Problem Question Model Answer

Question 1

a. Simon v Andrew – Intentional torts: battery

Simon, the plaintiff has standing to sue against Andrew, the defendant for trespass to person, battery. This is an intentional torts and there will be an application of both the relevant laws such as the Civil Liability Act and significant cases to establish legal advice for the plaintiff.

Battery

Trespass is actionable per say, meaning that actual damage does not have be shown or proven. However, to establish trespass occurred, the plaintiff must prove that the direct interference of the defendant caused his injury on the balance of probabilities as per **Platt v Nutt (1988).**

Physical contact

Although no direct physical contact takes place between Simon and Andrew, the explosion causing the release of carbon dioxide can be argued to be the physical contact causing harm against the plaintiff. Physical contact can be an act as minor as touching a plaintiff clothes **(Fagan v Metropolitan)** or even spitting in someone's face **(R v Cotesworth**). As such, physical contact can even occur through a medium as per **Pursell v Horn (1838**), a precedent case involving a defendant throwing hot water on the plaintiff, scalding him and damaging his clothes. The court held that there was no need for any contact with the plaintiff other than by water to establish battery. In consequence, the water of the Pursell Case can be likened to the carbon dioxide, which caused dizziness in Simon and his collapse and head injury.

Directness

Andrew, the defendant's act of shaking the fire extinguisher and the spraying it on the wine directly causes the dizziness and fall of the plaintiff. The direct act of spraying the fire extinguisher immediately causes an explosion, resulting in both the plaintiff and the defendant's injuries. In accordance to **Hutcher v Maughan**, consequence of an act must be immediate and inevitable, with the courts arguing that "where injury is immediate, an action of trespass is available". By applying the ratio of this case, it is clearly evident that the act of using the extinguisher caused immediate damage upon both Simon and Andrew.

Positive Act

The act of using a fire extinguisher to chill wine does not fall in the scope of everyday life. **RE F Mental Patient: Sterilisation** defines everyday life as 'jostling in a street…social contact, at parties… is an example of 'exigency of everyday life'. This notion is affirmed by the High Court in **Department of Health and Community Services v JWB (1992).** Clearly, the act of chilling wine with a dangerous mode does not fall under normal, thereby establishing a positive act with application towards the plaintiff.

Voluntary and Negligent Act

The defendant's actions of using the fire extinguisher can be seen as negligent. As per **Williams v Milotin**, it can be underlined that a negligent act such as driving can amount to battery. In that case, the truck driver's unintentional injury of a cyclist was not intended but rather negligent. Applying the same concept, Andrew's use of a fire extinguisher was not intended to injure the plaintiff, but it was

however negligently misused. Consequently, the defendant's action can be seen to be negligent, instead of intentional, with **Mc Namara v Duncan's** ratio stating that it is irrelevant that the defendant did not intend the consequences, the act was intentional. In other words, the defendant' use of the fire extinguisher was intentional and therefore can be seen as a voluntary negligent act.

Defences

There are no defences for the defendant. However, Andrew can also argue that Simon contributed to his injury as he aided in the use of the fire extinguisher to chill the wine.

Remedies

Simon would receive nominal damages, as well as compensatory damages for his injuries he sustained during the incident.

b. Simon v Dr Brown – Negligent for failure to warn case

Simon would attempt to commence legal actions/proceedings against Dr Brown to recover damages for his injury caused by his failure to warn.

Duty of care

The relationship between Simon and Dr Brown falls within the established categories of duty of care, namely patient and doctor, a duty which is recognised in Rogers v Whitaker.

Breach of duty

Section 5B of the Civil Liability Act 2002 (NSW) provides the necessary elements to prove breach. In accordance to section 5B(1) and (2), the plaintiff is required to prove that the risk was foreseeable and not insignificant, and that Dr Brown did not exercise the standard duty of care as a reasonable doctor to warn of such a risk.

i. Risk was foreseeable and not insignificant

The plaintiff must prove and establish that the risk of injury performing a dental surgery was foreseeable and not insignificant. Foreseeable risk is a notion defined in Wyong Shire Council v Shirt where the High Court held that a foreseeable risk is on that is not far-fetched or fanciful. However, statue law, the Civil Liability Act has altered this notion, requiring that the risk is *not insignificant.*

Not Insignificant risk is a phrase used to indicate a risk that is of a higher probability that is indicated by the phrase 'not far-fetched or fanciful'. As such, the phrase is not intended as a synonym for "significant". By applying this notion, the risk of dental implantation work on a patient was not insignificant, as complications arising from the dental surgery was common and therefore foreseeable.

