TORTS LAW
MODEL EXAM
2009
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**IRAC method of completing exams**

**Issues** - Outline the issues that you are going to discuss.

**Rules** - Define the legal rules that are relevant to the question.

**Application** - Apply the legal rules to the facts of the question (this is the hard part!).

**Conclusion** - Tie things up, usually in the form of an advice to your hypothetical client.

Always use your reading time wisely to **PLAN YOUR ANSWER** before writing. This is of utmost importance as it will help you clarify your thoughts and ensure that you avoid following desperate exam strategies that unprepared students commonly resort to, such as:

i) 'the kitchen sink’ i.e. spilling all of your knowledge that is vaguely related to the topic onto the exam paper and hoping for the best.

ii) ‘the garden path’ i.e. going off on an irrelevant tangent

Remember that the **APPLICATION IS THE MOST IMPORTANT SECTION** of your answer and should take up the bulk of your time. The actual conclusions you reach are often superfluous. Rather, your marker will be most interested in how you arrived at your conclusion.
Question One

In 2006, the Council of the Shire of Kelewan ("The Shire") just recently engaged engineers to build a new bridge ‘Avenue Bridge’ – an access bridge over a gully. The bridge was built to specification as required by statutes. The bridge is 15 meters long and 10m high, and serves a large recreational area that included a skate park, football oval, swimming pool, youth centre and local RSL. On Friday nights, the bridge was a place for local youths to congregate, talk and wait for friends and drink together. The council has been notified that the bridge has become a place for youths to meet and drink alcohol.

Jeff is a 19 year old first year law student. One night, he and a number of friends had just attended a ‘battle of the band’ competition at the RSL in celebration of end of year exams. At such gatherings, many students would bring their own alcohol to consume. Jeff was excited after his exams and decided to have a ‘big one’ – he consumed a large quantity of whiskey during the course of the evening. Jeff became quite intoxicated, having only had a cheese sandwich for lunch.

At 2.30 am Jeff and his friends left the RSL and intended to catch a taxi home. However, since it was a busy night and the taxi rank was congested, Jeff and his friend Matt decided to walk home via the bridge while the others waited for a taxi. They met some fellow law students who were hanging out at the bridge smoking marijuana and drinking. Jeff and Matt sat down to talk with the other students. At this point, Jeff began to feel nauseous, telling Matt ‘I think I am going to vomit’. Mat replied ‘Make sure you do it over the bridge and not on me’. Jeff runs quickly across the road and leapt up on a concrete step separating the rail and the road, he attempted to grab the railing but instead he fell over the railing and into the river. On that night, there was not much water in the creek. Jeff suffered severe spinal injuries resulting in paraplegia and also other injuries.

Jeff’s friend Matt was standing by near the railing and saw his friend fall head first into the river. Matt has been Jeff’s best friend since they were young. As a result of witnessing the horrific fall, Matt developed post traumatic stress disorder.
1) Advise Jeff of any action he might have against the Council and whether the council has any defences (do not discuss any cross-claim the Council might have against the engineers).

2) Advise Matt of any action he might have against the council.

**Answer**

a) **Jeff vs The Council**

Jeff would commence legal proceedings against the Council in negligence for the damage he has suffered. In advising Jeff of the likelihood of successfully commencing these proceedings, the relevant legal principles outlined in the *Civil Liability Act 2002* (NSW) and the cases interpreting these statutory provisions, will be applied to the facts of this case.

**Duty of Care**

The relationship between Jeff and the Council does not fall within the established categories of duty of care. Consequently, for the court to impose a duty of care, they would adopt the incremental approach based on reasonable foreseeability and salient features (*Perre v Apand*).

(I) **Reasonable Foreseeability**

In *Romeo* and *Australian Safeways*, the court in both cases held that a public authority has a duty to exercise reasonable care to prevent foreseeable risk of injury to the public arising out of structure and conditions of premises/land that it owns. In applying this legal principle to the present case, it is reasonable to assume that the council knew when building the bridge that it was to be used for recreational purposes and pedestrians who may or may not be under the influence of alcohol. Hence, the element of reasonable foreseeability would be established by Jeff.
(II) Salient Features

The predominant salient features which would establish the existence of a duty of care is vulnerability of the Plaintiff and control of the Defendant. These salient features were examined in *Ryan v Great Lakes Shire Council* where the High Court identified that (i) a high degree of control exercised by the Defendant over the risk of harm that eventuated, may result in the imposition of a duty of care; and (ii) a high degree of vulnerability of the Plaintiff who relies on the care and skill of the Defendant, may further lead to the imposition of a duty of care.

