty under the tort of negligence, there are a set of stipulations that have to be met. These determining factors have been outlined in “*Donoghue v Stevenson (1932)*.” As stated by “*Lord Atkins*” in the case law, to determine whether the tort of negligence is applicable one can apply the neighbour principles. The case introduced the principle of “*reasonable care*” that obligates an individual to ensure they avoid foreseeable threats/damages to one’s neighbour. To define what constituted a neighbour, Lord Atkins stated that anyone who is either directly or deeply affected

by the conduct of another is their neighbour. Therefore, people and entities alike owe a duty of care to the people within their proximity.

The Caparo Test

This idea was seen applied and further expanded upon in the case of “*Caparo Industries v Dickman (1990)*” where the court established a 3 stage test that determined whether the defendant owed a duty of care to the plaintiff. The Caparo test, as it was later coined, evaluates whether the plaintiff acted in a manner that was reasonable in the context of the events and their foreseeability.¹ Secondly, the test assesses whether there was sufficient or insufficient proximity between the two parties involved. Lastly, the test evaluates the fairness and objectivity of placing the duty of care on the defendant under the given situation.²

Foreseeability in Tort Law

For the defendant to be viewed as guilty under the tort of negligence, foreseeability of the act is a fundamental element. The foreseeability of the damage/harm decides whether the defendant breached the duty of care to the plaintiff as highlighted in “*Bourhill v Young (1943)*.” The case held that if the act that leads to the harm caused to the victim leads to unanticipated results then the instance was not considered as a breach of duty of care. However, when it comes to the notion of proximity the issue seems to be rather complex, consisting of various factors. These include foresight of the harm, economic loss, psychological or sentimental harm among others. There is also an alternative test that is used in cases dealing with negligence claims, where the assumption of responsibility is looked for between the claimant and the defendant. However, the given model is only used in cases where the accused is liable for omissions, economic loss, or false statements.

¹ Caparo v. Dickman, 1990 U.K.H.L. 2 (1990).

² Ibid.

BBC v HurriKane/Jess

The first issue to resolving the case at hand, it is noted that both HurriKane and Jess were under a contract to work with the BBC. Jess shared a more traditional employer-employee relationship with the company, whereas HurriKane was hired as an independent contractor. With the application of the Caparo test, one can assess that the BBC proposed the use of smoke machines during the last performance of HurriKane. Additionally, Jess was specifically hired to look after the activities that would take place on the stage during the performance. Thus, taking part in the activity for both HurriKane and Jess is a legal obligation as per their contracts.³ In the case of Jess, it also comes under the scope of her employment as she is to ensure the stage effects are operational.

Furthermore, considering that the BBC did not opt for any rehearsals prior, and understood that Jess was a novice at operating such mechanisms for creating optical illusions the foreseeability of something going wrong is rather apparent. Similarly, the rapper HurriKane is not a professional illusionist, and most likely has never performed such a stunt. Therefore, it would be reasonable to assume that he would require practice and guidance beforehand. When assessing the requirement of proximity, both of the individuals sustained injuries during the charity event held by the BBC. It is highly likely that a large number of representatives from the company were present at the show. Thus, the issue of proximity is one that is met from that assessment.⁴ Additionally, while the rapper did not sustain physical injuries, the embarrassment that he suffered due to the incident does qualify as his image, and his self-esteem was damaged.

³ Caparo v. Dickman, 1990 U.K.H.L. 2 (1990).

⁴ Ibid.

Lastly, under the Caparo test, the idea of reasonability is assessed. Considering that both individuals were hired by the company for the specific task that leads them to suffer the damages they did, it is reasonable that the BBC be held liable.⁵ Therefore, the BBC does owe both HurriKane and Jess a duty of care. Furthermore, due to the two individuals being inexperienced in how to properly implement optical illusions the principle of “*Imeritia Culpa adnumeratur*,” applies. Therefore, their actions are seen as being reasonable for a person of their competence/experience as noted in “*Phillips v Whiteley*.”

After it is established that the defendant owed the claimant the duty of care, it has to be further assessed whether there was a breach of said duty. Here, the question becomes whether the defendant failed at meeting the lawful standard of care. Within tort law, the standard of care refers to the conduct of an individual or an entity. In “*Glasgow Corporation v Muir*” the “*House of Lords*” stated that to judge whether the defendant failed to meet the standard of care, the reasonable man test should be used. The test is held to be objective, as it takes into account the skills required to meet the standard as well as the level of experience of the defendant. Thus, it will reasonably judge the person based upon their skill level during the time the incident occurred. For instance, a learning driver will not be held to the same standard as an experienced one.

In the given scenario, the BBC is a massive organisation that has most likely held countless concerts with similar prospects. Furthermore, the choice to not have the inexperienced individual rehearse such a crucial moment during the concert is not a reasonable decision. Therefore, the issue at hand is one that was preventable and one that was foreseeable holding

⁵ Ibid.

BBC liable for the injuries that were sustained by Jess, as well as the psychological stress imposed on HurriKane.

Possible Defences

One possible defence for the BBC can be that of “consent,” under the principle of “*volenti non fit injuria*.” Therefore, much like in the case of “*Morris v Murray [1991]*” the plaintiff can argue that both claimants were aware of the risks involved and offered consent. Furthermore, in the case of HurriKane, the defendant can also argue for non-personal injury damage, where per “*Section 14 A(4)(b)*” of the “*Limitation Act 1980*” if the damages are not readily apparent liability can be avoided.⁶ Furthermore, under the “*Civil Liability (Contribution) Act 1978*” the BBC can hold the head of the event as being partially responsible for the harm caused to both claimants.⁷ Thus, the BBC can recover a contribution from the event manager under “*Section 2(1)*” of the Act.

⁶ legislation.gov.uk. Limitation Act 1980. (2020). Retrieved 4 December 2020, from <https://www.legislation.gov.uk/ukpga/1980/58>

⁷ legislation.gov.uk. "Civil Liability (Contribution) Act 1978". (2020). Legislation.Gov.Uk. <https://www.legislation.gov.uk/ukpga/1978/47/contents>.

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