



ANU LAW STUDENTS' SOCIETY

LAWS1203

Torts

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HD (82)

The following causes of action seek to examine how various torts (mainly battery and negligence) seek to protect an individual's right to bodily integrity and to be ensured that measures are taken for an individual's safety.

1. Battery: Tara v Jody

Prima facie, any positive, direct and intentional act causing contact to the P's body is a battery (Marion's Case). It is clear that in this case a battery may have occurred, because Jody's action is positive (she acted: Fagan) and direct because the contact occurred as a direct result of her actions (Hutchins). Her actions were also intentional, as she intended to get Tara in a position of submission, in line with the rules of the game. The real issue to be discussed, however, is whether Tara has consented to this sort of contact by engaging in the sport of wrestling. [✓✓] Wrestling involves engaging opponents physically. Therefore, Jody can escape liability if she argues successfully the defence of consent (Marion's case). It is true that, by engaging in sports, you give an implied consent to the rules of the game (McNamara). Jody would argue then that Tara consented to such contact as she received by engaged in the match. If this is the case, Jody is likely to escape liability. [✓]

However, as McNamara v Duncan is the binding authority here and the facts are analogous, it would be found that Jody's conduct was in excess of what was agreed to in the game. In McNamara, the D was found to have committed battery because his contact with the P was beyond the scope of the rules. Likewise, we are told here that any obstruction to the mouth or nose is in breach of the rules of the game. Therefore, it would be found that Jody is liable and her defence of necessity fails, because of McNamara and the fact that the contact with Tara was outside what was consented to. [✓]

2. Negligence: Tara v Victor

The question here is whether or not Victor, the referee of the match, owed a duty of care (DOC) to Tara. This DOC situation is much like one in existence and largely recognised – the teacher/student relationship (Geyer v Downs). This is because the referee has taken responsibility to ensure that the wrestlers comply to the rules of the game, and has taken the responsibility of the safety of the wrestlers by implementing the rules. Therefore, Victor owes a duty to Tara to ensure her safety. [✓] The real question however if there was an omission. [this is what makes it problematic and means we can't resolve it by reference to foreseeability alone] There will be no duty of care found if Victor can prove that his conduct was a pure omission (Luntz v Humbly): this means that Victor's failure to act is the only relationship between himself and Tara. However, the fact that Victor has taken responsibility for the correct conduct of the rules and therefore the safety of the wrestlers, this is likely to prove that his actions were not a pure omission (Geyer v Downs).

Further, it may be argued that Victor's failure to supervise the match properly (and therefore halting Jody's breach of the rules of the game) occurred within the greater action of providing sport, so will not constitute a pure omission. [✓]

Based on this, it would be possible that a court would find that a DOC did exist, because Victor had taken responsibility for the safety of Jody and Tara by refereeing the match and ensuring that the rules were complied with. Also, the fact that Victor's action was not a mere omission leads us to the conclusion that he had a duty to act. [✓]

The only other factor to be considered however is policy considerations and indeterminate liability. If a court established a DOC, would the class of Ps get so large? (Agar v Hyde) The fact that only referees would be liable for negligent conduct means that indeterminate liability would not be an issue, and there are no constraining policy considerations, such as irreconcilability with statutory duty (Sullivan v Moody). [✓]

Therefore a court would find that Victor owed Tara a DOC. [✓]

3. Negligence: DOC: Tara v Jessica

This is a problematic DOC situation, and it warrants an incremental approach therefore to deciding if a DOC existed.

