

## **Torts 2004 (Kylie Day group) – Class test - Examples of good answers\***

*\*These are not necessarily perfect answers, nor was there only one possible answer to each question. As agreed in class, these answers are given to you simply as examples of good work in the time available. They are to be used solely for the purpose of this class, so that you may benefit as much as possible from the class test. Each answer was written by a different student. There were other very good answers which took different approaches (so there is no need to be concerned just because your answers do not appear here).*

### **Question 1**

*Consider the following statement:*

*The requirement under the existing law of trespass that the interference must be direct could, we think, with advantage be abolished. Such distinctions as that between giving poisoned meat to a dog (trespass) and leaving poisoned meat for a dog (case) do not seem to us to have any place in a rational system of law ... (English Law Reform Committee, 1971)*

*Do you agree? (Give reasons for your view.)*

#### **Example answer**

Generally, the distinction between trespass and case (which has developed into negligence) is that trespass involves the defendant directly interfering with the plaintiff's person, goods or land, while for case, damage is the gist of the action. This distinction would be diminished if the requirement of directness be abolished, and fundamentally goes against the purpose of the tort of trespass, which is to allow for the vindication of basic common law rights that every legal system must allow for. Hence, although it may seem arbitrary at first, the torts of trespass and case serve different purposes; for instance, damage is the gist of the action in case, and if plaintiffs were allowed to sue in trespass, it could undermine the role of trespass to deter intrusions into one's integrity. It could open the floodgates and lead to frivolous actions occurring. Also, relatively recently, statements of claim have been introduced (NSW – Supreme Court Act 1972) removing any procedural difficulties that were present due to the two different writs being in existence.

### **Question 2**

*The defendant fired a small calibre rifle at a target at a shooting gallery. The plaintiff, who was passing by, was struck in the eye by a piece of lead from the bullet fired by the defendant, which deflected off the target. In respect of this incident, identify the issues of tort law relevant in an action for trespass to the person brought by the plaintiff against the defendant.*

#### **Example answer**

Several issues of tort law are relevant in an action brought under the facts. In modern tort law (despite the medieval position), fault on the defendant's part must be proved for any action of trespass [here, battery] to be brought. *Stanley v Powell* reinforced this rule, holding that there can be no [trespass against] the person if negligence or intent cannot be established. The facts of this case can hardly be distinguished from the above scenario, where *Stanley v Powell* saw the defendant fire a rifle, which deflected off a tree, wounding the plaintiff in a bird-hunt. However, it could be argued that the defendant was negligent, able to reasonably foresee the damage he caused through the act. If so, as held in *Williams v Milotin* (where a child was struck by a truck being driven negligently by the defendant), if the defendant's fault comprises negligence, trespass can be brought, however intentional infliction of harm cannot be pleaded as negligence.

Whether the act itself was direct must also be considered. *Scott v Shepherd* held that any intermediaries who lack discretion in their action will not constitute an intervening force. Clearly, the target in this scenario lacked discretion.

The onus of proof is the final issue which must be considered. As held in *Platt v Nutt*, it is first up to the plaintiff to prove direct interference, to establish a prima facie case. Only when this is accomplished must the defendant prove an absence of fault: *Venning v Chin*. The latter is what is seemingly at issue here.

### Question 3

***Comment on the decision of the High Court of Australia in Balmain New Ferry Co v Robertson (1906) 4 CLR 379.***

#### Example answer

The decision said that although creditors cannot physically restrain [debtors], not all restraints are actionable. The restraint was referable to terms on which the plaintiff entered the premises, that is, he had to pay a penny to exit the wharf. It is a contract that can be implied from the circumstances. When the plaintiff rescinded the contract to be carried out by ferry, his rights were no more than someone who had landed on private property. However, Tan in his article "A misconceived issue ..." suggested that although most people believe that Balmain Ferry was entitled to impose a reasonable condition before allowing Robertson to exit because of the conditions of the contract, the Robertson case is more difficult than the Herd case because it involved a monetary aspect. Tan insists that the main issue should have been that a creditor could not forcibly restrain a debtor to recover a payment. However, Tan does agree with the High Court that either way, Robertson wasn't fully deprived of movement. He could have waited for a ferry to carry him off the wharf, which is a reasonable means of escape. *[Perhaps this last point would have been a better basis for the decision (it was referred to by Griffiths CJ but not relied upon, as some of you noted), and would have avoided setting out a principle which seems to be at odds with other fundamental principles of the common law, in particular, that the proper remedy for breach of a contract is to approach the court for damages and other appropriate orders (eg, specific performance), not to use physical force to try and compel someone to perform a contract.]*

### Question 4

***Explain, and comment on, the principles which govern liability in tort for aerial and underground trespass to land.***

#### Example answer

Though the basic elements of trespass to land are the same as other forms of trespass, the question of what constitutes land for trespass is a particular issue, formerly answered by the Latin maxim 'whoever has the earth also has the heavens above it and the depths beneath it'. Clearly, however, in a modern context this has had to be limited, and there is an inconsistency in its application for aerial as against underground trespass, reflecting the different uses of those spaces today. The *Damage by Aircraft Act* states that the reasonable flight of aircraft does not constitute trespass. In accordance with the common law, *LJP Investments*, applying *Bernstein*, holds that trespass is only made out where there is interference with any actual or potential use of the land or structures upon it. *Schleter* highlights that in the case of a lease, the rights of a tenant depend upon the terms of the lease. The position for underground trespass is broader, *Di Napoli* holding that a person has rights underground to a considerable depth, but nevertheless reinforcing the impracticality of the maxim. Though the two are inconsistent, this is justified as the inconsistency reflects the present uses of land, whereby airspaces is publicly used, underground space is not, and the law may change if future technology results in more use of underground space.