ii. The reasonable Person and the calculus of Negligence

The reasonable person test is enshrined in Section 5B(1)(c) which states that a reasonable person in the position of the plaintiff would have taken certain precautions. It is an objective standard test, where the plaintiff must establish that the defendant breached his duty as a doctor. In order to establish this element, the plaintiff must consider Mason's calculus of negligence in Wyong Shire Council v Shirt as well as **Section 5B(2) of the Civil Liability Act 2002 (NSW).**

- **The probability of harm**

As per Bolton v Stone, probability of harm is defined as the risk of danger being so small that a reasonable person , considering the matter from the point of view of safety, would have taken precautions to prevent the danger or harm from occurring. If the probability of harm is low, then the defendant will not be liable. However, in applying this law to the given facts, the risk of danger of further damage in Simon's jaw as low, as the dental implantation surgery complication was rather unusual but a well-known complication of this type of dental work.

- **Burden of taking precautions**

The burden of taking precaution was analysed in Caledonian Collieries Ltd v Speirs where the courts found that where the risk of injury is serous and comparatively simply to avert, the defendant is more likely to be found negligent. In applying the law to the facts, it can be extrapolated that the risk of injury was serious, even though the probability of such injury occurring was low as it was an uncommon but known complication in the dental surgery. The risk of injury of the plaintiff could have been avoided by warning him of such complications.

iii. Foreseeable Risk

The defendant knew of the risk that caused the plaintiff injuries, and so the element of the risk being foreseeable is clearly satisfied. Applying the facts, Dr Brown knew of the risk of complications arising during the dental implantation, but failed to warn of this risk.

- **Failure to Warn**

Sections 5O states that a liability in negligence cannot be incurred from a professional. However, Section 5P contended that Section5O will not be valid unless there is a failure to warn. In other words, Doctor Brown's failure to warn Simon of the risk of complications arising during surgery establishes foreseeable risk. As per **Rogers v Whittaker**, the court held that in any medical situation, a doctor must warn a patient of material risk of injury, regardless of the probability of the risk occurring. Consequently, it can be seen that Dr Brown fails to warn the plaintiff of such material risk.

Conclusion – Breach of Duty

The following elements for breach has been satisfied as the defendant did not perform the standard of his duty of care as a doctor, as there was foreseeable risk and failure to warn of the risk. Hence, the court would most likely conclude that Dr Brown has breached his duty of care.

Causation

Section 5E of the Civil Liability Act provides that the onus of proof for causation rests with the plaintiff. As such, **Section 5D(1)(a)** creates the necessary factors test for causation, allowing the courts to adopt the common sense approach outline in **March v E & Stramare Pty Ltd**.

In applying this law to the facts, the plaintiff would be able to demonstrate that the defendant's negligent act of failure to warn was a necessary condition for his physical injury of his droopy jaw. This is supported by the fact that Simon's statement, where he argued that if he had known of the possibility of a rising complication in a dental implantation work, he would not have such dental work done.

Remoteness

Remoteness of damage is governed by **Section 5D(1)(b)** which allows the court to take into consideration of the common law position on remoteness. Furthermore, common law has enshrined the decision of **Wagon Mound (No. 1)** for remoteness, where the case held that the defendant can only be found liable for damage that is reasonably foreseeable.

The reasonable foreseeability test in remoteness of damage cannot be satisfied as the facts clearly state that the nerve damage in the plaintiff's jaw was not due to the defendant's negligence.

Defences: Voluntary Assumption of Risk

The defendant can argue that he should not be held liable for the materialisation of an obvious risk that had a low probability occurring which amounted to the plaintiff's damage. Section 5K(3) of the Civil Liability Act 2002 (NSW) contends that obvious risk includes "a risk of something occurring… even though it has a low probability of occurring". This provision was interpreted and applied in Falvo v Australian Oztag Sports Association where Ipp JA (who was responsible for the drafting of the Civil Liability Act) held that a risk will be significant where the potential harm is serious but the risk is low or the risk is high but the potential harm is low.

In Applying this law to the facts, the defendant can absolve his liability for damage, as the materialisation of an obvious risk of a common dental practise was due to the defendant's negligence.

c. Bea vs Andrew – Consequential mental harm

Bea may have standing to sue against Andrew in pursuant to the Civil Liability Act 2002 (NSW) on the grounds that the Andrew his breached his duty to take care to avoid pure psychiatric or psychological harm to the plaintiff. She can commence legal proceedings for consequential mental harm she suffered from her nervous shock.

