

Examiner's Report
Torts, Summer 2013-14
Clary Castrission

The purpose of this report is not to give the answers to the questions themselves but to indicate what the examiner was looking for in the answers. The actual answers are attached to this report as Appendix A.

Overall,

- To **pass** each question, students had to identify the correct cause of action and show some application of the facts to the law.
- To be rewarded a **credit**, students had to satisfy the requirements of a pass, and show good application of the facts to the law
- To be rewarded a **distinction**, students had to satisfy the requirements of a credit, and also identify and show great insight into the key issues.

For the subject overall, the highest mark was **85%**. The average mark for the subject overall was **56%**.

The marks distribution for the exam was as follows:

Distinction	13
Credit	19
Pass	27
Fail	18

Question One:

Highest Mark: 28/30

Lowest Mark: 1/30

Average mark: 19.22

Before discussing the particulars of each part of this question, it is necessary to make a general comment about the students' approach to the question. The best answers came from students who were able to not only meet all the elements, but were able to identify which elements needed more comprehensive discussion and analysis and then spend sufficient time indulging in this. Students who simply listed, as a shopping trolley, the elements of negligence with no real analysis of the issues or certain facts were given passes, and sometimes fails if they did not engage with the facts at all.

With regard to Lance's action against the council, the contentious parts of the question were around the scope of duty and the defences available to the council. With regard to duty of care, it was acceptable to arrive at its establishment through a number of different methods. Under exam conditions, this could have done through a discussion of sections 41-45 of the *Civil Liability Act*, incrementally expanding the occupier's duty to councils, or possibly an extension of the roads authority duty expressed in *Dederer's* case. Those students who engaged with the council authorities limitations under the *Civil Liability Act* were rewarded.

Breach required the student to apply the calculus of negligence, as per s5B of the *Liability Act*. Whilst not contentious, the breach stage required the student to really engage with the facts and use case law to assess, in particular, the possible seriousness of harm and likelihood of occurrence. The more analytical the student was in applying the law to the facts, the more the student was rewarded. There was no issue with causation.

It was very important to consider two defences available to the council- both contributory negligence and the assumption of risk. Overall, this was not done well. Students often left it out all together, or did not give enough detail. In particular, when it comes to the risk provisions under the *Civil Liability Act*, it was necessary for students to make judgments about whether the risk was or was not obvious or inherent, as was done in *Wells v Council of the City of Greater Taree v Wells*.

Causation was not a contentious issue in this question.

Students were then required to advise Cadella's claim against the council for pure mental harm. A lot of students seemed to get confused as to how to apply the *Civil Liability Act*, and many ignored it all together and just cited the *Tame* and *Annetts* cases as their authority. Students were required to address the issues of Cadella arriving at the scene 'a couple of minutes' after the accident, as well as the issue of Cadella being Lance's wife.

Question Two:

Highest Mark: 9/10

Lowest Mark: 2/10

Average Mark: 6.50

This question was clearly a case of private nuisance. Students who tried to establish this situation as trespass to land failed the question. The loss of enjoyment interferences in this case was the smell. Students could demonstrate their knowledge best here in the way they balanced the right of Lleyton to carry on his business in a semi-rural environment against Roger's right to quiet enjoyment of his land. Students should have approached the task by discussing issues such as locality (*Munro*), duration (*Wherry*), and other alternatives.

In the second part, firstly the student had to go through the cases of *Oldham v Lawson*, *Khorasandjian v Bush* and *Hunter v Canary*. Students were required to conclude that given the tort of nuisance is a land-based tort, then only people who have a legal or equitable right to the land can make a claim. This was made abundantly clear in lectures. Students were rewarded if they went as far as saying that this issue hasn't been considered in Australia yet, and only the Victorian authority of *Stockwell v Victoria* has applied *Hunter*.

