

TORTS
WINTER SESSION 2009
EXAM Q1 - COMMENTS

ISSUE	Yes	No	COMMENT
CLA			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 apply to the question re self-defence
Vicarious liability			Comment that Motown Security Services was vicariously liable for the tortious acts of Tito as its employee committed in the course of his employment: <i>Lepore v NSW</i> (2003) 212 CLR 511
Battery			<ol style="list-style-type: none"> 1. Intentional/negligent: <i>Hart v- AG (Tas)</i> 2. Direct: <i>Scott v- Shepherd; Hutchins v- Maughan</i> 3. Without lawful justification/consent: consent is not a defence to foul play (<i>McNamara v Duncan; Hilton v Wallace, Giumelli v Johnston</i>) 4. Physical interference: <i>Collins v- Wilcock; Rixon v- Star City</i>
Assault			As above with the x factor of apprehension of imminent physical interference: <i>Tuberville v Savage; Hall v Fonceca</i>
Possible Trespass to Goods or Conversion			- Assuming Michael possessed the car. Unclear on the facts but a surprisingly high number of students raised the issues
Onus of proof			<ul style="list-style-type: none"> - Explain difference if “on” or “off-hwy” case: <i>McHale v- Watson</i> compared with <i>Venning v- Chin</i> - Refer to the discussion in <i>Blay</i>; ‘Onus of Proof of Consent in an Action for Trespass to the Person’ Vol. 61 ALJ (1987) 25
s.52 CLA, especially the subjective/objective test in s.52(2)			<p>If the student did not analyse s.52(2) in detail, there is a subjective (“...believes...” & “...perceives...”) / objective (“...reasonable response...”) test.</p> <p>It is very different from the objective test at common law. As a hybrid test it is difficult to interpret but as the subjective element of the test is so novel, s.33 of the Interpretation Act 1987 requires us to not simply read it down.</p> <p>Perhaps it operates in this way:</p> <ol style="list-style-type: none"> 1. Look at the D's subjective beliefs and perceptions; 2. Then consider whether those beliefs/perceptions were "reasonable" in the circumstances. <p>That approach is consistent with Howie J's interpretation of similar provisions in criminal legislation: see <i>R v Katarzynski</i> (2002) NSWSC 613</p> <ul style="list-style-type: none"> - If s.52(2) operated in that way, it would account for a D who was not of sound mind or intoxicated.
s.53(1)(a) & (b) CLA			<p>If the student did not define "exceptional" and "harsh and unjust", the terms are not defined in the Act so s.34 of the Interpretation Act 1987 requires us to, inter alia, look at the ordinary meaning of the words. In this instance, you may either refer to <i>Hansard</i>, a legal words & phrases dictionary or a normal dictionary.</p> <p>s.53(1)(a) & (b) is a 2 limb test and BOTH must be satisfied as the word "and" is used.</p>
s.53(2)			<p>If the student did not identify, s.53(2) may end up as the Ds' best (or only) avenue to prevent or restrict damages.</p> <p>Note: s.3 of the Act defines non-eco loss. It does not include exemplary/punitive damages as some students have stated.</p>
s.54(1) & (2)			"Serious offence" and "offence" are criminal terms so reference should be made to the criminal law to confirm whether P's actions are covered by the provisions. Also, it is not correct to say that s.54(2) applies simply because D is liable for assault/battery as they are civil wrongs. An "offence" is a criminal wrong
Provocation			Not a defence but worthwhile mentioning the debate – see Sam's article