In applying this decision in the present situation on the basis that it was intended to have general application in cases of this kind, the following inferences can be made: (i) the council exercised a high degree of control over the risk of harm that eventuated because they are responsible for maintenance of the bridge; and (ii) there was a high degree of vulnerability on behalf of Jeff because he was relying on the proper exercise of care and skill by the council. Thus, the relationship between Jeff and the council can be characterised by a high degree of control by the council and vulnerability by Jeff.

**Conclusion**

The Council owes a general duty to exercise care to protect from foreseeable injury anyone who uses the bridge, whether or not they have consumed alcohol. Furthermore, the scope of this duty clearly extends to safeguarding the type of harm which has eventuated in this situation, especially in light of the Council’s knowledge of the increased alcohol consumption by young people around the bridge.

**Breach of the Duty**

Section 5B of the *Civil Liability Act 2002* (NSW) covers the breach stage of negligence. In order to establish breach, Jeff is required to prove (i) the risk was foreseeable and not insignificant; and (ii) the Council did not exercise the standard of care and skill of the reasonable council according to the calculus of negligence.
(I) Risk was Foreseeable and Not Insignificant

Jeff is required to initially establish that the risk of injury to a young person through using the bridge whilst under the influence of alcohol was foreseeable and not insignificant. The notion of a foreseeable risk was laid down in Wyong Shire Council v Shirt where the High Court held that a foreseeable risk is one that is not far-fetched or fanciful. However, this has been altered by the Civil Liability Act which requires that the risk is not insignificant.

In order to ascertain the meaning of “not insignificant”, the court can have consideration to extrinsic materials pursuant to s 15AA of the Acts Interpretation Act (Cth). Consequently, the meaning of “not insignificant” was outlined in para 7.15 of the Ipp Report which stated that “the phrase ‘not insignificant’ is intended to indicate a risk that is of a higher probability than is indicated by the phrase ‘not far-fetched or fanciful’” but is not intended “to be a synonym for ‘significant’”.

In applying this law to the present fact situation, the risk of injury to a young person under the influence of alcohol using the bridge was not insignificant in light of the greater alcohol consumption by youths who used the bridge since its construction. In addition, the facts that there were no previous occurrences of injuries and the bridge was built according to statutory requirements do not negate negligence pursuant to the decision in Mercer.

(II) The Reasonable Person and the Calculus of Negligence

Jeff is required to demonstrate that the Council has fallen below the standard of care expected of a reasonable Council. In order to establish this element, Jeff must consider the calculus of negligence outlined in s 5B(2) of the Civil Liability Act 2002 (NSW).

a. The Probability of Harm

The factor, probability of harm, was outlined in Bolton v Stone where the court held that where the risk of danger is so small that a reasonable person, considering the matter from the point of view of safety, would have thought it right to refrain from making steps to prevent the danger, the defendant will not be liable. In applying this law to the facts,
the risk of danger that an intoxicated young person would sustain injury whilst using the bridge where the railing is low and there are inadequate warning signs was not so small that a reasonable person would have thought it right to refrain from making steps to prevent the danger.

b. Burden of Taking Precautions

The burden of taking precautions was examined in Caledonian Collieries Ltd v Speirs where the court held that where the risk of injury is serious and comparatively simple to avert, the defendant is more likely to be found negligent. In applying this law to the facts, it can be deduced that (i) the risk of injury was serious in light of the 10 metre drop and low water; (ii) the risk could have been averted by the Council installing railings on top of the existing railings which would not be expensive in light of the fact that the bridge is only fifteen metres in length; and (iii) the risk could have been minimized through the erection of warning signs.

