

Part A Question 1:

Note: All legislation referred to are sections of the *Civil Liability Act 1936* (SA).

Brad v Con

Duty of Care

Con owes Brad a duty of care as this is an established duty category (*Imbree v McNeiley* [2008] HCA 40) (*Imbree*).

Standard of Care

Referring to s31 and s32, it is clear off the facts that Con had breached his standard of care.

Causation

Referring to s34(1), it is clear that causation is satisfied. s35 stipulates that Brad has the onus of proving causation.

Under s34(2), Con may attempt to argue that he is not liable for any harm, as Dianne's subsequent tort extinguishes his own. Although, the courts may reject this argument, as this appears to be a *Baker v Willoughby* [1970] AC 46 situation, where the subsequent tort worsened Brad's injury, but may be independent of the first tort. Although, this does not extinguish Con's liability, and he will still be liable for the initial harm he had caused, where Dianne will be liable for the subsequent harm she caused. Liability will be apportioned between the two tortfeasors.

Alternatively, if Dianne argues that this case is analogous to *Chapman v Hearse* (1961) HCA 46, where it was reasonably foreseeable that an ambulance would come and provide medical assistance, then Con may be liable for a greater portion, as the injury flowed from the original tort and precise foreseeability is not required.

Damages

Part A Question 1:

Damages may be calculated under the headings of pecuniary and non-pecuniary loss.

Pecuniary damages are special damages, which compensate up to the date of verdict, for out of pocket expenses (*Paff v Speed* [1961] HCA 14) (*Paff*), and general damages, which are calculated at the trial to reflect future loss (*Paff*).

Pecuniary Loss

Brad will likely be awarded damages for loss of potential earning capacity up to one year.

s54(1) stipulates that Brad cannot claim damages for the first week of his incapacity.

s54(2) states that the award of damages cannot exceed the prescribed maximum, defined in s3 as being \$2.2 million with reference to the CPI. These damages will be awarded after income tax deductions as a net value (*Cullen v Trappell* [1980] HCA 10). Under s55, the award of damages will be discounted by a prescribed discount rate defined in s3 as being 5%. Under s56, there is no interest awarded for damages compensating future loss.

In order to quantify the net loss of earning capacity, the court will first calculate the potential earning capacity (*Norris v Blake [No 2]* (1997) 41 NSWLR 49 CA) (*Norris*), and then make additions or deductions for the vicissitudes of life (*Wynn v NSW Insurance Ministerial Corporation* 1995 [HCA] 53) (*Wynn*). Although Brad was not working at the time of the accident, the court will consider potential earning capacity. Even though Brad showed no interest to work, he may still be compensated for work potentially done in the future (*Husher v Husher* (1999) 197 CLR 138). Alternatively, the court may consider this a critical uncertainty and not award loss of future earning capacity (*Sharman v Evans* [1977] HCA 8) (*Sharman*).

Non Pecuniary Loss

Under s52, Brad will likely be awarded damages for pain and suffering for up to one year.

s52(1) sets a threshold for which, off the facts, Brad is likely to satisfy, where s52(3) -

s52(5) provide a framework by which damages are to be assessed. Under s56 there is no interest awarded for damages compensating non-economic loss.

Under other heads of damage, Brad may be awarded damages for disfigurement and loss of amenities of life.

Part A Question 1:

Defences

Contributory Negligence

The court may find that Brad was contributorily negligent in failing to meet the standard of care by failing to protect against a risk of injury that was reasonably foreseeable and within a class or risk that Brad was exposed to (*Joslyn v Berryman* (2003) 214 CLR 552). Under s44, the courts will apply the same standard to the plaintiff as to the defendant when determining if they had been negligent. It is clear off the facts that causation is satisfied, as the plaintiff's negligence contributed to the harm.

s50 outlines the process courts will use to assess damages for contributory negligence. s50(2) stipulates that first courts will assess the full amount of damages before making reductions in s50(3) that it finds reasonable. The court will then apply the statutory deductions in series as stipulated in s50(4).