Question Three:

Highest Mark:

Lowest Mark:

Average Mark: 12.00

This question tested the student's grasp of intentional torts. In the first part, the case of Scott against Sheers, the establishment of the intentional tort of battery was not

contentious, particularly the act of Sheers punching Scott in the face. No students should have spent any significant amount of time on establishing this. The marks for this part lay in the students' ability to navigate the defence of illegality, established under the *Civil Liability Act*. Overall, this was done poorly. The students were instructed in the lectures that, whilst difficult to grasp, the operation of section 3B excludes the application of the Act, except (in part) for illegal activities. That means that the Act still is applicable for intentional torts, as was the case in this set of facts. Students who were able to properly explain why the act was applicable, then who addressed ss 52-54 were rewarded.

The second part tested the ability of the student to identify a range of intentional torts that Sheers might action against Lorraine. It was important to go through each tort in turn, and address the elements of each. The most contentious issue in this question was about establishing the tort of assault by conditional threat, as Sheers could not see the knife.

APPENDIX A
TORTS SUMMER 2013-14
Marking Guideline

Question One

Lance v Parramatta Council

ISSUE	COMMENT
DOC	<ul style="list-style-type: none"> - Define the duty: council to road users. - category: could come from an extension of the roads authority (s42), or occupier's liability
Breach	<ul style="list-style-type: none"> - define the scope of the duty: that the council must take reasonable care to avoid the risk of a cyclist foreseeably hurting themselves after hitting the chain. The Council was entitled to place the chain there, but when doing so, it had to ensure that it was done with reasonable care. - S5B(1)- was risk foreseeable and not insignificant? (apply Shirt) <ul style="list-style-type: none"> o Chain was same as the ground beneath it. o Chain difficult to see (didn't see it until 10 ft away) - S5B(2)- would reasonable person take steps to avoid? <ul style="list-style-type: none"> o perform calculus from s5B: likelihood and seriousness v cost of taking precautions (here, could have painted it different colour, put warning side)
Causation	- no real issue here.
Defences	<p>Obvious Risk</p> <ul style="list-style-type: none"> • s5F- meaning of obvious risk. Explain why it is or not an obvious risk- look to: <ul style="list-style-type: none"> o speed, colour. Consider that the rider should expect conditions to change. • s5G- presumption of awareness of obvious risk • s5H- no duty to warn of obvious risk <p>chain very easily missed by reasonable person.</p> <ul style="list-style-type: none"> - Recreational activities: s5K (defines recreational activity). Not applicable here because it's nothing about a lack of risk warning. <p>CN- could have been riding slower.</p> <ul style="list-style-type: none"> - Firstly, was the P negligent himself? Going too fast? S5R (same test for negligence) Did he fail to take reasonable care for himself? He did slow down.

Cadella v Parramatta Council

ISSUE	COMMENT
Recognized psychiatric illness	- s31 (no issue here)
Duty of care	<ul style="list-style-type: none"> - s32: <ul style="list-style-type: none"> o 2(a)- sudden shock (suffered a number of weeks later) o 2(b) at the scene (she arrived a couple of minutes later) o 2(c)- relationship- here they were married.
Recovering damages	- s30- here, P is a close member of the family (s30(2)). No problem

Question Two

Scott v Sheers

ISSUE	COMMENT
CLA	The student should mention that “intentional acts done with the intent to cause injury” are excluded from the operation of the CLA: s.3B(1)(a) CLA except Pt 7, which does not apply to the question
Battery- 2 counts: tripping then hitting him in face three times	<ol style="list-style-type: none"> 1. Intentional or negligent act: <u>Morris -v- Marsden</u> or <u>Hart -v- AG of Tasmania</u>; ‘meant to do it’: <u>McNamara v Duncan</u> 2. Direct: <u>Scott -v- Shepherd</u> or <u>Hutchins -v- Maughan</u> 3. Physical interference: <u>Collins -v- Wilcock</u> or <u>Rixon -v- Star City</u> 4. Without lawful justification: <u>Wilson -v- Marshall</u>
Defence of illegality “Serious offence” committed by the defendant: s54	<ol style="list-style-type: none"> 1. CLA applies for intentional acts done with intent to injure for illegal acts: s3B 1. Immunity <i>from damages</i> under s54: Ordinarily, the plaintiff unable to claim damages against the defendants. Two main issues: <ol style="list-style-type: none"> a. Injury sustained by plaintiff “at the time of, or following” conduct that (on balance of probabilities) was a serious offence: s54(1) (larceny would be the serious offence) b. However, where the defendant’s action constitute an offence (serious or not), plaintiff can recover damages: s54(2). Defendant here committed assault occasioning actual bodily harm: s59 <i>Crimes Act 1901</i> (this is a serious offence under s54 CLA, as it carries 5 years imprisonment on its own). These damages are limited by defenses under s52 and s53 CLA.
s52 CLA-self-defence	<ol style="list-style-type: none"> 1. Explains that the doctrine of self-defence applies to the protection of property: s52(2)(c) CLA 2. Explains that given the defendants were acting in self-defence, they are prima facie immune to liability if the response was reasonable: s52(2) . 3. Here, the response by the defendants was potentially not reasonable (extra three punches to the head): see <i>Presidential Security Services of Australia Pty Ltd v Clinton Joseph Brilley</i> [2008] NSWCA 204 (9 September 2008)
s53 CLA	<ol style="list-style-type: none"> 1. Identifies that the defendants’ reaction was potentially unreasonable (beating plaintiff for over an hour, forcing plaintiff to kneal and beg for mercy). 2. For s53 to be invoked, the case must be “exceptional” and it must be “unfair and unjust” not to award damages: s53(1).

