

TORTS
WINTER SESSION 2008
EXAM Q1 - COMMENTS

| ISSUE | Yes | No | COMMENT |
|--|-----|----|--|
| <p>1.</p> <p>Negligence:</p> <ul style="list-style-type: none"> • CLA: general provisions for duty of care under s.5B(1) • CLA: specific provisions for duty of care • CLA: breach of duty • CLA: causation & damage | | | <p>As the injury occurred on 13/11/07, the student should mention that proceedings for negligence commenced on or after 20/3/02 are subject to the operation of the CLA: s.2 CLA</p> <ul style="list-style-type: none"> - Comment that ss.5B(1)(a) & (c) are similar or the same as the common law requirement that the risk was “reasonably foreseeable”, which codifies part of the common law test: <u>Koehler v Cerebos (Australia) Ltd</u> [2005] HCA 15 (6 April 2005); - Comment that s.5B(1)(b) refers to “not insignificant” which is a double-negative and it is different from “not far-fetched or fanciful” per Mason J in <u>Shirt</u>. - In any event, established category of “occupier’s liability” - Mention ss.5F, G, K & L “obvious risk” & “dangerous recreational activity” - Based on a recent Qld case of <u>Pollard v Trude</u> [2008] QSC 119 so Cadel unlikely to succeed <p>Assuming a duty existed, briefly refer to the application of s.5B(2) by Ipp JA in <u>Waverley Municipal Council –v- Ferreira</u></p> <p>Assuming duty & breach can be established, briefly refer to s.5D (1)(a) & (b) – “factual causation” and “scope of liability”, comparing the common law requirement of “causation-in-fact” and “legal causation” test of remoteness: <u>Wagon Mound No. 1 & 2</u></p> |
| <p>2.</p> <p>Negligent trespass:</p> <ul style="list-style-type: none"> • Onus of proof • Battery: Elements <p>Possibly <i>Wilkinson v Downton</i></p> | | | <p><u>Williams v Milotin</u>: two rights of action may arise from the same facts</p> <p>The student should mention that “intentional acts” are excluded from the operation of the CLA: s.3B(1)(a) CLA except Pt 7, which does not apply to the question. Arguably, “negligent” trespass is subject to the CLA as it is not “intentional”</p> <ul style="list-style-type: none"> - Explain difference if “on” or “off-hwy” case: <u>McHale –v- Watson</u> compared with <u>Venning –v- Chin</u> - Refer to the discussion in <u>Blay</u>; ‘Onus of Proof of Consent in an Action for Trespass to the Person’ Vol. 61 ALJ (1987) 25 <ol style="list-style-type: none"> 1. Intentional/negligent: <u>Hart –v- AG (Tas)</u> 2. Direct: <u>Scott –v- Shepherd</u>; <u>Hutchins –v- Maughan</u> 3. Without lawful justification/consent: consent is not a defence to foul play (<u>McNamara v Duncan</u>; <u>Hilton v Wallace</u>, <u>Giumelli v Johnston</u>) 4. Physical interference: <u>Collins –v- Wilcock</u>; <u>Rixon –v- Star City</u> <p>Intention may be reasonably inferred</p> |

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EXAM Q2 – COMMENTS

| ISSUE | Yes | No | COMMENT |
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| <p>Negligence:</p> <ul style="list-style-type: none"> • CLA: general provisions for duty of care under s.5B(1) • CLA: specific provisions for public authorities • CLA: breach of duty • CLA: causation & damage • Defences: contrib. negligence | | | <p>As the injury occurred on 16/10/07, the student should mention that proceedings for negligence commenced on or after 20/3/02 are subject to the operation of the CLA: s.2 CLA</p> <p>- Comment that ss.5B(1)(a) & (c) are similar or the same as the common law requirement that the risk was “reasonably foreseeable”, which codifies part of the common law test: <i>Koehler v Cerebos (Australia) Ltd</i> [2005] HCA 15 (6 April 2005);</p> <p>- Comment that s.5B(1)(b) refers to “not insignificant” which is a double-negative and it is different from “not far-fetched or fanciful” per Mason J in <i>Shirt</i>.</p> <p>- refer to <i>Crimmins –v- Stevedoring; Sutherland –v- Heyman; Parramatta CC –v- Luntz; Graham Barclay Oysters-v- Ryan</i></p> <p>- Probably not an obvious risk as the area was poorly lit: ss.5F & G: <i>Eutick v City of Canada Bay Council</i></p> <p>- s.42 Resources and responsibilities: ideally students should refer to Ipp JA’s speech on “Slip and Fall” and how rarely the resources defence is proven</p> <p>- s.45 nature strip = “road work”: <i>Porter v Lachlan SC</i> [2006] NSWCA</p> <p>- s.45 “actual knowledge”: <i>North Sydney Council v Roman</i> [2007] NSWCA 27</p> <p>Assuming there is a duty, briefly refer to the application of s.5B(2) by Ipp JA in <i>Waverley Municipal Council –v- Ferreira</i></p> <p>Assuming there is a duty & breach, briefly refer to s.5D (1)(a) & (b) – “factual causation” and “scope of liability”, comparing the common law requirement of “causation-in-fact” and “legal causation” test of remoteness: <i>Wagon Mound No. 1 & 2</i></p> <p>Assuming negligence may be established, there may be contrib. negligence: s.5R</p> |

