

THE UNIVERSITY OF
NEW SOUTH WALES



FACULTY OF LAW

LAWS1061 – Torts

FINAL EXAMINATION - Session 2 2007

- Time allowed: 3 hours, plus 10 minutes reading time
- Examination condition: **THIS IS AN OPEN BOOK EXAMINATION.**
You are permitted to bring any printed or handwritten materials into the examination room.
- Total number of questions: 2 – Part A and Part B
- Value of questions: Part A is worth 65%; Part B is worth 35%
- Questions to be answered: You should answer **both** Parts.

OTHER INSTRUCTIONS:

1. Your **NAME** and **STUDENT ID** should be written on the front of each exam booklet you use.
2. Your **TEACHER'S NAME** and your **GROUP NUMBER** should be written at the top right hand corner of each exam booklet you use.
3. Write legibly in ink.
4. Answer each question in a separate booklet.
5. You **MAY** retain the examination paper.
6. All facts and events take place in New South Wales

FACTS

Jocelyn Jones has just graduated in medicine. She is an intern at Royal Prince Albert Hospital in Sydney and is looking forward to being a surgeon in due course. At present she is doing a term of working in the Accident and Emergency Unit at the hospital. She has bought a pair of new and very expensive 'Manolo Blahniks Pumpy and Groovy' shoes for work to replace her previous pair of 'Pumpy and Comfy' shoes as she wants to look smart for the night shift. One Saturday night as Jocelyn is in the Unit, a man, Allan, is brought in who has been stabbed in the side. The Registrar (Jocelyn's senior and supervisor) tells her to hold Allan's wound together where he has been stabbed. The stabbing has left a wound approximately 45 cm long down his side. As she holds the wound together and staunches the bleeding some blood falls on the floor of the emergency room. This is not an altogether unusual occurrence, but when Allan's heart suddenly stops, and Jocelyn runs to the Cardiac Trolley she slips on the blood on the floor, because her new shoes do not have the grip of her previous pair of 'Pumpy and Comfy' shoes. She hits her head very hard on the Cardiac trolley and is knocked unconscious and her nose starts to bleed. Takashi, a hospital cleaner, who has always wanted to be a doctor but because of poor family circumstances was unable to do so, rushes to assist Jocelyn. The hospital runs a strict policy that no cleaner is to have contact with a patient in any circumstance. However, the night before, whilst watching his favourite show 'Medical Emergency', Takashi saw a doctor treat a man with a bleeding nose by placing him into an upright position and leaning his head back. Although he missed the end of the show he is confident that it is the appropriate treatment and places Jocelyn into an upright position and leans her head back. Takashi, who cleans for a number of facilities around Sydney, has been working at the Royal Prince Albert Hospital for 3 years. Although he has to supply his own mop and cleaning equipment the hospital insists, for health and safety purposes, that he wears a green uniform which the hospital provides to all non-medical staff. His hours are set weekly and he never knows in advance when he will be working. He pays his own tax and has no specified sick leave although the hospital pays him a 'medical bonus' as it is recognised that hospital workers are prone to infections.

It turns out that Jocelyn has a relatively thin skull and has suffered a severe brain haemorrhage from the accident. Unfortunately placing her into an upright position and leaning her head back is likely, doctors say afterwards, to have worsened the injury. Jocelyn's mother, who is furious at Takashi's intervention, insists she is transferred to Getwel Private Hospital where she is rushed to emergency for keyhole surgery. The operation is assisted by Wilhelm, a clinical nurse specialist, who has just finished his specialist training in surgery. Wilhelm's role in Jocelyn's operation is to monitor the keyhole camera screen and alert the surgeon to any bleeding or abnormality in heart rate and other vital functions. Although the NSW medical guidelines recommend that clinical nurses attend a training course of five modules before assisting surgeons in keyhole surgery Wilhelm has only attended two. After the surgeon pierces Jocelyn's skull she begins the keyhole surgery to stem the bleeding on the right side of the brain where the primary injuries are located. Wilhelm who is concentrating on the surgeon's amazing skills and meticulous technique fails to see and inform the surgeon that a large pool of blood has formed over Jocelyn's left temporal lobe. By the time the surgeon realises that blood has penetrated and flooded the wound, Jocelyn is left with severe brain damage. An investigation reveals that if Wilhelm had notified the surgeon of the blood pool on the left side of the brain then it would have been possible to stem the bleeding and the damage to

her speech and memory would have been greatly reduced. Although an inquiry reveals that Wilhelm was insufficiently trained to manage the multiple tasks that keyhole surgery requires the hospital claims that there are too few clinical nurse specialists in surgery to send them to five training workshops and that it is common practice in all hospitals to send to them to fewer. They also state that if Wilhelm had attended all the training workshops other lives would have been lost because there is a huge shortage of clinical nurse specialists in all fields.

Jocelyn is no longer able to practise medicine because her brain damage makes it impossible for her to concentrate and she is forced to work as a cashier in Franklins instead. Jocelyn used to play the violin in the Sydney Youth Orchestra, but she cannot do that any more. Jocelyn suffers from nightmares in which she runs and slips and runs and slips and she finds it almost impossible to sleep because of this. Her personality has also changed because of the brain damage. She used to have a sunny, happy personality, but now she is chronically miserable and has sudden episodes of anger and so her friends have gradually deserted her. Her mother has to look after her, and has given up her job as a solicitor because Jocelyn cannot be left alone for longer than about 20 minutes. Jocelyn turns things on and forgets to turn them off and needs to be watched constantly. She has difficulty remembering her address and often gets lost. Whilst no change needs to be made to their home, the doctors have recommended that Jocelyn have hydrotherapy for several hours a day and this would best be done if there was a pool at their home.

Part A (This part is worth 65% of the marks for the exam)

Consider your answer to the following questions in the light of the relevant law, including the common law and the *Civil Liability Act 2003* (NSW). You are not required to refer to any statutes outside the ones considered in your textbook and course materials.

1. Assuming that the Royal Prince Albert Hospital owes a non-delegable duty of care to Jocelyn as its employee will it be liable to Jocelyn in negligence?
2. Assuming that Getwel Private Hospital is vicariously liable for Wilhelm's actions will it be liable to Jocelyn in negligence?
3. Is the Royal Prince Albert Hospital vicariously liable for Takashi's negligence?
4. Assuming that the hospital(s) will be liable to Jocelyn in negligence, how will the damages be assessed? Consider the legal rules concerning damages and discuss the likely outcome for Jocelyn.

Part B (this part is worth 35% of the marks for the exam).

'Leaving the loss to lie where it falls is preferable to shifting it on to a system which will be unable to bear it.'

OR

'Personal responsibility and accountability are central to a responsible compensation system'

Critically discuss **one** of the above statements in the light of the facts above and at least one of the theoretical articles you have studied for this course.

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