

**TORTS**  
**MARCH 2013**  
**EXAMINERS COMMENTS**

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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 **86%**, and the lowest mark (that sat the exam) was **33%**.

**Question One:**

*Highest Mark: 26/30*

*Lowest Mark: 11/30*

*Average: 19*

Mrs Simpson had a potential claim against Springfield Elementary School in negligence. The contentious elements of the question concerned the duty of care, causation and the defences available to the school. Duty of care was not an issue because an occupier of land has an established duty of care towards entrants: *Zaluzna*. Students who spent a lot of time spelling out the theory towards duty of care often ran out of time to cover the other more contentious issues with due diligence.

Concerning the breach, proper discussion was required towards the calculus of negligence under s5B of the *Civil Liability Act*. Disappointingly, some students did not use the Act as the proper authority, referring rather to the common law exclusively. Proper discussion was required around whether the steps taken by Groundskeeper Willy constituted "reasonable care." This is a question of fact, and to get a distinction, it required deep analysis of the facts. Groundskeeper Willy did not remove the old paint before applying the new coat and RTA-approved paint was not used. Students needed to address these on the facts and come to a conclusion about whether this fell short of the standard of care required by the reasonable person.

With regard to defences, the student was required to navigate the *Civil Liability Act's* risk provisions. In essence, the student was required to explain whether or not slipping in the dark when it is wet is an obvious risk. Discussion about whether Mrs

Simpson herself was contributorily negligent because of her wearing high heels when the wet needed to be touched upon.

The other part of the question was regarding Mr Simpson's mental harm claim against the school. This did not require a lot of discussion as he was a close family member.

### **Question Two**

*Highest Mark: 18/20*

*Lowest Mark: 4/20*

*Average: 13/20*

This question asked the student to demonstrate understanding of the intentional tort of battery, as well as the professional negligence provisions under the *Civil Liability Act*.

Firstly, the student had to address the issue of Dr Phil removing the tattoo. This was clearly a case of battery, with the contentious issue being around lawful justification. The facts made it clear that there was no consent extended to the removal of the tattoo. This issue was overall discussed briefly and well by the students.

The second, and more difficult issue, was the professional negligence. Both provisions of the *Civil Liability Act* (ss 50 and 5P) were tested. The risk warning that Dr Phil was not particularly contentious (s5P), as proper warning of the materialization of DVT was given to Wayne. The more contentious issue was about the action taken by Dr Phil with respect to the clexane. The law under s50 requires a doctor to act in a manner widely accepted in Australia as competent professional practice. Two conflicting authorities were placed in the question to test the student's understanding of the application of this provision. The student who scored the better mark was the one who distinguished the authority that Dr Phil relied on as an older, *American* authority.

### **Question Three:**

*Highest Mark: 9/10*

*Lowest Mark: 2/10*

*Average: 6/10*

There were also two issues that needed to be discussed in this question. The first was the issue of nuisance associated with the smell. The second issue was the possible action that Ronald had against Jackie for the conditional threat "Go away right this minute or I will punch you in the face."

When it comes to nuisance, students are required to show their ability to analyse the facts, as the law is straight forward. Quite a number of students incorrectly applied *Hollywood Silverfox* in this case. The aforementioned case is authority for the fact that an act that would otherwise not constitute nuisance can constitute nuisance if it is done with malicious intent. Here, for the facts of *Hollywood* to apply, it would have had to be **Ronald** who acted maliciously, not Jackie.

With regard to the conditional threat, it was a straightforward application of the law of assault. Disappointingly, a number of students missed this issue entirely, either because they ran out of time or they thought the issue only concerned nuisance.

