Examiner's Report  
Torts, Winter 2018  
Clary Castrission OAM  

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.

Question One:  

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.  

This question was extensive, testing a range of concepts introduced to the students throughout the course. Such contentious issues in this question included:  
1. The intention element under s3B of the Civil Liability Act;  
2. Application of the calculus of negligence under s5B of the Civil Liability Act;  
3. The defence of contributory negligence (s5R)  
4. Mental harm (ss27-33), and  
5. Recover by criminals for intentional torts under ss52-54 of the CLA.

The biggest issue for students overall was addressing each of the items above effectively. There was a lot to get through, so the best students were able to articulate which issues were most contentious and to spend sufficient time demonstrating strong analysis and application of the law to the problem at hand. The students who scored lower marks either did not address all contentious issues, or did not effectively spend enough words showing the required depths. Students who failed did not demonstrate an understanding of the law for the particular topic.

Question Two:  

In this question, the contention lay in whether or not the tort committed could be argued as an intentional tort or in negligence. Both torts were acceptable, should the student have argued effectively, and students who identified both torts for discussion (based on an application of Williams v Milotin) did better.
It was critical that the student applied the risk provisions under the CLA, had they identified that the act was not intentional. Given the ambiguity around definition under the CLA the successful student was able to effectively work within the uncertainty playing out how the court may deal with different scenarios.

**Question Three:**

This question was clearly a case of private nuisance. The biggest issue for students regarding this question was that those who managed it less effectively clearly had run out of time. I urge students to carefully deconstruct the three hours of the exam effectively so that they are able to sufficiently navigate the issues evident in all three questions, rather than spend all their time on the first two questions.

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*.

**Appendix A**

**Torts 2018 Exam**

**MARKING GUIDELINE**

**Question One**

Dulcie v Engelbert

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>COMMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negligence or Battery</td>
<td>Engelbert <em>meant</em> to drive the vehicle, but didn’t <em>mean</em> to crash it into Dulcie.</td>
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<tr>
<td></td>
<td>- Intentional action with intention to do harm is excluded from application of the CLA: s3B.</td>
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<tr>
<td></td>
<td>- Intentional action without intention to do harm could still be negligence: s3B: <em>Williams v Milotin</em> [(1957)] [1957] HCA 83; 97 CLR 465</td>
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<td></td>
<td>The better student would consider the incident in the context of s3B, and discuss both battery and negligence.</td>
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Battery

1. Intentional or negligent act: *Morris –v- Marsden* or *Hart –v- AG of Tasmania*: ‘meant to do it’: *McNamara v Duncan*
2. Direct: *Scott –v- Shepherd* or *Hutchins –v- Maughan*
3. Physical interference: *Collins –v- Wilcock* or *Rixon –v- Star City*

Establishment of battery is not contentious.
Negligence:

1. Duty of Care
   - Road users to other road users: Chapman vs Hearse.

2. Breach
   - Risk statement: There is a risk that should reasonable care be not taken, Dulcie would be struck by Engelbert’s car, resulting in a serious injury.
   - S5B(1) was risk foreseeable and not insignificant?
   - S5B(2) would reasonable person take steps to avoid?
     o Likelihood: High. Engelbert had been drinking, was going 70km/hr in a 50km/h zone and went through a give way sign.
     o Seriousness: High. Getting struck by a fast-travelling car can lead to serious injury.
     o Precautions: slow down, don’t drink.

3. Causation: no issue here

Defence 1: Contributory Negligence

Dulcie was not looking at the road, as she was texting.

- Firstly, was the P negligent herself? She was not looking. S5R (same test for negligence) Did she fail to take reasonable care for himself? Yes.
- Then apportion under s5S- looking for reasons to apportion damages.

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Dulcie v Royal Carnoustie Hospital

**ISSUE** | **COMMENT**
---|---

**Mental Harm under the CLA**

1. First question is to establish a DOC under s30 of the CLA. Student to ask whether a plaintiff in Dulcie's position would have suffered a recognised psychiatric illness as a result of being told she was over the limit, for a very short time. Answer most likely “no” as per Tame.

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Engelbert v Boris

**ISSUE** | **COMMENT**
---|---

**Battery**

1. Intentional or negligent act: Morris –v- Marsden or Hart –v- AG of Tasmania; ‘meant to do it’ McNamara v Duncan
2. Direct: Scott –v- Shepherd or Hutchins –v- Maughan
3. Physical interference: Collins –v- Wilcock or Rixon –v- Star City

Establishment of battery is not contentious. Boris clearly battered Engelbert with intent.

Student could also establish assault and false imprisonment.

**Recovery by criminals**

1. Establishment under s3B: Ordinarily, intentional acts done with intention to injure cannot be recovered under the CLA, except for criminals.
2. Apply test under s54 of the CLA: check
   a. Was Engelbert in the course “or following”...
   b. A “serious offence”
   c. And was his injury connected to this? Answer to this is
3. Apply s52: Was Boris acting in self-defence? Yes. But it may have been unreasonable. This is a subjective test.
4. Apply s53: student must distinguish between what acts may be unreasonable (hit 6 further times with a cricket bat, tied him up, further 45 minutes of beating with the cricket bat).

Question Two

Barney v Homer

<table>
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<tr>
<td>Negligence v Battery</td>
<td>Clearly no intention on action or injury, so cannot be battery.</td>
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</tbody>
</table>
| Negligence | 1. Duty of Care:  
|           | • Passengers to other passengers as an established duty area: Joslyn v Berryman. |
|           | 2. Breach:  
|           | • There is a risk that if Homer does not take reasonable care when handling a shotgun, the gun will fire hitting a passenger causing serious injury.  
|           | • Go through the s5B test: low likelihood but high seriousness. |
|           | 3. Causation is not an issue. |
| Defence: Risk provisions under the CLA (CN and VAR not available here). |
|           | 1. Is the risk of getting shot by a shotgun an obvious risk? Student must refer to s5G. |
|           | 2. If so, student must define the activity that Barney and Homer were engaged in at the time.  
|           | a. If the activity (game shooting) is defined as a “dangerous recreational activity” (s5M) then there is no liability.  
|           | b. If the activity (driving) is defined as “recreational activity” then there is no liability if there is a risk warning. |

Question Three

(a) Malcolm v Bill

David v Kurtley

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

**Michaela v Kurtley**

| Establishing nuisance | - Oldham v Lawson  
- Khorasandjian v Bush  
- Hunter v Canary  
- Not clear in Australia (other than Stockwell v Victoria) |