LAW OF TORTS EXAM 2004 Q1
[High Distinction – 90%]

The potential plaintiffs in this problem are Brian, Cindy, Dalton, and Fred, who may bring an action in negligence against Andy. Dalton may also bring an action in negligence against Gordon.

In order to bring a successful claim, the plaintiff must satisfy the elements of negligence: that a duty of care existed, that that duty was breached, and that damage resulted. If successful, they may be awarded damages. Andy could potentially argue a defence of 'volenti non fit injuria'.

In cases of personal injury claims, a duty of care is recognized in the law in all but few cases. Assuming this is true in this instance, to satisfy duty the test of reasonable forseeability must be carried out. Lord Atkin set this out in Donahue v Stevenson: 'ought the defendant to have reasonably foreseen a risk of injury to a class of people of which the plaintiff was a member". The Majority in Chapman v Hearse went on to say that "it is not necessary for the plaintiff to show a precise manner in which his injuries were sustained was reasonably foreseeable; it is sufficient if it appears that the injury to a class of persons he may have reasonable foreseen as a consequence." This was further extended in Wyong Shire Council v Shirst, which held that for the risk to be 'reasonably foreseeable' it must be proven to not be 'too far-fetched or fanciful'.

Thus, on the facts, ought Andy have reasonably foreseen a risk of injury to the plaintiffs by no concentrating on driving? It is arguable he did, and also arguable that it is not too far fetched or fanciful to assume this. Thus, it is arguable that Andy owes a duty of care to the plaintiffs.

As a duty in fact is arguable, we can now determine if a breach of this duty was committed. In the judgment of Mason J in Wyong, he pointed out that the existence of a foreseeable risk of injury does not in itself dispose of the question of the breach of duty. The magnitude of the risk and degree of probability remain to be considered with other relevant factors, those being the expense, difficulty and inconvenience of taking precautions against the risk. This is known as the 'calculus of negligence', and is used to determine whether a standard of care was breached.

On the facts, it is arguable that the magnitude of the risk was high, as was the degree of its probability. Considering the other factors, it does not arguably appear that any expense, difficulty, or inconvenience would have been reached to take precautions against the risk of crashing his car. Concentrating, rather than enganging in conversation, is none of these. Thus, it is arguable that Andy breached the standard of care owed to the plaintiffs.

Regarding damage, the plaintiffs must satisfy both causation and remoteness. Causation is utilized to determine that the defendant's alleged negligence was the cause

of injuries. This is governed in Australia by the 'common sense' test, the approach approved by the majority in March v E and MH Stramare.

Thus, applying common sense, it is arguable that Andy's driving was the cause of the plaintiff's injuries. In Dalton's case, it is arguable that his further injury was due to Gordon, and this shall be argued later.

Remoteness is concerned with the extent of the defendant's liability for loss caused by their alleged negligence. If the injury is too remote, then he/she is not liable. The two Wagon Mound cases outlined the test for remoteness – essentially, a defendant is only liable for harm of the 'same type or kind' from that which is reasonably foreseeable.

Thus, it is arguable that Andy committed a harm of the 'same type or kind' that is reasonably foreseeable – injuries resulting from a car crash.

However, in the case of Dalton, Hughes v Lord Advocate also applies. The House of Lords found in this case that the defendant may only escape liability if the damage is not a 'variant of the foreseeable'. If Andy relies on Doughty v Turner Manufacturing regarding the intrusion of the 'new and unexplained factor', the lubricant, Dalton may argue that although it was never before seen in cars, like the paraffin lamp in Hughes, it was still a 'variant of the foreseeable', the dangerous object, the lubricant, was known to act in such a way.

Regarding Andy's potential defence, in the cases of Cindy and Brian, he might argue that they voluntarily assumed risk of injury by driving with him. However, the Full Court of the Supreme Court of WA in Kent v Scattini, a similar fact case, held that 'volenti' must be judged objectively on the facts of the case. Despite talking 'animatedly' with Andy, Cindy and Brian may argue that, like Kent and Scattini, there is no reason for them to consent to Andy running a red light. If Andy is successful, which he arguably wont be, then he is exonerated from liability regarding Cindy and Brian. If Cindy and Brian successfully argue that there was no 'volenti', then Andy must pay damages for the, as well as arguably Dalton.

