Torts Exam 2006
Question 5 – 86%

The main issue here is that of omissions. While the common law does not impose a positive duty to act for the safety of others, some fiduciary relationships are recognised as giving rise to such a duty (*Sutherland Shire Council v Heyman*).

Suri v Zed

Zed owed Suri a duty to protect her from harm as they were in a recognisable teacher and student relationship (*Richards v State of Victoria*). The issue is whether Zed breached their standard. In order to determine standard, according to s 31 CLA, the Court must ask what behaviour could be expected of a reasonable person in the circumstances. Section 32 determines what is "reasonable", having regard to factors such as foreseeability of a risk, its magnitude and probability, and the burden of adequate precautions of guarding against it. These are all questions of fact and thus previous cases are not binding. As the legislation is yet to be interpreted however, it is useful to look at the common law to see how the court is likely to decide.

Although *Parkin v ACT Schools Authority* provides authority that a lesser duty is owed in the playground than in the classroom, Theo could still have failed to meet his standard. On the facts there was nothing else he could have done. Hwoever, it was known that Suri was particularly likely to get up to such behaviour, thus the facts are like *Parkin* in which it was held that not only was the risk foreseeable, but in fact it was *foreseen*. Also like *Parkin*, which involved a relief teacher, Theo, in spite of never working with Suri before, ought to have been brieed by the centre, who did know her history. Thus it is arguable that although the particular injury was perhaps not foreseeable, the comments of Hoffman LJ in *Jolley v Sutton London Borough Counil* are relevant: "kids will find unexpected ways of doing harm to themselves and others." Thus there seems to be god authority for the proposition that more precautions ought to have been taken: it wouldn't have been burdensome to get all the children to come inside with Theo while he dealt with the child with the blood nose. His failure to do this breached his duty and he could be found liable.

Walter v Uri

Although a lower standard of care is required by a parent to their chid, there is nevertheless a duty owed by the parent to protect their children (*Robertson v Swincer*). This duty, as recognised in *Carmanthenshire City Council v Lewis*, also extends to prevent the child under one's control from doing harm to another, such as Walter in this case. Applying the calculus of negligence it would seem that there was quite a foreseeable risk that injury of this "kind' would be foreseen (*Wagon Mound*), and the probability would be quite high given it was on a road and Violet was only three. Arguably Uri could have done much more to guard against the risk: talking to another person is hardly something that would be burdensome to stop doing. Uri could have walked her across the road. While he may have breached his duty, for policy reasons the Court is hesitant to hold parents liable in such circumstances as the frequency of doing so would have enormous personal implications not only for them, but also socially.

Yuri & Zia v Walter & Xavier

Walter and Xavier clearly owed a duty to the employees under Lord Atkin's neighbourhood principles they would reasonably be affected by their acts (*Donoghue v*

Stevenson). Furthermore, this duty was arguably breached as they would have failed to meet their standard - that of professionals under s 40(a) CLA - by performing their work negligently, so much so that the shelter collapsed. The question is whether they shared an employment relationship giving rise to vicarious liability. The test for distinguishing employees from independent contractors is set out in *Stevens v Brodribb Sawmilling Co Pty Ltd* which weighs up the facts. Although they are provided with a van by Zed, the fact that they supply their own equipment and uniforms supports the inference that they are independent contractors. Zed is only liable for the negligence in the absence of non-delegable duties being owed on its behalf. As the school essentially invites children to its premises, there is arguably a great level of control exercised not only as an occupier, but as a service owing a pre-existing duty of employer and employee (*Burnie Port Authority v General Jones Pty Ltd*), thus they do have a duty to ensure the safety of their patrons, who are vulnerable, thus a non-delegable duty does arise, and Zed would be liable for its breach, which led to Y and Z's negligence.

Theo v Aardvark

Theo must argue that A owed a duty to protect him from the actions of a third party. Although occupiers are recognised as owing a duty of care (*Neindorf v Junkovic*), it is the standard of care that must be determined. Section 20 CLA is relevant in determining the standard of occupiers, which requires the Court to consider the extent to which the occupier was aware, or ought to have been aware, of the risk, the measures taken, the nature of the premises and the nature and extent of the loss of damage. This legislation is yet to be interpreted however case law may be helpful in determining the standard of care the Courts often attribute to occupiers.

The facts are somewhat analogous to those in *Modbury Triangle Shopping Centre Pty Ltd v Anzil*, however there the Court found that the unpredictability of criminal behaviour is one of the reasons the law, in the absence of a special relationship, does not impose a duty to prevent harm to another from the criminal conduct of a third party, even if the risk of the harm is foreseeable. It was also held that the duty of an occupier to protect people on their land does not extend to preventing them from the criminal behaviour of those also on that land. While T could argue that this case could be distinguished on the basis that there had been a string of robberies, whereas in *Modbury* the assault was new to the premises, it would seem that *Modbury* effectively negated the requirement of foreseeability. It could be found however that in conjunction with this knowledge, *some* measures ought to have been taken, and the failure of A to do so resulted in this duty (however low the standard) being breached.

An application of *Hardgrave v Goldman* may produce a better outcome, where it was held that occupiers, with the capacity and resources, are liable for the consequences of happenings there.

Although it is unlikely T will succeed, should he do so, due to his coma, he will not be awarded compensation on the grounds that he has no perception of his loss (*Shelton v Collins*).