



ANU LAW STUDENTS' SOCIETY

LAWS1201 Foundations of Australian Law 1st Semester 2005

How to Use this Script:

These sample exam answers are based on problems done in past years. Since these answers were written, the law has changed and the subject may have changed. Additionally, the student may have made some mistakes in their answer, despite their good mark.

Therefore **DO NOT** use this script by copying or simplifying part of it directly for use in your exam or to supplement your summary. If you do so **YOUR MARK WILL PROBABLY END UP BEING WORSE!** The LSS is providing this script to give you an idea as to the depth of analysis required in exams and examples of possible structures and hence to provide direction for your own learning.

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Question 1

78/100

Leela v Fillida: Trespass

As this case involves interference with a person, any action involves false imprisonment, assault and battery.

There was no false imprisonment because there was no total restraint of the liberty of the plaintiff. There was also reasonable means of escape.

Assault involves the apprehension of imminent bodily harm. It is unlikely that an apprehension of imminent harm existed, as Leela did not remove herself from the situation until after the contact occurred.

Battery

For Leela to succeed in battery she must show that there was a *prima facie* battery.

The elements of battery are a direct physical contact outside the reasonable course of everyday life.

The fact that the Defendant directly struck the Plaintiff when flailing her arms is not in question, and thus on the surface it would seem there was a battery.

Reasonable Course of Everyday Life

Leela must establish that this contact was outside the reasonable course of everyday life.

It is difficult to consider the negligent flailing of the Defendant's arms which caused a considerable, offensive contact with the Plaintiff's eye as being generally acceptable in the ordinary conduct of everyday life (although perhaps some bumping was). It is more likely that this argument will be raised under implied consent.

Negligent Battery

The Defendant may then argue that this was neither intentional nor negligent.

Williams v Milotin held that negligent acts could be a battery. Once the contact occurs, the onus to prove that there was no intent/negligence falls to the Defendant as to whether there was "a neglect or want of due caution in the person who did the injury, although there was no design to injure."

The Defendant could probably establish that her acts were unintentional. It is likely, on the balance of probabilities, however, that the actions of the defendant were negligent. This is because the Defendant, intoxicated in a heavily populated area, failed to show due care for those around her by dancing quickly, spinning wildly around, and by flailing her arms repeatedly in a manner which may have caused serious harm.

Defences: Implied Consent

Fillida may argue that this contact was impliedly consented to.

Collins v Wilcock held that most physical contacts of ordinary life are impliedly consented to by all who move in society. This case considers circumstances, using examples of increased susceptibility to physical contact in an underground station, supermarket or party. This is further demonstrated by *McNamara v Duncan*.

Just as a footballer consents to those tackles which the rules permit, a person who voluntarily dances in a place with other intoxicated people is impliedly consenting to the possibility of being bumped by fellow revellers. The Plaintiff remained in proximity to the Defendant after being bumped a number of times and must have been aware of the possibility of being bumped further. The consent was formed/affirmed when she did not remove herself (as she later did with ease).

It could be argued that the Defendant consented to some bumping but not the more significant bump. *Giumelli v Johnston* held that consent in such circumstances does not extend to intentional harm. As this was unintentional it may fall within the scope of implied consent - a person consents to general physical contact reasonable in the context. This *could* be dealt with analogously using *Rogers v Whitaker*: consent applies to the general nature of the act.

Conclusion

Therefore while a negligent physical contact did occur, which was outside the reasonable course of everyday life, in the context there may have been an implied consent to the type of contact.

Leela v Diego: Negligence

Duty of Care

To prove negligence Leela must establish that Diego owed her a duty of care in ensuring safe conditions. This can be dealt with using reasonable foreseeability and other factors.

Reasonable Foreseeability

Leela must establish whether Diego could reasonably have foreseen that she was a class of person likely to be affected by his actions: *Donoghue v Stevenson*

The defendant, by his own acknowledgement, did, and it was foreseen by others. It was foreseeable that if Diego did not provide a safe environment the invitees may be affected.

Other Factors:

This acknowledgement could satisfy a further element of assumption of responsibility raised in *Modbury v Anzil*. There is a further vicinity of relationship between owner/invitee which is not

negated by third party intervening acts and the Defendant therefore had direct control over the harm.. The Plaintiff was also specifically reliant on the Defendant taking reasonable measures to ensure her safety.