Conclusion

Jeff would most likely be able to establish that the Council has fallen below the standard of care of a reasonable council in light of the probability of harm and minimal burden of taking precautions. Hence, the court would most likely conclude that the Council has breached their duty of care.

Causation

Section 5E of the Civil Liability Act provides that the onus of proof for causation rests with the plaintiff. Section 5D(1)(a) establishes the necessary condition test for causation which allows the courts to adopt the common sense approach laid down in March v E & M Stramare Pty Ltd.

In applying this law to the facts, Jeff would be able to easily demonstrate that the Council’s negligent acts of not creating a higher railing or erecting warning signs was a necessary condition for his physical injury. This is supported by the fact that had a higher railing been installed, Jeff would not have fallen over the bridge.
Remoteness

The law relating to remoteness of damage is covered by s 5D(1)(b) which enables the court to take into account the common law position on remoteness. Moreover, the common law position is laid down in *Wagon Mound (No. 1)* where the court held that the defendant is only liable for damage that is reasonably foreseeable.

In applying this law to the present situation, spinal injuries culminating in paraplegia is reasonably foreseeable from falling off a ten metre bridge where the water level was low.

Defences: Contributory Negligence

The Council would argue the defence of contributory negligence because s 50(3) of the *Civil Liability Act* provides that contributory negligence will be presumed in circumstances where the plaintiff was intoxicated or under the influence of drugs at the time of the injury. Further, this presumption would not be rebutted by Jeff because it is clear that his intoxication played a role in causing his physical injury.

Hence, the court would find that Jeff is contributorily negligent. As a consequence, the court has a wide discretion to reduce the damages proportionate to the extent to which Jeff is responsible for his own injuries.

b) Matt vs The Council - Liability for Post Traumatic Stress Disorder

Matt be able to commence legal proceedings against the Council for causing him pure mental harm pursuant to Part 3 of the *Civil Liability Act 2002* (NSW).

Duty of Care and Breach

(I) Recognised Psychiatric Illness

Section 31 of the Act imposes a requirement upon the plaintiff to demonstrate that they have suffered a recognised psychiatric illness. This requirement would be easily established by Matt because he suffers from post-traumatic stress disorder.
(II) Normal Fortitude

Section 32 provides that a duty of care will arise where the defendant ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness if care were not taken. Matt would be able to establish this element because it is reasonable foreseeable that a serious spinal injury to a friend could result in the victim suffering a recognised psychiatric illness.

(III) Circumstances of the Case

Section 32 also outlines the circumstances of the case that the court must consider when determining whether a duty of care should be imposed and whether this duty has been breached.

(a) Sudden Shock

The notion that the mental harm was caused by a sudden shock is a relevant factor which has been examined in Annetts v Australian Stations Pty Ltd. The court held in this case that the notion that shock be sudden has been supplemented with a cumulative notion of shock. In applying this law to the facts, Matt's mental harm has been predominantly caused by a cumulative notion of shock in witnessing his friend's injury and realising the impact over the subsequent weeks.

(b) Direct Perception

An indicia of a duty of care will be whether the plaintiff directly perceives another person being placed in a position of peril. Consequently, Matt has directly perceived his friend being placed in a position of peril. Hence, this is a relevant factor when considering the imposition of a duty of care and the breach of such a duty.

(c) Nature of the Relationship between the Plaintiff and Person Injured

The nature of the relationship between the plaintiff and the person injured is especially relevant where the plaintiff is a close friend of the person injured. Consequently, the
court is more likely to find a duty of care and breach of such a duty when the nature of the relationship between the plaintiff and defendant is one of a close friendship.

**Conclusion**

The court would most likely conclude that the defendant owed the plaintiff a duty of care of which they breached through failing to erect a higher railing on the bridge and erecting warning signs.

**Causation**

Matt would be able to easily satisfy the causation test in s 5D by proving that the negligence of the Council was a necessary condition in causing the incident which ultimately culminated in Matt suffering from post traumatic stress disorder.

**Remoteness:**

The law relating to remoteness of damage is covered by s 5D(1)(b) which enables the court to take into account the common law position on remoteness. Moreover, the common law position is laid down in *Wagon Mound (No. 1)* where the court held that the defendant is only liable for damage that is reasonably foreseeable.