**Appendix A: Marking Guideline**

**Question One**

**(a) Mrs Simpson v Springfield Elementary School /20**

ISSUE	COMMENT
DOC - Engagement with duty	<ul style="list-style-type: none"> <li>- Define the duty: occupiers of land to entrants: <i>Zaluzna</i></li> <li>- No discussion needed here as it is a recognized category.</li> </ul>
Breach - look at way scope is defined - see way they run through calculus	<ul style="list-style-type: none"> <li>- define the scope of the duty: that the school must take reasonable care to avoid the risk of a school visitor hurting themselves after when crossing a road in a way the school directed.</li> <li>- S5B(1)- was risk foreseeable and not insignificant? (apply Shirt)               <ul style="list-style-type: none"> <li>o Risk that someone could slip on poorly painted pedestrian crossing is not insignificant.</li> </ul> </li> <li>- S5B(2)- would reasonable person take steps to avoid?               <ul style="list-style-type: none"> <li>o Here, school used had repainted the pedestrian crossing only 2 years before. May not have been painted properly (old paint not removed properly, may have been issue with the outdoor paint used- not the same as the RTA one).</li> <li>o perform calculus from s5B:                   <ul style="list-style-type: none"> <li>▪ likelihood (facts say this road had frequently been travelled, but does not say if there had been injury before).</li> <li>▪ Seriousness (not too high- slipping whilst walking could lead to breakages but not grave danger).</li> <li>▪ Cost of taking precautions (here, could have removed old paint properly which would have taken time, and used the paint the RTA uses- don't know if that would have been more slip-resistant though)</li> </ul> </li> </ul> </li> </ul>
Causation - needs to discuss factual causation.	<ul style="list-style-type: none"> <li>- What caused the slip? Facts do not make it clear.               <ul style="list-style-type: none"> <li>• Mrs Simpson said painted sections were very slippery. Did she actually slip on a painted section though? Facts don't make it clear.</li> <li>• Did she simply slip because it was wet?</li> </ul> </li> </ul>
Defences - explain whether it is or not obvious risk. - Consider both defences.	Obvious Risk <ul style="list-style-type: none"> <li>• s5F- meaning of obvious risk. <b>Explain why slipping in the wet when it is getting dark is or is not an obvious risk- look to:</b> <ul style="list-style-type: none"> <li>o speed, colour. Consider that the rider should expect conditions to change.</li> </ul> </li> <li>• s5G- presumption of awareness of obvious risk</li> <li>• s5H- no duty to warn of obvious risk</li> </ul> CN- wearing heels in the wet and dark

	<ul style="list-style-type: none"> <li>- Firstly, was the P negligent herself? Walking across a darkening road in the wet in 5cm heels? S5R (same test as negligence) Did she fail to take reasonable care for herself? She said she walked carefully.</li> </ul>
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**(b) Mr Simpson v Springfield Elementary School /10**

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

**Question Two /20**

Wayne v Dr Phil

ISSUE	COMMENT
Trespass- battery (removal of the tattoo) - must go through each /5	<ul style="list-style-type: none"> <li>- Intentional: no issue here</li> <li>- Direct: no issue here</li> <li>- Physical interference: no issue here</li> <li>- Lawful justification- had justification to perform surgery, but this did not extend to removing the tattoo.</li> </ul>
Medical Negligence (need to go through both s5O and s5P)	<ul style="list-style-type: none"> <li>- S5P (failing to warn of risks)               <ul style="list-style-type: none"> <li>o No real issue here. Risk warning of the DVT was duly given, and Phil chose to go ahead based on this risk warning.</li> </ul> </li> </ul>
<i>Issue here is reconciling the two different opinions</i>	<ul style="list-style-type: none"> <li>- No DOC issue (doctor to patient), or causation (facts say pulmonary embolism was caused by not having more clexane)</li> <li>- Contentious issue is breach. S5O (standard of care for professionals)               <ul style="list-style-type: none"> <li>o Breach: must act in a manner                   <ul style="list-style-type: none"> <li>▪ <b>widely accepted in Australia:</b> Dr Phil's authority was an American one</li> <li>▪ <b>as competent professional practice:</b> <i>Chest</i> said that 1 dose could be ok.</li> </ul> </li> <li>o Doesn't matter if there are differing opinions: s5O(3)- here there were different opinions, however only one was Australian.</li> </ul> </li> </ul>

### Question Three

#### Issue 1: Nuisance

ISSUE	COMMENT
Establishing nuisance - discuss the interference (both smell AND flies)	<ul style="list-style-type: none"> <li>- unlawful interference in someone's land: <i>Halsey v Esso</i></li> <li>- Here, smell was not MATERIAL, it was just interference.</li> </ul>
Balancing rights - marks for application to facts.	<ul style="list-style-type: none"> <li>- Locality: <i>Munro</i>- here it was a farming area.</li> <li>- Duration: <i>Wherry</i>. Been there for a long time.</li> <li>- Alternatives: <i>Cohen</i>. Could Jackie have cleaned it more often?</li> <li>- malicious intent? No malicious intent from Jackie (distinguish <i>Hollywood Silverfox</i>- here it's the other way round. Ronald possibly had the malicious intent with shooting the rabbits).</li> </ul> <p><b>Nuisance unlikely.</b></p>
Who can sue	No issue
Who can be sued	No issue

#### Issue 2: Trespass

ISSUE	COMMENT
Assault (conditional threat: "Go away right this minute ... or I will punch you in the face")	<ol style="list-style-type: none"> <li>1. Apprehension of immediate physical contact: <i>Stephens – v- Myers</i></li> <li>2. Act must be intentional: <i>Rixon -v- Star City</i></li> <li>3. Apprehension of contact was reasonable: <i>Barton–v- Armstrong</i></li> <li>4. Without lawful justification: issue here</li> </ol> <p>Could he comply with the condition? Here, yes (he could leave the property): <i>Police v Greaves</i> [1964] NZLR 295 (unacceptable demand)</p>