Conclusion:

A duty existed as it was reasonably foreseeable that Leela's class of person may be affected and a number of further factors were satisfied.

Breach:

There are a number of factors which need to be weighed up when considering whether a reasonable person would have taken precautions against the risk of harm, and thus if there was a breach.

Likelihood:

Under reasonable foreseeability of harm, *Wyang Shire Council v Shirt* states that the likelihood of the risk must be considered (not far fetched or fanciful) as modified by the *NSW CLA 2002*. to be 'not insignificant'. Even if a risk is foreseeable, it must not be so unlikely as to cause a reasonable person in the Defendant's position not to act.

Several other people of the same class have slipped - thus the likelihood of a further accident is high. Intoxicated people may take less care for themselves, and as it was reasonably foreseeable that at this party there would be intoxicated people, this *may* increase the likelihood.

It could be contended from *Romeo v Conversation Commission of the Northern Territory (CCNT)* that the obviousness of the risk of harm was so high that the likelihood was reduced.

This is negated by the fact that already several people had slipped and that the Defendant was present and had knowledge of the dangerous circumstances.

Gravity:

Wyong Shire Council v Shirt examines gravity of harm in relation to magnitude of the risk. The standard of care varies according to the gravity of the *potential* harm and the likelihood. In this case it was foreseeable by the Defendant that if such a risk occurred then the harm could be *potentially* quite severe on a hard, wooden floor – as it was.

Burden:

Romeo v CCNT states that the burden/practicability of avoiding the harm must not be so imposing as to overburden the Defendant, in relation to the likelihood and gravity of harm:

Caledonian Collieries v Speirs

The precautions the Defendant could have taken in this case to avoid the harm include: mopping the floor, increasing lighting, making an announcement or stopping the party. None were particularly impractical or overburdening, especially in comparison to the likelihood and seriousness of the ensuing harm.

Justifiability:

This rests on whether the justification of the activity outweighs the other factors.

Unless there is a greater social utility/justification for the activity a breach will be found: *E v Australian Red Cross Society*

The justifiability or social utility of the party is not likely to succeed. There was no particular need for the party, which refers to the broader community rather than a specific group. Any justification is far outweighed by the potential harm and gravity.

Conclusion:

In determining what the reasonable person's response would be, all these considerations must be weighed against each other. The probability of the risk occurring and the gravity of the ensuing harm far outweigh the burden on the Defendant, and thus he is likely to have breached his duty.

COMMENTS PAGE:

STRUCTURE:

You had a good structure. Your clear introductions set out the elements in a concise and helpful way. In future, you might provide a heading for your introductions. Your use of headings for each substantive element you address was great. This could be strengthened with numbering, and using differentiated subheadings. Have a look at some recent High Court judgments (most recent ones tend to use headings and numbering) or academic writing in legal journals for some ideas about how you can do this.

You logically progressed through the various issues, and arguments were easy to follow.

METHODOLOGY:

This was one of your clear strengths. You consistently state, first, the relevant legal rule. You always gave authority for that rule (and your authorities were relevant and persuasive). You then went to apply the general principle to the given facts. You argued from authority in a convincing manner. Keep this up – it was fantastic.

Your discussion of negligent battery was particularly good – you are one of a very few people to address this issue well.

CITATIONS/LEGAL WRITING/RESEARCH:

Your citation method generally followed the guide, except that only the case name should be in italics. Your use of pinpoint citing was excellent, as was your use of the names of Judges. It is that kind of attention to detail which distinguishes excellent writing from good writing. You also clearly did extra research, and the additional cases you cite increased the persuasiveness of your arguments.

You have a very good knowledge of the substantive torts law. This is not an easy thing to demonstrate at this early stage, so great work.

You have a good writing style: you write in an appropriate, formal manner, and you have an articulate voice. Our writing always improves, so I suggest reading judgments and articles in legal journals to help continually develop your own.

This was a really great start to your degree. To take your writing to the next level, think about offering critiques of principles or doctrinal analysis, where words allow and you consider it appropriate. If you can, show where you see that law is grey or confusing – show where different courts have disagreed with each other. (But don't do that at the expense of the clarity you have clearly demonstrated). You might say, for example, "Although McHugh J in X case said abc, the majority of the High Court has said xyz...".