Law of Torts 2 – Semester 2 2011 Exam

Question 1

a)

E v B – trespass

Standing to sue

E was in actual possession at the time of the trespass (taking the bike) and so has standing to sue (Johnson v Diprose).

Nature of interference

B taking the motorcycle was clearly a positive, voluntary act, and was a direct act because B took it. He moved and took the bike out of possession of E, so there has been a trespass here (City Motors v Southern Aerial Super Service).

Defences

Jus tertii – B may argue a greater right for the bike exists in J, its legal owner (Edward v Amos). However it is possible jus tertii will not defeat the action because B has invaded the existing possession of E and so trespass cannot be defeated (Jeffries v Great Western Railway)

Remedies

Because E has a limited right to the good there will only be nominal damages – also the bike was not destroyed (Roberts v Roberts)

E v B – conversion

Standing

As above.

Nature of Interference

E may argue there has been conversion by using and delivering the goods (as in Aitken Agencies v Richardson). However because B redelivered to the bike's owner there may be no issue. But arguably E still has a right to the good, because the bailment between E and J is on a term, and J hasn't paid yet so E still has a right to the good.

So arguably there has been conversion here because B has dealt with the bike in a matter repugnant to E's right to it (Penfolds v Elliot)

Defences

As above.

Remedies

E would get the value of the goods if jus tertii wasn't successful.

E v L – conversion

Standing

As above.

Nature of interference

There has arguably been a conversion here because L's act of joyriding with the bike has amounted to denying E's right to the good (Penfolds). L may argue that she was merely using the bike and as it was for a short time may not count as conversion. Though Aitken Agencies v Richardson supports the act of joyriding being conversion.

Defences
Jus tertii as above.
Remedies
As above.

E v L – detinue
Standing
As above, E has a right to possession as he is a bailee for a unexpired term.
Nature of interference
E could make a demand for the bike. It must indicate when and where the good should be delivered (Lloyd v Osbourne).
If L refuses the demand, it must be unreasonable, and this is detinue.
Defences
As above.
Remedies
E may have the bike returned to him.

b)
P and E v B and S (private nuisance)
Standing to sue
E has standing to sue as he is the legal owner (presumeably) of the property, however whether P can take action is uncertain. The position on who can sue in Australia is uncertain as there have been no High Court cases on it.
Under the traditional rule, only E has standing to sue (Malone v Laskey). According to this case only the owner or leaseholder has sufficient interest in the land.
Under the liberal approach, as D is the daughter of E, the owner, she could bring an action (Khorasandijian v Bush).
So it is certain that E could sue but P's standing is uncertain.
Interference must be substantial with enjoyment/use of land
Because E and B are neighbours, they are expected to put up with eachothers' noise to an extent (Halsey v Esso). However here because the fights are at 5am, it is arguable the timing of the fights is unreasonable. In Halsey, the plaintiff was entitled to an injunction to stop noise between 10m and 6am. This could help E and P here because the fights are at 5am and arguably this is unreasonable. As held in Andreae v Selfridge, a loss of one night's sleep is considered a serious interference.
B might argue the noise is reasonable given B and S are fighting and this is a normal use of land (Bamford v Turnley) but it is unlikely this will hold up.
On balance, it is arguable that B and S's fights are sufficiently serious to constitute a nuisance (Halsey v Esso) as the reasonable person would consider being woken serious.
Even though B and S may argue P is unduly sensitive because she has exams and therefore there is no nuisance (Munro v Southern Dairies) I think it is still arguable being woken at 5am is unreasonable.
Who is D?
B and S are defendants because they are making the noise.
Defences

Prescription – it is unlikely this will hold up because B and S probably haven't been fighting continuously for 20 years.
Consent – no evidence on facts of consent.
Remedies
E and P may be able to recover damages for financial losses arising from tiredness at work, but more likely would receive compensatory damages for the interference to enjoyment of land.
E and P could also seek an injunction to stop the early fighting.

