

QUESTION:

KRZ-FM Morning Crew are the most popular local morning radio show and they have built their reputation on high profile stunts, usually exposing those who feel they are the victims of the stunt to ridicule and embarrassment. Community opinion is divided on the two hosts Albie and Barrie, with some adoring their 'in your face' humour and others deriding them as vile parasites lacking either conscience or common sense. A recent morning stunt has left the community even more divided and Albie and Barrie are facing the axing of their show. The loss of a prime time slot may, however, be the least of their problems.

It all began with a campaign asking anyone with an open invitation to those struggling to raise a deposit for their first home loan. The campaign ran for three weeks with participants involved in increasingly extreme stunts to win the coveted prize. Finally, the winner was chosen and Carmen and Dion were told that all they had to do was live in a 'small accommodation' in Rundle Mall for 3 days. During this time they would be asked to undertake some challenges but these were described as 'nothing worse than you have already done.'

After much media hype, the first day of the challenge dawned and a nervous Carmen and Dion met Albie and Barrie in the Mall. It was their understanding that they would be expected to live in a small cubby house under the central canopy (a similar stunt had recently been run by a rival station) and they thought that whilst it might be a little embarrassing, it shouldn't be too taxing.

When they arrived in the Mall they were surprised to see a transparent perspex box suspended just above the ground. They looked around, in vain, for the 'cubby house.' There was a lot of noise and confusion with music playing, the crowd cheering and Albie and Barrie shouting into their microphones. Somehow Carmen and Dion found themselves ushered up the steps and into the box, two Security Guards (Effie and Franco) stepped forward and shut the door to the box, ostentatiously securing it with an oversized padlock. The box was then raised above the heads of the crowds.

Carmen and Dion looked around themselves in some dismay, Carmen suffered from claustrophobia and began to panic. Dion was able to calm her down by focusing her gaze outside of the box and telling her that he was sure it would only be for a short time. They were completely cut off from all of the sound outside as the box was soundproofed and whilst they saw that the show was continuing they were not able to hear anything that was said. Finally, after about half an hour of this Barrie's voice came through a speaker in the wall of the box. He sounded delighted at the progress of the morning and began by asking what they

thought of their 'accommodation.' Carmen said nothing but Dion asked where they were going to spend the 3 days. Barrie laughed and told them that the time would be spent right where they were, Dion explained that Carmen was claustrophobic and that they simply couldn't stay where they were. Barrie simply laughed and told him that they could 'check out' at any time, so long as it coincided with the scheduled 4 hourly 'comfort breaks.'

Upon hearing this Carmen screamed and began knocking on the walls, demanding to be let out. Albie and Barrie simply laughed, assured the crowd that all was fine and promised to allow them to exercise their option to leave – once the full four hours were up. The next three hours were miserable for all involved, Carmen's distress was obvious to all onlookers, and Dion kept shouting out to Albie and Barrie to let them out. Albie and Barrie remained unmoved, everytime Dion called out they simply laughed and told him to calm down, he'd get over it. After an hour of such activity Carmen simply sank to the floor and Dion sat next to her, attempting to reassure her.

At the end of the first four hours the box was lowered and opened, Carmen and Dion were told that they had half an hour comfort break but had to be back in the box after that. Carmen simply walked away and sat on a nearby seat. Dion was furious, he walked over to Albie and said, "you're lucky mate, if my wife wasn't so upset I would make you answer for this here and now. Watch your back mate!"

As Carmen and Dion went to leave, Effie and Franco, who had become distressed at their part in the whole sorry affair, walked towards them, intending to apologise. Carmen began to panic and screaming out 'don't touch me' began to rapidly retreat into the crowd. In her haste and panic she did not take care and elbowed Gregory in the eye, he had been holding a hot coffee which he dropped in shock when he raised his hands to eyes and Halle, seeing the coffee falling towards her baby daughter knocked it out of the way, it then landed on Ion who suffered serious burns.

Advise generally.

Answer:

Carmen and Dion v Albie, Barrie, Effie, and Franco

Carmen ('C') and Dion ('D') may have an action in false imprisonment against Albie ('A'), Barrie ('B'), Effie ('E') and Franco ('F'). The plaintiffs must show that the imprisonment followed directly upon an act by the defendants and that the imprisonment was total. The defendants, to escape liability, may show either an absence of fault on their part, or a lawful justification for the imprisonment: *Myer Stores v Soo* [1991] 2 VR 597.

In *Reynolds v Clarke* (1725) 93 ER 747, it was held that for an act to be considered direct, the purported infringement of the plaintiff's rights must have followed immediately upon that act. The imprisonment of C and D followed immediately upon E and F's closing and locking of the door of the perspex box in which C and D were situated. As such, C and D would very likely succeed in arguing that the closing and locking of the door was a direct act.

Though it is clear that only E and F were physically involved in locking the perspex box, C and D may succeed in implicating A and B in the imprisonment. This argument can be supported by *Myer Stores v Soo*, where it was stated at 617 that where several parties are "active in promoting and causing the detention" then they will be jointly liable for the imprisonment. A and B seem, on the facts, to have organised the event, had a good deal of control over the event, and - though the facts are not altogether clear on this point - to have been actively encouraging or guiding the imprisonment over their microphones as it took place. It seems that A and B may be found jointly liable along with E and F. E and F might even argue, with some chance of success, that they themselves ought not to be liable at all, because they were simply acting at the direction of A and B and exercised no personal discretion. For support they might cite *Dickenson v Waters Ltd* (1931) 31 SR (NSW) 593, in which a police officer was not held liable for a false imprisonment on the grounds that he was simply acting upon information given by another party.