TORTS
WINTER SESSION 2009
EXAM Q2 - COMMENTS

ISSUE	Yes	No	COMMENT
<p>(a) <u>Samu –v- Shooter</u></p> <p>CLA</p> <p>Battery:</p> <p>Assault:</p> <p>Onus of proof</p> <p>Possibly Trespass to Goods or Conversion</p>			<p>Mention s.3B(1)(a) except Pt 7 – even though does not apply to these facts</p> <ol style="list-style-type: none"> 1. Intentional/negligent: Hart –v- AG (Tas) 2. Direct: Scott –v- Shepherd; Hutchins –v- Maughan 3. Without lawful justification/consent: <i>Murphy v McMurchy</i> 4. Physical interference: Collins –v- Wilcock; Rixon –v- Star City <p>As above with the “x factor” of apprehension of imminent physical interference: <i>Tuberville v Savage</i>; <i>Hall v Fonceca</i></p> <ul style="list-style-type: none"> - Explain difference if “on” or “off-hwy” case: <i>McHale –v- Watson</i> compared with <i>Venning –v- Chin</i> - Refer to the discussion in <i>Blay</i>; ‘Onus of Proof of Consent in an Action for Trespass to the Person’ Vol. 61 ALJ (1987) 25 <p>If the student assumed the shooter damaged Samu’s car – unclear on the facts</p>
<p>(b) <u>Samu –v- Levuka Security</u></p> <p>Vicarious liability</p> <p>Negligence:</p> <ul style="list-style-type: none"> • General provisions for duty of care • Breach of duty • Causation & damage 			<p>Comment that Levuka Security is vicariously liable for the tortious acts of its employees committed in the course of his/her employment: <i>Lepore v NSW</i></p> <p>As the injury occurred at work then the CLA does <u>not</u> apply: s.3B(1)(f) CLA</p> <ul style="list-style-type: none"> - Common law requirement that the risk was “reasonably foreseeable”: <i>Koehler v Cerebos (Australia) Ltd</i> [2005] HCA 15 (6 April 2005); - Comment that the risk was “not far-fetched or fanciful” per Mason J in <i>Shirt</i>. In the circumstances of the violent scuffle, the damage to Samu’s car, the availability of other security staff inside and the opportunity to re-locate Samu to work inside, the risk of further attack to Samu was reasonably foreseeable: <i>see PAB Security Pty Ltd v Mahina</i> [2009] NSWCA 125 - In any event, established category of “master/servant”: <i>Stevens v Brodribb Sawmilling Company Pty Ltd</i> (1986) 160 CLR 16 <p>Apply the <i>Shirt</i> Test/Calculus: balance the magnitude of the risk and probability of its occurrence with expense, difficulty and inconvenience of taking alleviating action.</p> <p>“Causation-in-fact” and “legal causation” test of remoteness: <i>Wagon Mound No. 1 & 2</i></p>