Question 2

C v M
C's Case
Limitation of action
We will assume C took her case within 1 year of the publication of defamatory material to satisfy sch 1 s 6 amending s 31 Limitation of Actions Act 1936.
Standing to Sue
C is alive and so has standing to sue consistent with s 10 of the Defamation Act ('the Act').
Must have defamatory matter
M's speech is a defamatory matter consistent with s 4(d) of the Act.
C is identifiable because C was mentioned by name and so the material would lead people to believe C is the person referred to (David Syme and Co v Canavan).
Who is D?
M is the defendant as she authorised the publication by speaking the words. M might try and argue the defence of innocent dissemination (s 30 of Act) in that M was redistributing D's thoughts, not her own. However arguably this will not stand up because M still spoke the words and chose not to not publish/speak them, she is not a mere distributor.
Published material defamatory?
The imputations are that C is a bad writer and a bad person, as well as being "unoriginal and pedestrian". These arise from the natural and ordinary meaning of the material, they come from a literal reading.
Using the Radio 2UE v Chesterton test, it is arguable this defamatory material is impacting on C's reputation because it would definitely lower C in the estimation of others and also probably expose her to ridicule. The "general community standard test" would be satisfied, it is clear that C's reputation would be lowered.
M might argue that her words count as vulgar abuse and so are not defamatory (Woods v Branson). However it is arguable that the words are not understood as such here and so are still defamatory. M might also bring up bane and antidote, that she praised C after defaming her. However there is no authority to support that what M said after would "undo" the harm to C.
Material published?
The defamatory material was published because it was communicated to 350 people, satisfying s 40.
Conclusion
Given C has satisfied all of the above elements, the court will assume there has been defamation and the onus switches to M to rebut the claim.

M's Case
Defences
Truth and justification (s 23) – If M is able to prove at the time of trial that the imputations are true, she has a defence. We do not have enough facts to prove them here.
Consent – M might argue C gave consent because C pretended to have a dead relative and agreed to go up on stage. However C may argue that she didn't give consent to have bad things said about her, and that M exceeded her implied limitation of consent as in Ettinghausen v Aust. Consolidated Press. M would rebut that she couldn't control what she said and she didn't know she would say bad things. A court arguably would find that C didn't agree to being defamed.
Innocent dissemination – discussed above.
Triviality (s 31) – M might argue that in the circumstances, it is unlikely C would suffer harm because everyone knew what she saying wasn't true (Jones v Sutton). It is unlikely M would be able to satisfy C is unlikely to suffer harm, because there is always a chance of harm, that people would believe M.

Remedies
C would receive general damages to reflect the injury to her reputation and feelings. There is a limit of $250000 damages here (s 33 of the Act).

M v C
M's Case
Choice of law
M would have to choose where to take the action. According to s 11(2) of the Act, the law to be used is the one of the place with the closest relationship to M.
M may want to take action in the US because she ordinarily lives there (s 11(3)). However, while some people in the US and NZ have seen the post, more people have seen it in SA and so the extent of publication is further there.
Limitation of Action
If bringing action in Australia, M must bring the action within 1 year of the date of the publication (sch 1 s 6 amending s 37 Limitation of Actions Act).
Standing to sue
M is alive and so has standing (s 10 of Act).
Defamatory matter?
C's blog would count as a defamatory matter under s 4(b). M is identifiable as she is mentioned by name.
Who is D?
C is the defendant because she wrote and published the post. C may argue her ISP or Twitter or Blogspot should be the defendant because they failed to remove her post. However all of these would probably argue the defence of innocent dissemination. Also in the Lalit Modi case, Twitter was not liable for the tweet, supporting that C should be the defendant here.
Published material defamatory?
Imputation 1: that M is ridiculous, this arises from the natural and ordinary meaning.
Imputation 2: that M is a liar, also natural and ordinary meaning from the post.

Imputation 3: that M cannot speak to the dead, this is arguably a false innuendo as it arises from reading the whole article and together with everything C has said about M. An ordinary person would draw this conclusion (Jones v Skelton).
Overall, it is arguable M's reputation has been affected. It has definitely exposed M to ridicule by the Society group. Additionally the fact that M has lost a show in NZ indicates people think less of her and her show and believe C.
Overall, the M's reputation would be lowered in the general community, satisfying the 2UE v Chesterton test.
Material published?
The material has been published as it has been communicated to people other than C (s 40).
Conclusion
If the court were satisfied that all of these elements were satisfied, it would assume there was defamation unless C can rebut the claim:

C's case
Defences
Truth and justification – C may struggle to prove the imputations were substantially true as, on the facts, C did have a relative called Dan and so it is possible M is not lying and can speak to the dead.
Honest opinion (s 29) – C would probably struggle to prove s 29(1)(b), because arguably a psychic show is not a matter of public interest. Also the defence, even if it arose, may be defeated if M proved that C was acting maliciously in retaliation to her comments (Jones v Skelton).
Triviality – C would probably struggle to prove triviality because it was quite obvious C was being serious and also there was clearly a chance of harm if M was harmed.