Duty of Care

Section 32 of the Civil Liability Act recognises that a duty of care only exists to persons of normal fortitude. There is no precise definition of what a 'normal fortitude' means, but Tame v New South Wales recognised that 'in nervous shock cases, the law imposes only a duty to take reasonable care to avoid psychiatric injury to a person of normal fortitude.

i. Sudden Shock

Applying the facts, Bea experienced sudden shock as she become immediately upset upon witnessing her husband's terrible injuries. Wicks v State Rail Authority of New South Wales (2010) was a High Court decision which held that witnessing the horrific scenes of the train crash can still constitute as shock. The case dealt with section 32 and establishes that the plaintiff is required to have physically witnesses the victims "being killed, injured or put in peril" which may amount to nervous shock.

In a similar manner, the plaintiff can prove that she experienced sudden shock as she was physically upset after witnessing her husband's injuries. As such, the sudden shock resulted in further psychological damage, where the plaintiff became diagnosed with a psychological disorder.

ii. Direct witness of incident

Section 30(2) contends that there will be no recovery for pure mental harm unless the plaintiff witnessed the scene or is a close member of the victim. However, the plaintiff should be able to recover damages, as she was a direct witness of the aftermath of the explosion where her

husband, Simon was severely injured. Nevertheless, as per Gleeson Cj in Tame, argued that a duty is established simply by distinguishing between witnesses.

iii. Nature of relationship with injured person

Bea, the plaintiff has a very close relationship with Simon, the injured person who is her new husband. As the Civil Liability Act only allows recovery for witnesses or family members, there was a duty owed to the plaintiff given that she was both a witness and a close relative of the injured person. In this case, Bea satisfied both elements, as she was a witness but also a closely family member by law. Common law within the scope of torts has accepted "close and intimate" relationships as sufficient basis to establish a duty. The relationship of husband and wife would undoubtedly constitutes a relationship of that kind. Nevertheless, to restrict liability to close family members would in essence restrict the duty owed by the defendant.

iv. Pre-existing relationship between Plaintiff and Defendant

The existence of a relationship between the plaintiff and the defendant is necessary to prove that such a duty existed, as outlined in Section 32(2)(d). Annetts v Australian Stations Pty Ltd affirms this notion, with the court finding that pre-existing relationships can be established through the phone, regardless of not physically meeting. Likewise, in this case, the plaintiff's relationship with the defendant falls under the employer/employee relationship, as Andrew is the Flight Services Director whereas Bea was a flight attendant.

Despite this, **Koehler v Cerebos (Aust) Ltd (2005)** held that an employee did not owe a duty of care in negligence to an employee not to inflict a stress-related psychiatric injury on the plaintiff. One may argue that this gives rise to no duty being owed to the plaintiff, as the scope of such injury did not fall under an employment environment, but rather the nervous shock occurred outside of working hours. The High Court's decision in Koehler that a reasonable person would not have foreseen the risk of the psychiatric illness to the employee, thereby suggests that the plaintiff, Bea may not be able to recover damages.

Breach of Duty

As per Tristan v Richard and Annetts Case, breach of duty can be identified as the defendant knew of the plaintiff's close relationship with the injured person yet failed to ensure the safety of that person.

Causation

Section 5D(1) sets out that the negligence was a necessary condition of the occurrence of the harm, where the plaintiff must utilise the but for test, or prove factual causation. Breach in the duty of care is evident in this case, as 'but for' the negligence of Andrew, Bea would not have suffered mental harm if she had not witnessed her husband's terrible injuries. The but for test has been satisfied as that the defendant's negligence was a necessary condition which amounted to the plaintiff's mental harm and eventual psychological disorder.

Remoteness

The scope of the damage can be determined through the reasonable foreseeability test. Considering the nature of the pre-existing relationship between the defendant and the plaintiff, the defendant would have foreseen the risk of causing injury to Bea as a direct consequence of witnessing her husband's severe injuries. Mt Isa Mines v Pusey provides that mental disturbance will be foreseeable in this instance and will be immaterial to the extent of such disturbance. Thus, the mental harm suffered Beau can be argued as largely remote.

Defences

Contributory Negligence

The defendant can argue that the plaintiff contributed to her own injury as she had bought the wine from the airplane for her own recreational use. Section 5R(2)(b) provides that the plaintiff ought to have known of the risk of bringing the wines down. Nevertheless, she wouldn't have been able to foresee the risk of the explosion as it was Andrew, the defendant's suggestion.