If the plaintiffs had a reasonable means of escape, or if the restriction of the plaintiffs' movement was not total, then the tort of false imprisonment cannot be made out: *Bird v Jones* (1845) 7 QB 742. It seems clear that C and D's freedom of movement was totally restricted by the physical boundaries of the perspex box, and no reasonable means of escaping from the box suggests itself. Hence it seems likely that C and D would succeed in arguing that the imprisonment was total and not escapable by reasonable means.

Intention suffices for fault in an action for false imprisonment: *Myer Stores v Soo*. It seems clear that the act of closing and locking the door of the perspex box was intended to restrict the movement of C and D. It seems very unlikely that the defendants could escape a finding of fault in the form of intention.

It is ordinarily possible for a defendant to escape liability for false imprisonment by showing that the imprisonment was lawfully justified: *Ruddock v Taylor* (2005) 79 ALJR 1534. The defendants would likely argue that they had lawful justification in the form of the plaintiffs' consent, arguing that since C and D knew, through a combination of information provided to them by the station and their own deductions, that they were likely to be required to surrender some portion of their liberty as part of the final challenge, their attendance at the mall could be taken to constitute consent to the imprisonment. This argument would very likely fail. This is because C and D were not truthfully informed of the full details of the challenge, and in particular did not know that they would be entering into a total deprivation of their liberty. It seems likely, then, that the action for false imprisonment would succeed. The remedy would most likely be an award of compensatory damages for the mental anguish and distress inflicted upon the plaintiffs: *Vignoli v Sydney Harbour Casino* [2000] Aust Torts Reports 81-541. The mental anguish suffered by C seems, on the facts, to have been especially severe. Aggravated or exemplary damages may also be awarded at the court's discretion, provided it were held that the defendants engaged in conscious misconduct: *Thompson v Commissioner of Police* [1997] 3 WLR 403.

Albie v Dion

Albie ('A') may have an action in assault against Dion ('D'). A would have to show that D, through a direct act or threat, raised in the plaintiff a reasonable apprehension of imminent battery. D could escape liability by showing that he lacked fault: *Hall v Fonceca* [1983] WAR 309. The element of directness is easily satisfied. D's words with A would very likely be found to fall within the test of directness set out in *Reynolds*. It would most likely be

successfully argued by D, however, that his threat was neither intended to raise an apprehension of imminent battery, nor would have raised such an apprehension in a reasonable person. D would likely argue that this is so because his threat was qualified by his statement that he intended to take no immediate action due to his wife's state of distress. For support in this argument, the defendant could look to the analogous case of *Tuberville v Savage* (1669) 86 ER 684. It is hence likely that A would fail to make out the tort of assault.

Carmen v Effie and Franco

Carmen ('C') may have an action in assault against Effie ('E') and Franco ('F'). It would very likely be found that the act of walking towards C was a direct act under the definition in *Reynolds*. A difficult issue is whether C can show that this act caused a reasonable apprehension. In *Macpherson v Beath* (1975) 12 SASR 174, it was said at 177: "if [a] defendant intentionally puts in fear of immediate violence an exceptionally timid person known to him to be so then the unreasonableness of the fear may not prevent conviction". C could argue that E and F certainly would have been aware of C's timidity towards them, given the preceding events. As such, she might be successful in arguing that even if her apprehension could be said to have been one which a reasonable person in her position would not have experienced, the assault can still be made out if E and F intended to cause the apprehension. To make out an assault, then, the element of intention would have to be present. It seems clear that E and F would be able successfully to argue that they did not intend to raise an apprehension of battery in C. They were, on the facts, intending simply to apologise for their prior conduct. Hence it seems unlikely that the assault could be made out.

Ion v Carmen and Gregory v Carmen

Ion ('I') and Gregory ('G') may each have an action in battery against Carmen ('C'). I and G must show that C, through a direct act, interfered with them physically. C may attempt to avoid liability by showing a lack of fault. As well as the basic test for directness in *Reynolds*, there is a wider test in *Scott v Shepard* (1773) 96 ER 525, which held that a physical interference will be considered to be direct if it arises from the original force of a defendant's act, with any intervening actors acting out of compulsive necessity. The interference with G would likely be found direct under the *Reynolds* test. The interference with I is less clear, though it would likely be found to be direct, having arisen from a chain of events following from the force of Carmen's interference with G, including Halle's act of compulsive necessity. Though in *Scott v Shepard*, those acting out of compulsive necessity acted to save themselves from injury, whereas Halle was acting to save another - her baby - from injury, it would likely be found that the character of Halle's act was sufficiently similar to those of the intermediate parties in *Scott* to justify the application of the precedent.

It seems that C was totally unaware of the risk she posed to I and G, and thus she would likely be able to show that she neither intended the consequences of her actions nor was recklessly indifferent to them. *Williams v Milotin* (1957) 97 CLR 465, however, shows that a battery action can be sustained on negligent fault. The actions would hence likely succeed. Damages would likely be compensatory damages for the plaintiffs' injuries: *Scott v Shepard*. It seems clear that C did not engage in any conscious misconduct, so it is very unlikely that aggravated or exemplary damages would be awarded: *Thompson v Commissioner of Police*.