

Question 1

An accident is always fatal especially when it happens with a train, the consequences are highly serious since the railway is a public mode of transport in which thousands of people travel at a time. Even a smallest of the mistakes may end up in the loss of hundreds of lives. A majority of the train accidents have been caused due Signal Passing at Danger and negligence of crew members (ARA 2018). However, the reason may differ from country to country. In populous countries like India and China, the majority of the rail accidents are caused due to the unauthorized level crossing (Economic Times 2017).

Before understanding the legal aspects related to the case, let us quickly throw light on why and under what circumstance the event has occurred. As given in the case, the driver (Crew) was tired after the Charismas celebration. He had excess drink resulting in serious hangover on the next day morning. Though the crew was physically unfit for the duty; he had been asked to report the duty. I think that is one of the fundamental reasons for the accident. Before Don being a crew for the train, he is the citizen of Australia. Being Australian he has the right to celebrate the events. However, it is also important for Don to understand that he is in a public service which transports thousands of citizens every day. The safety of those passengers is the critical responsibility of a crew who assumes the duty. Under such circumstances, it is the foremost duty of the crew members to take care of his health and ensure that he or she is fit enough to assume duties and responsibilities. In our case, Don has failed to take care of his fundamental duties for which he deserves punishment from the concerned authorities. He hasn't cared about the safety of the passengers. In fact, physically he was unfit to assume the duty. It is surprising that how NSW Rail Authority has allowed him to drive the train when he was physically unfit. We would say there was no standard check-up before he assumed the duties on 26th Nov 2017.

Considering the above scenario, Don, NSW Rail Authority has legal obligations to face the case in the court of Law. To begin with, an investigation is required to define the

range of duties assigned to the crew member. If a duty of care is not established, the case may not stand in front of the court of law.

The accident occurred between Nowra and Sydney. Nowra falls in the region of New South Wales. Railway Safety National Law No 82a is applicable in this case. The Act has provisions to deal with Alcohol and drug-related matters. Part 3, Division 3.1 explains how to deal with alcohol-related complaints. The Act recommends for alcohol test from an approved entity. The Road Transport Act 1977 Section 6 and 12 provides a few recommendations in this regard. Further, Rail Safety (Drug and Alcohol Testing) Regulation 2008 provides detailed guidelines for this type of situations.

In the case, it is clearly exhibited that the train driver violated Clause 5, Part 2 of Rail Safety (Drug and Alcohol Testing) Regulation 2008. The investigating officers must ensure the blood reports submitted by the approved authority. If the blood reports of the driver disclose the alcohol content in his body, then the driver will be guilty and liable for punishments under Rail Safety (Drug and Alcohol Testing) Regulation 2008.

The maximum penalty and the severity of punishment can be applied based on subclauses (4) and (5)): 20 penalty units. According to the law, the driver can be punished with 10 penalty units or imprisonment for 6 months, or both (if the driver has survived the accident).

Beyond Railway safety regulations, the driver and NSW Rail Authority can be sued under Tort of Negligence, duty of care, Causation and breach of duty. The Act applies to both individuals and the Railway authorities in Australia.

Under this Act, the driver can be sued for not taking reasonable care to avoid the accident. The railway authorities can be sued for not taking reasonable care in choosing a driver. Further, the message should go to the railway authority so they should take care of the following aspects

- Alcohol test before allowing the crew to take care of the train
- Medical test before driving the train
- The condition of the trains

- Mindset and fitness of the driver before allowing them to drive.

The Australian railway authority can be sued big time for the damage caused to the passengers, especially for surviving passengers. The court considers a series of factors to consider the person or authority guilty in the case. For example, the court may go for 'but for' test. Further, the court may consider the recent similar cases before passing the judgments.

Conclusion

No amount of money, government facilities, consolation or compensation can bring the lost lives back and those compensations may never bring back the normal physical conditions to NSW Rescue Squad (Warren and Stev). However, under the law the guilty whether an individual or a concerned authority must be punished for the negligence under the tort of negligence. A huge compensation can be claimed under this provision so that Jack, Jill, Stev, and Warren can take care of themselves for the rest of their lives.

Question 2

Often our friend and family members offer advice on what we can do. A few are good while many are bad. The advice is given based on their personal experiences, viewpoints, and assumption about a particular person, situation or an event. The amount of weight that we would assign for that advice depends on the person to person. However, unsolicited advice puts an individual down when the advice goes wrong.