Remedies
If the case was successful M would be awarded general damages to reflect on the injury to her reputation, special damages because due to the negative publicity she has lost a show, and possible aggravated damages because C was quite malicious in publishing the matter and did not publish an apology when she found Dan was real.
The damages M is awarded must bear a rational relationship to the harm suffered to M's reputation (s 32 of the Act.

M v S

Question 3

a) H and T v Trench
Intent
Does the statute create a private right to sue on H and T?
Arguably the statute confers a right to sue.
The aim (s 4) of the Act is to protect the workers, so this is a limited class of the public (X v Bedfordshire). The statute does impose an obligation on Trench to protect the workers (Byrne v Australian Airlines). Given that there are no other

penalties or fines, you would use the presumption of statutory intention that Parliament intended to confer a right to sue (Cutler v Wandsworth Stadium).
So arguably a statutory duty was imposed for the protection of a limited class of the public, and Parliament indended members of class to have right to sue (X v Bedfordshire).

Scope
Arguable the harm suffered by H and T was the kind the statute was meant to prevent (Byrne v Aust Airlines). This is because H and T were injured by the collapse of the trench and s 4 specified the Act intends to protect workers from injuries from collapse.

Are H + T people who the statute was designed to protect?
Arguably yes because the statute states in s 4 it aims to protect digging workers, and H and T are digging workers, so the Act was designed to protect them.

Who is D?
The statute specified the person upon whom the duty is imposed is the employer, i.e. Trench Devils. An action only lies against TD, not against anyone not in the statute (O'Connor v SD Bray).

Breach
TD has breached the duty because the statute specified in s 40 retaining walls must be erected.

Causation
Here TD may argue that it was not the lack of wall that caused H and T's injuries, but the blast from the cables. However if the retaining wall was there, then the trenching machine would not have hit the cables. So the lack of retaining wall made a material contribution to injury (Bonnington Castings v Wardlaw)

Defences
None

Damages
H and T would receive compensatory damages for their personal injury and lost wages.

b) MT v TD (pure eco loss)
Type of damage
There is pure economic loss here because MT has lost sales + profit due to not being able to make tiles.

Duty of Care
There is no single duty of care test (Caltex Oil v Dredge Willemstad).
I am going to focus on McHugh J's principles approach in Perre v Apand, with some reference to other salient features in Johnson Tiles v Esso.

Reasonable foreseeability of loss

The harm here was arguably reasonably foreseeable, because TD had the maps and was aware of the electricity cables so the loss is reasonably foreseeable, as it was in Caltex Oil (which had similar facts).
However reasonable foreseeability of loss is not sufficient (Caltex Oil).

Indeterminacy of liability
Arguably liability is not indeterminate to MT because the map showed at least 1 cord went to MT and so only MT would be affected by that cord.
Also TD could have foreseen loss would be economic because it is foreseeable lost sales would result if the cord was cut.

Protection of legitimate business conduct
TD may argue they were pursuing legitimate business interests in doing the damage they did. However the two above indicia of duty are present, and there wasn't legitimate business conduct since TD breached the statutory duty, so the "cloak of immunity" cannot extend here.

Vulnerability of MT to risk
As in Johnson Tiles v Esso, MT was vulnerable because there was nothing MT could have done to stop the blast. However TD would argue MT should have had back up generators. However unlike in Johnson Tiles, MT did not know there was a chance supply could be interrupted, and so MT was still vulnerable here.

Knowledge of risk and magnitude
TD (through Jason) knew of the cables and where they went. However because J looked at the report quickly he probably didn't have actual knowledge of the risk.

Control (Gummow J in Perre)
TD was in control of the actions that caused loss.

Breach
Arguably there is a duty of care in this situation as a sufficient number of features have been satisfied. The relevant standard of care is that in s 31/32, and arguably it has been breached since the harm was reasonably foreseeable.

Causation
Causation satisfied as in s 35 CLA because MT can prove would not have suffered harm but for TD's negligence.

Defences
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Damages
Compensation for loss.

iii) Workers can't recover due to "ripple effect" – their loss is dependent on the companies' loss (Johnson Tiles) and so liability is indeterminate, so there is no duty to them.