Having satisfied that age requirement in s49(1), Brad's damages will be reduced by 25% for failing to wear a seatbelt. While he may argue that this did not contribute to the accident, the main consideration is what contributed to the damage, not the accident (*Froom v Butcher* [1976] 1 QB 286).

Illegality

Con may argue that Brad and himself were engaged in an illegal enterprise, and therefore no duty was owed. Under s43(1), having satisfied that an armed robbery is an indictable offence, and under s43(4)(a), which states that the defence may operate against injury arising from a motor accident, Con may attempt to plead this complete defence.

Although, Brad may rebut this by arguing that under s43(1)(b), the illegal enterprise did not contribute materially to the injury, as it had not occurred during the robbery, and therefore this provision did not apply.

It is likely that the courts may not sustain this defence, as the injury was caused by the Con's negligent driving during the drag race, and not the illegal enterprise.

Part A Question 1:

Annie v Con

Duty of Care

Under s53(1), Annie will be entitled to claim damages as she was present at the scene of the accident, and under s53(2), she appears to have been diagnosed with a recognised psychiatric illness.

Under s33(1), it appears likely that based on the gory state of Brad's position, a person of normal fortitude may have also suffered mental harm. Although, this may be rebutted as the facts suggest that the mental harm was caused by a previous accident that Annie was involved in, suggesting that a person of normal fortitude witnessing this accident may have not been so profoundly affected, as Annie was.

Standard of Care

As concluded above, Con breached his standard of care.

Causation

Under s34, causation is clearly satisfied. Under s35, Annie bears the burden of proving causation.

Damages

Damages will be awarded in line with the principles and legislation outlined above. Annie may receive damages for pain and suffering, but may not receive loss of earning damages, as nothing from the facts indicate an inability to earn.

Defences

Illegality

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Con may argue that Annie was part of an illegal enterprise, and therefore no duty was owed. Under s43(1), it is arguable that by 'coming along', Annie was engaged in the enterprise, and under s43(4)(a)(ii), the defence applies to the accident as it was a result of negligence.

Annie may rebut this by arguing that she was not a participant in the enterprise, as the facts suggest that she had no financial gain, nor did she express any interest throughout. Even if she was deemed to be part of the enterprise initially, her act in exiting the car is analogous with the case of *Miller v Miller* [2011] HCA 9, where the court viewed this as exiting the enterprise, thereby reestablished a duty for any harm that occurs afterwards.

Brad v Dianne

Duty of Care

A duty of care was owed as this is an established duty category (*Imbree*).

Standard of Care

Referring to s31 and s32, it is clear off the facts that Dianne had breached the standard of care.

Causation

From s34(1), causation is satisfied. Considering s34(2), as aforementioned, liability will be apportioned between Dianne and Con, where Dianne may only be liable for the subsequent harm she caused.

Damages

Dianne will likely be liable for the loss of earning capacity of Brad from after one year, to the age of his death, calculated in the process outlined above.

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Dianne may not be liable to Brad for damages for pain and suffering, nor for lost years, as he is unconscious and does not feel subjective feelings of loss (*Skeleton v Collins* [1966] HCA 14).

Defences

There appear to be no defences.

Edwina v Dianne

Duty of Care

A duty of care was owed as this is an established duty category (*Imbree*).

Standard of Care

Referring to s31 and s32, Dianne had breached the standard of care.

Causation

Referring to s34, causation is satisfied. Under s35, Edwina has the burden of proving causation.

Damages

Edwina will likely be awarded damages for loss of potential earning capacity. The facts are analogous to *Norris*, where the courts will likely award her the damages similar to the earning capacity of Miranda Kerr, after discounting for any vicissitudes (*Wynn*), and costs of earning a living (*Norris*). Marriage (*Sharman*) and childcare are not deductions (*Wynn*).

Defences

There appear to be no defences.