**TORTS
WINTER SESSION 2009
EXAM Q3 - COMMENTS**

ISSUE	Yes	No	COMMENT
CLA			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
Vicarious liability			Comment that NSW Police are vicariously liable for the tortious acts of its employees committed in the course of their employment:
Trespass to Land			<ol style="list-style-type: none"> 1. Intentional/negligent: Hart –v- AG (Tas) 2. Direct: Scott –v- Shepherd; Hutchins –v- Maughan 3. Without lawful justification/consent: consent is not a defence to foul play (<i>Halliday v Nevill</i>; <i>Plenty v Dillon</i>) <i>See Kuru v State of New South Wales</i> HCA 26 (12 June 2008) – implied licence revoked 4. Interference with the exclusive possession: <i>Bernstein of Leigh v Skyways & General Ltd</i>; <i>Kelson v Imperial Tobacco</i>
Assault			As above plus “x factor” of apprehension of imminent physical interference: <i>Tuberville v Savage</i> ; <i>Hall v Fonceca</i>
Battery			As above plus “x factor” of apprehension of physical interference: <i>Collins –v- Wilcock</i> ; <i>Rixon –v- Star City</i>
False Imprisonment			As above plus “x factor” of apprehension of total restraint: <i>Bird v Jones</i> ; <i>Symes v Mahon</i>
Onus of proof			<p>Explain difference if “on” or “off-hwy” case: <i>McHale –v- Watson</i> compared with <i>Venning –v- Chin</i></p> <p>Refer to the discussion in <i>Blay</i>; ‘Onus of Proof of Consent in an Action for Trespass to the Person’ Vol. 61 ALJ (1987) 25</p>
Private Nuisance			<p><u>Title to sue</u>: owner or tenant with rights in or over the property: <i>Oldham v Lawson</i>;</p> <p><u>Interference with the use and enjoyment of the land</u>: <i>Munro v Southern Dairies</i>; <i>Thompson-Schwab v Costaki</i></p>
Self-defence: s.52 CLA			<p>If the student did not analyse s.52(2) in detail, there is a subjective (“...believes...” & “...perceives...”) / objective (“...reasonable response...”) test. It is very different from the objective test at common law. As a hybrid test it is difficult to interpret but as the subjective element of the test is so novel, s.33 of the Interpretation Act 1987 requires us to not simply read it down. Perhaps it operates in this way:</p> <ol style="list-style-type: none"> 3. Look at the D's subjective beliefs and perceptions; 4. Then consider whether those beliefs/perceptions were "reasonable" in the circumstances. <p>That approach is consistent with Howie J's interpretation of similar provisions in criminal legislation: see <i>R v Katarzynski</i> (2002) NSWSC 613</p> <p>Although <i>Sirius</i> made “contact” with an officer, he was outnumbered and the punches and capsicum spray were not “reasonable” in the circumstances</p>
Damages			<p>Comment that restricted damages under CLA does not apply: s.3B(1)(a). However, if Pt 7 applied – which it does not on these facts - then s.53(2)(a) may operate to restrict damages under CLA even though there was an “intentional act”.</p> <ul style="list-style-type: none"> - General damages (ie. Past & future pain & suffering, loss of enjoyment of life etc) - Economic loss (past & future; includes loss of wages/loss of super/loss of opportunity: <i>Malec –v- Hutton</i>); use 3% Tables to assess future eco loss - Out-of-pocket expenses (past & future treatment expenses) - Gratuitous care: <i>Griffiths –v- Kerkemeyer</i> (past & future) - Interest on past heads of damage referred to above; Supreme Court of NSW rates [Schedule J – currently 9% pa] for past eco loss but see <i>Gogic</i> re general damages - Exemplary damages: available most likely in this case

TORTS
WINTER SESSION 2009
EXAM Q4 - COMMENTS

ISSUE	Yes	No	COMMENT
<p>Vicarious liability</p> <p>Negligence:</p> <ul style="list-style-type: none"> • CLA: general provisions for duty of care under s.5B(1) • CLA: specific provisions • CLA: breach of duty • CLA: causation & damage • Contributory negligence 			<p>Comment that the Department is vicariously liable for the tortuous act of Slim as its employee committed in the course of his employment</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: <i>Koehler v Cerebos (Australia) Ltd</i> [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 <i>Shirt</i>. - <i>Negligent misstatement: Lutz –v- Parramatta CC Shaddock –v- Parramatta CC</i> - Public authorities: <i>Graham Barclay Oysters Pty Ltd v Ryan</i> (2002) 211 CLR 540; <i>Perre v Apand</i> - s.42 Resources and responsibilities - s.43 Proceedings based on a breach of statutory duty - s.43A Proceedings based on the exercise of special statutory powers - s.44 Failure to exercise regulatory powers <p>see <i>RT & YE Falls Investments Pty Ltd v State of New South Wales</i> [2007] NSWCA 18</p> <p>Refer to the application of s.5B(2) by Ipp JA in <i>Waverley Municipal Council –v- Ferreira</i></p> <p>Failure to exercise a statutory duty: <i>Lutz –v- Parramatta CC</i> : <i>Sutherland SC –v- Heyman</i></p> <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: <i>Wagon Mound No. 1 & 2</i></p> <p>s.5R and possible 100% discount although unlikely re <i>Wynbergen v Hoyts</i></p>