BUSINESS LAW CASE STUDY

[HA 2022 Assessment 2]

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[UNIVERSITY]

Explain what action or actions Lance and Cadella could bring against Parramatta Council. Do not discuss damages.

In order to decide whether the Parramatta Local Council can be accused of tort against Lance and Candella we need to look at the case with respect to each element of the tort as presented in the Civil Law (Wrongs) Act, 2002 and the examples from the common law. In the presented case study the Council had closed the entrance to the park for illegal visitors arriving in car in order to preserve the park's environment. The setting took place near the intersection of the road and the pathway whether cyclist Lance was riding. The Council has the legal right to take steps for the betterment of the society and locality but general understanding of due care and responsibility dictates to us that all hurdles and barriers in the pathway or roads should be accompanied by adequate road side signs and boards warning the visitors and local residents of the nearby obstructions and barriers. It so appears that any of the signs relating to the upcoming chain barrier blocking the entrance to the park not only for the cars but for the cyclists as well. It therefore appears that the Council of the city district had failed to exercise its duty of care as required by the tort laws. The failure to display necessary road signs may have had a direct involvement in the injury suffered by Lance and resulting emotional distress suffered by Cadella. However before arriving at any conclusion we will now look at each element that must be present to prove the claim for the tort of negligence committed by the Parramatta Local Council.

Negligence is basically the failure by one person to take and exercise reasonable due care in performing his legal duties. (Merriam-webster.com 2015). Exercise of prudence and reasonable care ensures that the actions of the person do not harm the other in any way and this is the objective behind the tort laws. The main question that the law would seek to answer in the aforementioned case study is whether the harm suffered by Lance and Cadella can be considered to be a direct result of the failure to exercise duty of care by the Council or did Lance failed to

properly safeguard himself, say by not wearing the proper safety gear while riding bicycle and not taking adequate safety measures while riding. Claim for damages against the Council can only be brought and proved in the favour of Lance and Cadella, if it can be proved that the harm suffered by them was because of the failure to exercise reasonable care and fulfil the duty of care on the part of Parramatta Local Council (Section 40, Civil Law (Wrongs) Act, 2002).

Now let us consider each and every element of the tort of negligence with respect to the presented case.

Duty of Care

Firstly it needs to be proved that the duty of care existed and the Council needed to act in a certain way so that any foreseeable harm or loss of the nearby passing pedestrians and cyclists can be avoided. It is the duty of the road authorities and those empowered to take actions in the public interest should exercise their statutory powers with due care so that any accidents and injuries can be avoided at all costs.

The English case law Caparo v. Dickman sets a great benchmark for testing if the duty of care existed and could have been breached by the party by conducting a threefold test as follows.

Can the risk said to be reasonably foreseeable?	The Council being the sole metropolitan authority is expected to have knowledge of the locality surrounding Macquarie Avenue and should have knowledge that failure to put a chain that can be easily spotted and/or omission to place relevant road side warning signs could result in a gruesome accident.
Can the relationship of proximity said to have	This does not simply means the existence of physical proximity but in fact according to the developments and judgements made

existed between the plaintiff and defendant?	in Donoghue v Stevenson it means, “such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act.” It can be assumed that the Council had the knowledge that the chain placed by them could cause injury if not noticed or seen by the nearby cyclists from a safe distance. Hence proximity relationship existed.
Is it just and fair to impose the liability in the given circumstances?	This depends on the Caparo Test as stated by the Lord Bridge in judgement for Caparo v. Dickman, “What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.”

Breach of Duty

Secondly we need to prove that the duty of care was not exercised by the Council. This is apparent from the facts presented in the case study. What constitutes reasonable and due care is defined by section 42 of the Civil Law (Wrongs) Act 2002 as the level of care that can be

expected to be exercised by the person who is prudent and possesses all the information and knowledge that the defendant is expected to have at the time the incident took place.

There appears to have no evidence at all relating to the placement of proper sign boards attracting the attention of nearby cyclists and pedestrians who may consequently not notice the chain that is of the same color as the footpath and suffer a fall causing injuries. The chain should have been painted in red or green or other prominent colour different from the surroundings so that it can be easily noticed and avoided. It would not be possible for the pedestrians and cyclists to notice the chain that was possible of the same matching color as that of the footpath from the safe distance.

Factual Causation and Contributory Negligence

The chain couldn't be noticed by Lance from a safe distance as a result of which even after the application of sudden brakes he was unable to stop the bike causing the collision resulting in injury. Here are the results of the test that was followed in the Perre v Apand (1999) to prove the factual causation link between the event causing harm and the plaintiff's breach of duty of care.