Part B Question 1:

Lois v Marc

Standing

To sue in nuisance, Lois must establish that she has standing. The current Australian position is unclear, where there is authority to suggest that only an owner or tenant of the property can sue in nuisance (*Hunter v Canary Wharf Ltd* [1997] 2 AC 655) (*Hunter*). As Lois is a tenant, she will likely have standing to sue.

Who Can Be Sued

To be a defendant in nuisance, Marc will need to be the creator, adopter or authoriser of the nuisance. As Marc is the creator of the nuisance, he may be found liable (*Fennell v Robson Excavations* [1977] 2 NSWLR 486).

Elements of a Nuisance

A private nuisance occurs when:

- 1) the conduct indirectly:
 - i) either causes material physical damage to land; or,
 - ii) substantial interference with the use or enjoyment of land, or an interest in the land;
- 2) which, in light of the surrounding circumstances is unreasonable.

The courts will strike a balance to determine what is fair and reasonable, considering the rights of the plaintiff and the defendant in enjoying their land (*Halsey v Esso Petroleum* [1961] 1 WLR 683) (*Halsey*).

Noise Caused by Artwork and Exhibition

Marc's conduct may not be substantial as he has a right to artistic expression on his own property. Although, the conduct may be substantial, as it occurs at unusual hours, which may disrupt sleep, where the loss of sleep is accepted as substantial (*Halsey*). In addition,

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the courts may consider the production of pollution noises at unusual hours as being substantial.

Considering reasonability, in a residential area, a court may find it unreasonable to subject a person to pollution conditions. In addition to this, the time at which the nuisance occurs appears unreasonable.

Alternatively, the nuisance caused by the exhibition may be reasonable, as its duration was only two days.

Although, Marc may argue that Lois is an unduly sensitive plaintiff as meditation requires absolute silence, which, may arguably be unreasonable (*Robinson v Kilvert* (1889) 41 ChD 88).

Blocking Her House

The courts may find the inability to leave the house as being substantial, as this deprives her of her liberty.

As this is a deprivation of her liberty and right to property, it may be unreasonable.

Physical Damage to Clothes

The courts are likely to find that any form of material physical damage is unreasonable, thereby satisfying the second element of the definition.

As aforementioned, it seems reasonable that a plaintiff should be allowed to dry their clothes outside.

Defences

There appear to be no defences off the facts.

Remedies

Part B Question 1:

The court may likely grant an injunction to stop Marc from carrying out his artwork at unreasonable hours, releasing smoke, and blocking Lois's driveway.

The court may also award damages to compensate Lois for past inconveniences, and her damaged clothes.

Ned v Marc

Trespass

Ned likely cannot sue in trespass, as he does not have actual nor constructive possession of the vehicle. He may sue on behalf of the bailee, but not as the bailor (*Johnson v Diprose* [1893] 1 QB 512).

Conversion

Ned may likely sue in conversion as Marc had dealt with the Oomobile in a manner that is seriously inconsistent with his right to immediate possession. This is clear as Marc had not only dismantled the car, but had also sold it (*Citicorp Australia Ltd v BS Stillwell Ford Pty Ltd* (1979) 21 SASR 142) (*Citicorp*).

While Mark may argue he did so by an honest mistake, dishonesty is not a consideration (*Finesky Holdings v Minister for Transport for WA* [2001] WASC 87).

The remedy for conversion is a forced sale, where Ned will receive the value of the chattel at the time of the conversion.

Ned v Petra

Conversion

Ned can likely sue Petra for conversion, as she satisfies the definition above.

Even though she was a bona fide third party, purporting to buy goods that the vendor does not have legal title to amounts to conversion (*Citicorp*).

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The remedy for conversion is a forced sale, as outlined above.

Detinue

Ned may likely sue Petra for detinue if he 1) makes a demand for the return of the car, that 2) the defendant refuses, 3) unreasonably.

The remedy for detinue is the return of the chattel. Considering the vehicle can be sold for a high price, this may be preferable to conversion.