Before diving deep into the legal aspects, let us be clear about fundamental facts in this case. As given, Samuel and Yusuf are neither business partners nor have any such plans in the future. They are just friends. They did not have any business relationship in the past. They have no plans to start any joint venture in the future. Since Samuel was in Bistro business and Yusuf had an interest in Bistro business, they must have met and held a discussion.

However, nobody can be trusted completely when it comes to a business. Though Yusuf didn't know much about Bistro business, he must have conducted enough

research before getting into bistro business. Simply relying on the worlds of Samuels shows that Yusuf lacked clarity on what he wanted to do. Definitely, an entrepreneur shouldn't take business decisions at that stage of the mindset.

Firstly, the case doesn't fall under the boundary of the Australian Competition & Consumer Commission since the advice offered by Samuel to Yusuf was just a friendly discussion and no contractual relationship exists between the parties. If Yusuf and Ali decide to bring an action against Samuel they should prove that the advice given by Samuel was 'The action for negligent misstatement'.

It is comparatively recent regulation passed especially when *Derry v Peak* (1889) 12 App Cas 337 was found that a negligent misstatement was insufficient to take an action in treachery since non-fraudulent misrepresentation in the absence of contractual agreement was insufficient to establish a duty of care. However, the similar case with *Hedley Byrne & Co v Heller & Partners* was honored by the courts and states that

"The duty will arise whenever a person gives information or advice to another, whether that information is actively sought or merely accepted by that other upon a serious matter... and the relationship... arising out of the circumstances is such that on the one hand the speaker realizes or ought to realize that he is being trusted... to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to seek or accept and in either case to act upon that information or advice."

However, the duty of care cannot be established in this case since there was no contractual agreement. Further, the common law considers the individual as autonomous hence make their own choices and be liable for their choices. In this case, Yusuf and Ali have taken their own decision to buy the Bistro business. However, Yusuf and Ali may attempt to bring Samuels into the case by mentioning competitive behavior and defendant's knowledge about the risk and magnitude of risk. But the knowledge of the defendant and the magnitude of risk are determined by the court's case to case basis. In order to establish the case in the court of law, Yusuf and Ali need to establish some of the important aspects noted below:

Student Name:

Student Number:

- Proof to show that there was a misrepresentation either intentionally or negligently
- Proofs to show the actual loss or damage caused due to the decision was taken based on the advice
- A legal duty must be recognized in the case
- The plaintiff must have suffered material injury
- The existence of a special relationship between all the parties concerned
- Prove the duty of care

Conclusion

If the above-mentioned aspects are proven in the court of law Yusuf and Ali have chances to make claims under Tort of negligent misstatement. Further, it is important to know that in case of Victim is imprisoned due to the hidden intentions of the parties who incurred a loss, and then the court may put Yusuf and Ali behind the bars.

References

- ARA. 2018. *We are the Voice of the Rail Industry*. [ONLINE] Available at <https://ara.net.au/>. [Accessed 7 November 2018].
- Australian Government. 2018. *The organization of Australia's Railways*. [ONLINE] Available at <https://infrastructure.gov.au/rail/trains/background/index.aspx>. [Accessed 7 November 2018].
- PWC. 2018. *gross negligence*. [ONLINE] Available at: <https://www.pwc.com.au/legal/assets/investing-in-infrastructure/iif-49-gross-negligence-feb16-3.pdf>. [Accessed 7 November 2018].
- HG Legal. 2018. *Laws of Rail Accidents*. [ONLINE] Available at <https://www.hg.org/railroad-accidents.html>. [Accessed 7 November 2018].

- Carter. 2015. *Injury Liability Gegette*. [ONLINE] Available at https://www.carternewell.com/icms_docs/231539_Injury_Liability_Gazette_5th_edition.pdf. [Accessed 7 November 2018].
- The Australian. 2018. *Taiwan train driver 'was negligent': court*. [ONLINE] Available at: <https://www.theaustralian.com.au/news/latest-news/Taiwan-train-crash-driver-granted-bail/news-story/56e481f1e816767f03f243a1c35ba038>. [Accessed 7 November 2018].
- Etherington. 2017. *What Is the Tort of Negligence?*. [ONLINE] Available at <http://www.etheringtons.com.au/blog/what-is-the-tort-of-negligence/>. [Accessed 7 November 2018].
- Economic Times. 2017. *why so many train accidents occur in our country*. [ONLINE] Available at: <https://economictimes.indiatimes.com/industry/transportation/railways/a-look-at-why-so-many-train-accidents-occur-in-our-country/articleshow/60199423.cms>. [Accessed 7 November 2018].