- The injury suffered by Lance would not have happened if the Council had exercised reasonable care while placing chain barrier.
- Lance riding near the locality was vulnerable by the wrongly placed chain as it approached him all of a sudden.
- Council is expected to have the knowledge of the omission in displaying proper signs along the road where the barrier was installed to stop illegal entries.

- It appears that Lance did took reasonable steps to ensure his safety. He looked left and right before crossing the road side intersection but since the chain was not prominently noticeable he missed it and hit directly into it.

The concept of contributory negligence would come into lay if it can be proved that Lance was not wearing proper safety gear while riding the bicycle or if it can be proved that he was riding at very high speeds which contributed to the causation of accident (Safety and Traffic Management) Act 1999. In case of contributory negligence the Council cannot avoid damages for the part of their contribution to the harm resulting directly from their negligence.

Harm

Lance has clearly suffered from the injuries. However the emotional distress suffered by Cadella seems too remote to develop a factual causation with the act of negligence done by the Council.

Based on the facts and details of the case presented above Lance can proceed to sue the Council for the injury suffered by him due to incorrect and irresponsible installation of the barrier at a very critical place in the locality. The Courts shall in awarding the damages also take into account the degree of care and caution exercised by Lance in the circumstances.

Andrew seeks your advice as to whether Smith would be protected by the clauses in the invoice if Andrew were to take action against Smith's Auto. Answer this question by reference to general principles of common law. Do not consider any statutory provisions you might think relevant.

The legal capacity of the exclusion calluses contained din the invoice billed by the Smith's Autos depend on whether or not they constitute and fulfil all the legal requirements for a valid and binding contract which are as follows:

1. The agreement must be conclusion originating from the offer made by one party and acceptance given by another resulting in their respective promises and the agreement. In this case Smith's Autos has promised Andrew to fix his car in return for the sum of money, which is impliedly accepted by Andrew by leaving his car at Smith's office.
2. Intention to be legally bound by the contract should be present in both the parties in order for the contract to be valid and effectual. This means both parties should have knowledge of the terms they are agreeing to be bound by under the law. The exclusion clause written on the invoice would not form the part of the contract if it is expressly or impliedly not communicated to Andrew. This is so because the parties should be aware of all the terms in the contract and should have intention to be bound thereby.
3. A valuable consideration should be necessarily present in order for the contract to be binding. The respective promise of both the parties are present.
4. Terms of contract should clearly stipulate what the parties expect each other's to perform. There shouldn't be any form of vagueness. (Reuters 2014).
5. Reality of consent.
6. Legal capacity of the parties (Burnett 2001).

The legal validity of the exclusion clauses depend on their physical form that is whether they are stated in the signed documents or unsigned documents. In invoice given by the Smith's autos is assigned document but in nature it is not a contract but merely an acknowledgment of the billed

amount and consequently receipt of the payment in this respect. So the signing or not does not make the exclusion clause binding on the either parties once the services under the contract for the repair of auto cars has already been performed (Causer v Browne, 1952).

Now we need to consider the validity of the sign on the wall behind the counter that says, 'All vehicles are accepted for repair subject to the terms and conditions appearing in our invoice'. It is necessary for such exclusion clauses limiting the liability mentioned on walls, that they should be brought to the reasonable notice of the customers. Based on the facts presented in the case it can be easily said that the exclusion clauses were hardly even noticeable by the customers let alone read by them since it was surrounded by a number of other printed sheets as well. Hence a sign that is not prominently displayed cannot be said to be part of the contract for repairs as a normal customer would be expected to ignore such statements. However if it can be proved that the customer had the actual notice of this statement and how the dealings are conducted.

Constructive notice can be said to be present in situations depending on the extent of business dealings between the parties (Balmain New Ferry Co v Robertson, 1906). Moreover the number of business dealing should be sufficient to prove notice of the exclusion clause. Andrew has been going to Smith' Autos for repairs for the last 7 years, but he pays a visit only twice every year, which amounts to 14 visits in total with big time intervals. In such case it would be considered by the court whether the person involved in dealings could be considered to have notice of the elusion clause based on his dealings and the normal business practices in such repair shops. This is based on the principle that a term can be impliedly included in a contract based on customs and trade usage if those terms are generally accepted by the people conducting dealings in that industry (British Crane Hire Corp. Ltd v Ipswich Plant Hire Lt, 1974). In such a case Andrew would not be entitled to claim damages against Smith's Autos.

However, Andrew can proceed to take legal action against Smith Auto's if he can prove to the reasonable satisfaction that the damage caused to his vehicle was because of violation of terms of usage as the shop manager took his car for personal use where someone ran into it causing the damage.

References

Balmain New Ferry Co v Robertson (1906) 4 CLR 379

British Crane Hire Corp. Ltd v Ipswich Plant Hire Ltd [1974] 2 WLR 856

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Causer v Browne [1952] VLR 1

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