Defences to Actions

No defences of jus tertii apply in all actions, as Ned is the owner of the chattel, and therefore there is no party with superior title.

Part B Question 2:

Quinn v 'Rockery'

Quinn may likely sue Rockery for negligent statement. A duty of care may arise from negligent statements when reasonable reliance can be established (*Mutual Life and Citizens' Assurance Co Ltd v Evatt* (1968) 162 CLR 340) (*Mutual*). Reasonable foreseeability of loss on its own is not sufficient to give rise to a duty of care (*Ensanda Finance v Peat Marwick Hungerfords* (1997) 188 CLR 241) (*Ensanda*).

A duty of care is owed when the following elements are satisfied:

- 1) the representor realises or ought to realise that the representee will trust in his advice;
- 2) it is reasonable for the representee to accept and rely on that information;
- 3) it is reasonably foreseeable that the representee is likely to suffer loss should the statement turn out to be incorrect, or the advice unsound. (*San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act* (1986) 162 CLR 340) (*Sebastian*).

In order to establish reasonable reliance and whether a duty is owed, the salient features and policy interests need to be considered.

Supporting a Duty

The court may find a duty of care as Rockery possessed a special skill as being an expert. In addition, Rockery's advertising of the business had occurred formally in a magazine article (*Mutual*). Furthermore, Quinn may have been vulnerable as knowledge on rare antique clocks may not have been easily available (*Mutual*). Quinn may also argue that because there was a request for information, and considering that this was a serious business matter, Rockery should have known he was being relied on (*Sebastian*). Furthermore, there were numerous statements encouraging inducement by Rockery, supporting the notion of reasonable reliance. Finally, considering the financial interest of the defendant, although Rockery was not directly benefiting, his spouse was, which may have been in his financial interest.

Opposing a Duty

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Although, Rockery may have presented a disclaimer when he said that he could not provide specifics (*Hedley Byrne & Co v Heller* [1964] AC 465) (*Hedley*). In addition, Rockery's language was informal, which suggest that he was not warranting any statements (*Mutual*).

It is likely the courts will find that a duty is owed. The courts will then proceed through the rest of the negligence enquiry.

Quinn v Agent

If the agent is acting in 'trade or commerce', Quinn may bring an action for breach of s18 of the *Australian Consumer Law 2010* (Cth).

Supporting a Duty

The courts may find a duty of care was owed as the agent may likely have a special skill as they facilitate transactions for a living, and may have also have had a financial interest in the transaction (*Mutual*). Considering the formality of their interchange, the agent had quoted figures which they did not verify, while discussing a serious business matter (*Mutual*), and in light of the request for the meeting (*Sebastian*), supports the notion that the agent should have realised they were begin relied on.

Opposing a Duty

Although, Quinn was not vulnerable as she had access to an independent accountant, even though she forgot (*Ensanda*). In addition, the agent was an intermediary, where a duty is only owed if Quinn shows:

- 1) the statement was given on the basis it would be conveyed to a third-party;
- 2) for the purpose of reliance;
- 3) and that the third party would be likely to act in reliance.

It is clear off the facts that this test is arguably satisfied, and therefore it is likely that the courts will likely find that a duty is owed.

Quinn v Sal

Part B Question 2:

Supporting a Duty

The courts may find a duty of care as Sal had financial gain in this transaction (*Mutual*).

Opposing a Duty

Although based on Sal's language, she was professing information without request (*Evatt*), which may have made her believe she was not being relied on.

It is likely the courts will find that a duty is owed.

Tomas v Agent

As aforementioned, Tomas will need to have standing to sue in nuisance (*Hunter*). He may sue if the two elements of nuisance are satisfied.

Off the facts, it is likely the courts will find the loss of one night's sleep to be substantial (*Halsey*), and the constant chiming of the clocks to be unreasonable considering locality. On the other hand, Quinn may argue that she has no choice but to wind the clocks.

It is likely the courts will regard this as a private nuisance, and grant an injunction to stop making noise, as well as award damages to compensate for past nuisances.