Sheers v Lorraine

ISSUE	COMMENT
Battery- the drive-off and the slamming the brakes	<ol style="list-style-type: none"> 1. Intentional or negligent act: <u>Morris -v- Marsden</u> or <u>Hart -v- AG of Tasmania</u>; 'meant to do it': <u>McNamara v Duncan</u> 2. Direct: <u>Scott -v- Shepherd</u> or <u>Hutchins -v- Maughan</u> 3. Physical interference: <u>Collins -v- Wilcock</u> or <u>Rixon -v- Star City</u> 4. Without lawful justification: <u>Wilson -v- Marshall</u> <p>Where there is battery, there is usually also assault. Was this the case as the car continued to drive?</p> <p>Possible negligent act: <u>Williams -v- Milotin</u> (can frame an action in negligence and trespass)</p>
False Imprisonment- driving the car whilst he was hanging out the window.	<p>P to prove</p> <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. Total restraint/No reasonable means of escape: <u>Zanker -v- Vartzokas</u>; <u>Burton -v- Davies</u>
Assault- the threat	<ol style="list-style-type: none"> 1. Apprehension of immediate physical contact: <u>Stephens -v- Myers</u> 2. Act must be intentional: <u>Rixon -v- Star City</u> 3. Apprehension of contact was reasonable: <u>Barton v Armstrong</u> 4. Without lawful justification <p>Can the threat actually be carried out? <i>Tuberville v Savage</i>.</p> <p>Could he comply with the condition? Here, no- not only because his hand was stuck, but also because the car was moving: <i>Police v Greaves [1964] NZLR 295</i> (unacceptable demand)</p>

Question Three

Roger v Lleyton

Establishment of Nuisance	<ol style="list-style-type: none"> 1. Nuisance is a tort of interfering with LAND: <i>Munro v Southern Dairies</i> 2. Interference with someone's land- can be MATERIAL, or mere LOSS OF ENJOYMENT: <i>Halsey v Esso Petroleum</i> 3. Balance interests: here, it's Kurtley's right to a living against Berrick's right to enjoy his farm: <i>Colls v Home and Colonial Stores</i>. Look to <ul style="list-style-type: none"> o Locality: <i>Munro</i> (here, it is semi-rural) o Duration: <i>Wherry v KB Hutchison</i> (here continuing) o Nature of activity: <i>Thomson-Schwab v Costaki</i> (here, agricultural uses were allowed without further approval)
Who Can Sue?	Must have proprietary interest in land: <i>Malone v Laskey</i>
Who can be sued?	The creator of the nuisance: <i>Fennel v Robson Excavations</i>
Defences	Consent? None.
Remedies	<ul style="list-style-type: none"> • Abatement <p>Injunction more likely than damages given severity.</p>

Casey v Lleyton

Establishing nuisance	<ul style="list-style-type: none">- Oldham v Lawson- Khorasandjian v Bush- Hunter v Canary- Not clear in Australia (other than Stockwell v Victoria)
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