

**Law of Torts 2004 Exam**  
**Question 1**  
**High Distinction**

The potential plaintiffs Brian, Cindy and Dalton will bring an action of damages for personal injuries against the potential defendants Andy and Dalton.

Dalton v Andy

In order to do so, Dalton has to first establish a duty of care owed to himself by Andy. Applying the Neighbourhood Principle stated by Lord Atkin in *Donoghue v Stevenson*, a duty of care is owed by Andy as a road user, to Dalton as other road users because of the proximity (“so directly affected”) and it is reasonable foreseeable to Andy that there is a risk of injury to a class of people (road users) including Dalton if he fails to take care.

Andy has not met his duty of care by driving negligently, running the red light and talking, and therefore has breached his duty owed to Dalton.

The major issue here is damage and assessing damages.

Dalton has to argue that the burns he suffered were not too remote ie the kind of injuries was reasonably foreseeable (*Wagon Mount No.1*). Andy might argue that the lubricant burns were not a usual reaction therefore not foreseeable and there is an intrusion of a new factor, therefore too remote (*Doughty v Turner*). However as long as the kind of injury (burns) is foreseeable, it is not too remote (Hughes). Dalton can argue that burns is foreseeable because it is also caused by the battery acid therefore not too remote and it is not relevant that the extent of the burns was in excess (*Hughes v Lord Advo?*). Therefore he is entitled to damages paid by Andy.

Pecuniary damage is the major issue here. D is entitled to damages under the heading of loss of earning capacity. In assessing such damages the Court will look at the probable path of D’s future career (*Wynn v NSW*) (the pre-accident capacity) and the post-accident capacity to award damages representing the difference. (The annual income difference between the two multiplied by his remaining work year to retirement of 65).

In order to determine the pre-accident earning capacity of D, the Court would determine the path of his future career as a hand model by looking at evidence such as the photo shoots he did and other comments (“rising star”) (*Norris v Blake*). He is entitled to the loss of future earning capacity as a hand model. However, a few deductions have to be made to the damage.

- 1) Tax (*Cullen v Trapple*)
- 2) Expenses he incurs to maintain his career as a model eg agency fees (*Wynn v NSW*)
- 3) Investment income of 3% is deducted (*Todorovic v Walker*)
- 4) Negative vicissitude deduction that would likely vary between 5% and 15% (*Wynn v NSW*) and
- 5) Relevant statutory deductions (s54 of the Civil Liability Act eg 1<sup>st</sup> week of loss capacity).

Dalton is also entitled to non-pecuniary damages as general damages for pain and suffering during the treatment.

(Andy may argue that D was contributory negligent because he was speeding ie failed to meet the standard of care to take care of himself and the liability would be apportioned between A and D (*Pennington v Norris*) and damages would be reduced accordingly).

Dalton also suffered injuries due to the negligence (improperly...) of Gordon, who arguably owed him a duty of care (see above discussion) according to *Donoghue v Stevenson*.

Andy would argue that he is not liable for this because going bungee jumping was a novus actus interveniens because it was a voluntary act of D that broke the chain of causation (defined in *Haber? v Walker*). If so, Gordon would be liable for the leg injuries suffered. However, G would argue that it's not novus because A's act (hand injury) generated the very risk of the subsequent injury which otherwise would have been avoided (*March v Stramere*). If so, A is also liable for D's leg and G is liable for contribution.

However, because it is found a vicissitude may overtake the tortious event in the future to cause a total loss of earning capacity in 10 years, the damages D gets would be reduced to the ten years (*Malec v Hutton*) taking the possibility into account, it would be further reduced to only award the second 5 years loss due to the 40% chance. So neither A or G will have to pay the loss of D after 10 years.

### **Cindy v Andy & Dalton**

Duty can be established (see above). Both Andy (driver-passenger) and Dalton (other road user) owe C a duty of care (*Donoghue*).

Breach is also established as A was running a red light and D was speeding ie failed to meet the standard of care.

C suffered injuries using the egg-shell skull principle (*Stephenson v Waite Tileman*) as long as the original injury (scratch) was foreseeable, which C can prove, the following injuries that resulted is not too remote (*Stephenson*). Therefore she is entitled to damages and loss of earning capacity. This will be assessed using the methods discussed above, and the same deductions would apply. However here as C is doing voluntary work, the loss would be assessed on this basis (not as a lawyer) and plus any amount representing the loss of chance to ever go back to her lawyer job (*Mann v Elbourn*).

She is also entitled to the cost of employing a babysitter to care for her daughter, applying the rule from *Sullivan v Gordon*, which is an extension to the rule from *Griffiths*.

If damages are awarded, it is assessed on the basis of market child care, not Fred's income as a lecturer (*VanGarvan v Fenton*)

However, because a gratuitous service is provided by Fre, she can not get the damages because according to the Wrongs Act 1936 (SA) (WsA) s244(1)(a) damages shall nto be awarded because Fred is a brother not a parent, spouse or child to C, therefore no damages for child care.

The WsA is now part of the Civil liabilities Act, it is yet uncertain how the Court is going to interpret it) but it is likely that in this case, damages is not awarded for gratuitous services by Fred.

C is also entitled to loss of amenity (non-pecuniary loss)

## **Brian v A & D**

Same with Cindy about duty and breach. Brian is entitled to damages for his minor injuries but not to the bad feelings because it is not a recognized psychological illness, cant claim for mental harm, no duty in this area can be established (*Mt Isa v Pusey*)