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EXAM Q3 - COMMENTS

| ISSUE | Yes | No | COMMENT |
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| <p>(a) <u>Alica –v- Dr Craig</u></p> <p>Negligence:</p> <ul style="list-style-type: none"> • CLA: general provisions for duty of care under s.5B(1) <p>CLA: specific provisions</p> <ul style="list-style-type: none"> • CLA: breach of duty • CLA: causation & damage <p>Damages</p> | | | <p>As the injury occurred in Feb 2007, the student should mention that proceedings for negligence commenced on or after 20/3/02 are subject to the operation of the CLA: s.2 CLA</p> <ul style="list-style-type: none"> - Comment that ss.5B(1)(a) & (c) are similar or the same as the common law requirement that the risk was “reasonably foreseeable”, which codifies part of the common law test: <u>Koehler v Cerebos (Australia) Ltd</u> [2005] HCA 15 (6 April 2005); - Comment that s.5B(1)(b) refers to “not insignificant” which is a double-negative and it is different from “not far-fetched or fanciful” per Mason J in <u>Shirt</u>. <p>ss.50 & P: Bolam test & duty to warn</p> <ul style="list-style-type: none"> - Refer to the application of s.5B(2) by Ipp JA in <u>Waverley Municipal Council – v- Ferreira</u> <p>s.5D (1)(a) & (b) – “factual causation” and “scope of liability”, comparing the common law requirement of “causation-in-fact” and “legal causation” test of remoteness: <u>Wagon Mound No. 1 & 2</u></p> <ul style="list-style-type: none"> • Ss.71 (1) & (2) no eco loss for damages for economic loss for: <ul style="list-style-type: none"> (a) the costs associated with rearing or maintaining the child that the claimant has incurred or will incur in the future, or (b) any loss of earnings by the claimant while the claimant rears or maintains the child – unless the child suffers from a disability. • s.16 Non-eco loss – very different from common law as subject to threshold & maximum • ss.12 & 14 – Eco loss max. of 3x average weekly earnings & now use 5% Tables for future eco loss • s.15 – Gratuitous care: <u>Harrison –v- Melham</u> • s.18 – no interest on past non-eco loss or gratuitous care; interest on eco loss based on low 10 yr bond rate • s.21 – no exemplary damages • Out-of-pocket expenses not governed by the CLA |
| <p>(b) <u>Derrick –v- Dr Craig</u></p> <p>Negligence:</p> <ul style="list-style-type: none"> • CLA: general provisions for duty of care under s.5B(1) <p>Damages</p> | | | <ul style="list-style-type: none"> - Comment that ss.5B(1)(a) & (c) are similar or the same as the common law requirement that the risk was “reasonably foreseeable”, which codifies part of the common law test: <u>Koehler v Cerebos (Australia) Ltd</u> [2005] HCA 15 (6 April 2005); - Comment that s.5B(1)(b) refers to “not insignificant” which is a double-negative and it is different from “not far-fetched or fanciful” per Mason J in <u>Shirt</u>. - refer to <u>Harriton v Stephens</u> ; <u>Waller v James (2006) 226 CLR</u> <ul style="list-style-type: none"> - As above, especially s.71(2) CLA |

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EXAM Q4 - COMMENTS

| ISSUE | Yes | No | COMMENT |
|--|-----|----|--|
| <p><u>Dulcie –v- Engelbert</u></p> <p>Negligence:</p> <ul style="list-style-type: none"> • CLA: general provisions for duty of care • CLA: breach of duty • CLA: causation & damage | | | <p>Comment on CLA: s.3B(2) viz. inter alia the CLA tests for negligence apply to motor accidents</p> <ul style="list-style-type: none"> - Comment that ss.5B(1)(a) & (c) are similar or the same as the common law requirement that the risk was “reasonably foreseeable”: <u>Koehler v Cerebos (Australia) Ltd</u> [2005] HCA 15 (6 April 2005); - Comment that s.5B(1)(b) refers to “not insignificant” which is a double-negative and it is different from “not far-fetched or fanciful” per Mason J in <u>Shirt</u>. - In any event, established category of duty of care owed to other road users - Refer to the application of s.5B(2) by Ipp JA in <u>Waverley Municipal Council –v- Ferreira</u> <p>s.5D (1)(a) & (b) – “factual causation” and “scope of liability”, comparing the common law requirement of “causation-in-fact” and “legal causation” test of remoteness: <u>Wagon Mound No. 1 & 2</u></p> |
| <p><u>Dulcie –v- State of NSW</u></p> <p>Negligence:</p> <ul style="list-style-type: none"> • CLA: general provisions for duty of care under s.5B(1) • CLA: specific provisions for mental harm | | | <p>As the injury occurred on 1/1/07, the student should mention that proceedings for negligence commenced on or after 20/3/02 are subject to the operation of the CLA: s.2 CLA</p> <ul style="list-style-type: none"> - Comment that ss.5B(1)(a) & (c) are similar or the same as the common law requirement that the risk was “reasonably foreseeable”, which codifies part of the common law test: <u>Koehler v Cerebos (Australia) Ltd</u> [2005] HCA 15 (6 April 2005); - Comment that s.5B(1)(b) refers to “not insignificant” which is a double-negative and it is different from “not far-fetched or fanciful” per Mason J in <u>Shirt</u>. <p>s.32(1) “normal fortitude” codifies <u>Tame v State of NSW</u></p> |