Conclusion

All elements were satisfied, but plaintiff can claim compensation for his injuries and nominal damages for mental harm.

d. Walter v Bluesky Airlines

Walter has standing to sue Bluesky Airlines pursuant to the Civil Liability Act 2002 (NSW) on the basis for breaching their duty to provide safety measures, and this breach amounted the Walter' injuries.

Duty of Care

Section 41 of the Civil Liability Act 2002 (NSW)

The plaintiff would initially be required to establish that the Bluesky Airlines is a public authority for the purposes of the Civil Liability Act 2002 (NSW). Consequently, the plaintiff would be able to establish this requirement because the Bluesky Airlines is a public body for air travel which is responsible for the safe delivery of passengers.

Section 44 of the Civil Liability Act 2002 (NSW)

The plaintiff would be required to overcome section 44 of the CVL which provides that a Defendant authority will not be liable for failing to exercise a regulatory function unless the plaintiff would require the authority to exercise that function. Clearly, the defendant fails to provide safety measures on the plane in the circumstances of fires or accidents.

1. **Reasonable foreseeability** – it is reasonable foreseeable that the failure to exercise statutory power resulted in injury to the plaintiff, as he suffered from lung damage due to a fire that could not be put out due to an empty fire extinguisher.
2. **Control** – was Bluesky airlines in control? Yes there were in control of replacing the empty fire extinguisher.
3. **Vulnerability** – the plaintiff was vulnerable as he could not stop the fire, causing him to suffocate and damage his lungs
4. **Knowledge** – there was a replaced defective fire extinguisher which was empty – employees did not check
5. **Purpose of public authority** – to safely deliver passengers, but in doing so must have back up safety measures in the case of unforeseen accidents.
6. **Policy reasons** – are there any policy reasons that denies the existence of a duty of care?

Threshold test: CLA s 44:

- Authority is not liable when they fail to exercise a function to prohibit or regulate an activity unless they could have been required to exercise the function in proceedings instituted by the plaintiff

Cases:

Statutory authorities may have a positive duty to act: Crimmins v Stevedoring Industry Finance Committee; Pyrenees Shire Council v Day

- Establishing a duty of care: Graham Barclay Oysters Pty Ltd v Ryan

Problem Question Answer 2

Question 2

a. Mike v Everest Climb Club – Occupiers/ Entrant – Negligence

Mike would have standing to sue Everest Climb Club to recover damages for his physical injury caused by their negligence.

Duty of care

The relationship between Mike and Everest falls within the established categories of duty of care, namely owner/occupier and entrant as per (Zalzuna).

Breach of duty

Section 5B of the Civil Liability Act 2002 (NSW) ("CLA") covers the breach stage of negligence. It provides that in order to establish breach, (i) the risk must be foreseeable and not insignificant, and that (ii) Everest did not exercise the standard of skill of the reasonable occupant according to the calculus of negligence.

i. Risk was Foreseeable and Not Insignificant

The first step in proving breach requires Mike to establish that the risk of injury to a young person using a harness unsupervised by staff was foreseeable and not insignificant. The concept of foreseeable risk is epitomised in **Wyong Shire Council v Shirt** where the High Court held that a foreseeable risk is one that is not far-fetched or fanciful. Nevertheless, this has been altered by the Civil Liability Act which now requires that the risk is not insignificant, a higher standard to prove.

Not insignificant risk is a phrase used to indicate a risk that is a higher probability which is indicated by the phrase, 'not far-fetched or fanciful'. As such the phrase is not intended as a synonym for the word significant. By applying this notion to the given facts, the risk of injury climbing unsupervised was foreseeable. Similarly the risk of causing injury whilst using an unchecked harness to climb is not insignificant.

ii. The reasonable person and the calculus of negligence

Mike needs to establish that Everest fell below the standard of care expected of a reasonable person. In order to prove this element, Mike needs to consider the calculus of negligence stated in **s 5B(2) of the Civil Liability Act 2002 (NSW),** legal principles which was applied in **Wyong Shire Council v Shirt.**

This case dealt with a plaintiff water skier who misunderstood the signs and thought that the water was deep in places, after reading the sign 'Deep Water'. However this caused the plaintiff to mistake the depth and fall and injure himself in shallow water, injuring his head and becoming a paraplegic.

- **The probability of harm**

As per **Bolton v Stone**, probability of harm is defined as the risk of danger being so small that a reasonable person in the position of the defendant would have taken precautions to prevent the danger or harm from occurring. If the probability of harm is low, then the defendant will not be liable. However, in applying this law to the given facts, the risk of injury in an unchecked harness