Before damages, I will quickly assess if Gordon is liable for any injury of Dalton, as it may affect Andy.

Applying reasonable foreseeability, ought Gordon have reasonably foreseen a risk of injury to a class of people which Dalton was a member? Gordon, by not securing the harness properly, would have reasonably foreseen a risk of injury to Dalton. It is not too far fetched or fanciful that Dalton, despite his head injury, would not have felt the tension of the harness. This, it is arguable that Gordon owes a duty to Dalton.

Regarding the standard of care, the magnitude of the risk and degree of probability may both be judged as extreme, compared to the lack of any difficulty,

expense, or inconvenience on Gordon's part to properly do his job. Thus, it is arguable that he breached the standard of care owed to Dalton.

For damage, it is of a 'same type or kind' that is reasonably foreseeable that Gordon's negligence will be the main factor in Dalton's further injury. This it is arguable that Gordon's negligence was not too remote.

Causation, on the other hand, it becomes an issue of whether Andy or Gordon is responsible for Dalton's injuries. Applying Performance Cars v Abraham, Gordon may argue that the consistent nature of the damage, resulted from Dalton act having any feeling in his hands. Andy, on the other hand, would rely on Baker v Willoughby, where the majority found the first tortfeasor is only liable for his damages caused: thus Andy would arguably be liable for all the injuries bar Dalton's broken leg, which would be Gordon's liability. Either of these may further argue that Dalton's decision to bungee jump broke the chain of causation by making an unreasonable decision, as noted in McKew v Holland. This must be assessed objectively on the facts, however, the High Court noted in Medlin v SGIC. Dalton arguably broke the chain of causation knowing that he had little use for his hands and would have possibly avoided injury by noticing the harness was loose objectively does this. Thus, on this ground, Gordon arguably is not liable for Dalton's damage.

Regarding damages in the action against Andy, the defendants may be awarded 'special' and 'general' damages. Special damages are those that arise prior to trial, such as medical bills and must be pleaded. It is arguable that Dalton, Cindy, and Brian may be awarded these. General damages are split into pecuniary and non-pecuniary headings.

To determine pecuniary damages, it is necessary to determine the loss of earning capacity as well as ongoing medical expenses, and then deduct from this sum. Using Mann v Elbourn, the court must establish an earning capacity based on the probabilities of the future as well as the established facts of the past. Dalton is never going to be a hand model again, with the damage to his hands. However, the onset of Parkinson's Disease must be taken into account – despite the accident there is a 40% chance that within 5 years and 100% that within 10 years he would have zero earning capacity.

This allows, when we determine the loss of earning capacity, to subtract Dalton's after earning capacity from the capacity after his injuries. As the disease shows, it is probable that he would have only spent a minimum number of years at this capacity.

Subsequently, under Norris v Blake, the court may look at the promising nature of Dalton's hand model career but only award damages for the remaining years he would have had but for the injury. This will generate a lump sum for deductions to be made.

Deductions need to be made for costs associated with earning an income, such as business clothing and daily living expenses are not deducted. For Dolton this would be done for a small number of years. A deduction may be made for vicissitudes of life – in

Dolton's case, the maximum of 15% from Wynn v NSW Insurance may apply. 3% investment/income deduction also occurs.

Regarding hospital, medical, rehab damages, Shannahan v Evans requires costs to balanve health care and benefits to plaintiff. Dolton wont arguably receive ongoing care and as such will not receive much under this head, although he will have Parkinsons but this was not caused by Andy's damage.

Dolton will also arguably receive damages for non-pecuniary injuries – pain and suffering, loss of amenities, and loss of life enjoyment. Australian courts generally only ward one big head and two small ones.

Cindy, having already stated her intention to leave work, would not receive damages for loss of earning capacity. Fred, her brother, would arguably gratuitously recover damages under Griffiths v Kerkmeger. Cindy would also recover substantial non-pecuniary damage.

Brian will likewise most likely be awarded high non-pecuniary damages, as his injuries are minor.

The newly assented Law Reform (IPP Recommendations) Act 2004 (SA) covers a lot of these principles, but as it is untested in courts, it is unknown what affect it may have.