The first factor that must be taken into account and considered is reasonable foreseeability: was it reasonably foreseeable that if the D was careless in some way, that the class of people of which the P was a member would be injured if care wasn't taken? (Chapman v Hearse) In this case, it may be said that the injury to the class of Ps in wrestling is reasonably foreseeable because:

- Wrestling is a high contact sport, and any carelessness on behalf of the board to conceptualise and implement appropriate rules governing the safety of wrestlers could result in injury of the class of Ps (the wrestlers) [✓]
- It is apparent that the FAW has considered the risks to their wrestlers, based on the motion to implement the rule of 'tapping out'. This proves that the FAW has foreseen reasonably the risks. [✓ - excellent]

The question of reasonable foreseeability in this case is not whether it was r.f. that Tara would receive a neck injury, but whether it was r.f. that if the rules were not adhered to and created for safety purposes, then the class of Ps would be at risk. Based on the above, and Chapman v Hearse, it would be found that the risk in this case to the class of Ps was reasonably foreseeable. [✓]

However, reasonable foreseeability is not enough to establish a DOC situation (Sullivan v Moody). Other considerations must be taken into account.

Control is another issue that impacts on finding a DOC (Modbury v Anzil): did the D have any control over the risks that led to the Ps injury? In this case, it may be argued either way. [✓]

Firstly, the FAW may have had control over the safety of its members by implementing rules to halt serious injury. This could be sufficient to show that the FAW had sufficient control over to prevent the situation which caused injury to Tara. Alternatively, it could be argued that the board had no control over how the rules were administered (Agar v Hyde). This would lead to a no duty situation because they had no control. [✓]

Ultimately, a court would find that the FAW did have control because they could create rules to prevent injuries. The issue of implementation does not apply here because, in this instance, there

was no rule to prevent the harm that occurred in the first place. Therefore the FAW had sufficient control because they could have created a rule to prevent such circumstances. [not sure about this]

Vulnerability of the class of Ps must also be taken into account (NSW v Godfrey). In this case, it is clear that the class of Ps of which Tara belongs, that is female wrestlers, are particularly vulnerable because their safety relies on the implementation of strict rules protecting them. Based on Godfrey, tara's class of Ps would therefore be regarded as vulnerable.

Another issue is the assumption of responsibility. It must be clear that there is a distinction between the assumption and the capacity (Modbury). Here, the board definitely had a capacity to provide safety for the P, but was under no obligation to ensure that accurate measure were taken during a match to ensure safety; that responsibility is up to the referee. Therefore it could be found that there was no assumption of responsibility on behalf of the FAW in this case [registration?]

Specific reliance must also be taken into account – did the P come to rely on the D for a particular task (NSW v Godfrey)? It may be argued either way here. It could be found that yes, the P had relied upon the board for safety during matches, and therefore specific reliance existed. However, it could also be argued that the responsibility of safety relied on by the P was in fact attributed to the referee: the referee was in charge of implementing the rules during a game, and therefore the P had a specific reliance to the referee to provide safety. Based on the latter, a court would not find specific reliance. [✓]

Policy considerations must also be taken into account: would finding a DOC mean that the class of Ps would get so large as to be farcical? In this case, the fact that the FAW has 400 wrestlers under its guise would mean that no duty would be found, because the idea that the board owes a DOC to every member is absurd (Agar v Hyde)/ This factor is the most significant in the incremental approach in the matter, because finding a DOC will come down to indeterminate liability.

Taking all of the above into consideration as to whether Jessica (the FAW) owed a duty of care to the class of Ps which Tara belonged to, a court would find that no duty was owed. This is because of the indeterminate liability that would result (Agar v Hyde), despite finding other factors to exist. Therefore Tara has no claim against Jessica, and her pursuit of damages through negligence would fail as no DOC existed.

A final issue to be considered is why Tara singled out Jessica, not the FAW in total. The answer is that launching a suit against the entire board would be difficult [probably not a legal entity] and we are told that Jessica is the only member with any assets on the board. Agar v Hyde would show us that Tara would in turn sue Jessica solely therefore, as she is the best means to acquire damages.

Therefore, the three claims that Tara could make are in battery against Jody, and negligence against both Victor and Jessica. She is likely to succeed in the first two cases, but fail in the claim against Jessica. [✓ - 82].