There are no issues in relation to remoteness because a mental illness is a reasonably foreseeable consequence of witnessing a friend sustain a severe spinal injury.
Question Two

Bill is the owner of “Go-go kart Racing Pty Ltd”. He has just recently built a large go-kart race track and every month Bill organises a race for local youths where entrants race off against one another. Each team registers a driver and pit crew and pays $100. The race runs for 6 hours, with each team having a maximum of 4 drivers, with drivers changing every 1 hour. The meetings usually take place on the last Friday of every month and a large number of youth spectators often come to watch.

Go-kart engines usually run on petrol or methanol. But given the rising cost of petrol Bill is finding it hard to keep his current price structure using petrol. Bill’s friend Ted, is a mad scientist from the ANU. Ted has just recently developed a new type of fuel that is much more efficient and adds extra power to engines – it is called “Dinamite”. Yet to be approved by the Australian Petrol Board, Dinamite is more flammable than fuel and heats up engines more quickly. Thus, engines will require bigger radiators to keep them cool and overheating. Bill considers using Dinamite in his karts, but considers it unnecessary to install bigger radiators in the engines as it might slow the karts down.

On race day, Bill contracts three body guards - Bruno, Franco and Bobo - to take care of the crowd. Bill is responsible for overseeing that the body guards carry out their duties effectively and requires them to wear his uniform and use his equipment. In addition, they are paid with deduction of income tax.

Barriers are installed on most parts of the race track, except for one section on the far side of Bill’s property. Bill had ordered less than he expected he would need when he was building the track.

Race day was an extremely hot and dry summer’s day. The team in second place, driven by Jed, is racing well and Jed is pushing his kart very hard whilst his engine is running extremely hot. Jed attempts to overtake another kart – approaching a corner he accelerates when all of the sudden his engine explodes and catches fire. Jed’s cart spins out of control and slides off the track and hits a tree. This part of the track had no barriers installed.
Meanwhile, on another part of track Bruno was standing around having a cigarette and watching the race. Having turned his backs to the track, he did not see Vincent running onto the track waving his arms. Vincent is hit by one of the karts. He suffers significant injuries and has had his leg amputated.

a) Advise Jed of any claims he may have against Bill; and

b) Advise Vincent of any claims he may have against Bill on the basis of vicarious liability in light of the fact that Bruno has limited assets.

**Answer**

a) **Jed vs Bill**

Jed would attempt to commence legal proceedings against Bill to recover damages for his physical injury caused by his negligence.

**Duty of care**

The relationship between Jed and Bill falls within the established categories of duty of care, namely owner/occupier and entrant (*Zaluzna*) and manufacturer and consumer (*Donoghue v Stevenson*).

**Breach of duty**

Section 5B of the *Civil Liability Act 2002 (NSW)* covers the breach stage of negligence. In order to establish breach of the duty of care, Jed is required to establish (i) the risk was foreseeable and not insignificant; and (ii) Bill did not exercise the standard of skill of the reasonable manufacturer according to the calculus of negligence.

(i) **Risk was Foreseeable and Not Insignificant**

Jeff is required to initially establish that the risk of injury to a young person through using the bridge whilst under the influence of alcohol was foreseeable and not insignificant. The notion of a foreseeable risk was laid down in *Wyong Shire Council v Shirt* where the
High Court held that a foreseeable risk is one that is not far-fetched or fanciful. However, this has been altered by the Civil Liability Act which requires that the risk is not insignificant.

In order to ascertain the meaning of “not insignificant”, the court can have consideration to extrinsic materials pursuant to s 15AA of the Acts Interpretation Act (Cth). Consequently, the meaning of “not insignificant” was outlined in para 7.15 of the Ipp Report which stated that “the phrase ‘not insignificant’ is intended to indicate a risk that is of a higher probability than is indicated by the phrase ‘not far-fetched or fanciful’” but is not intended “to be a synonym for ‘significant’”.

In applying this law to the present fact situation, the risk of injury to a go-kart rider on a track where there are limited safety barriers is clearly not insignificant. Similarly, the risk of causing injury to a go-kart rider where the owner has failed to install radiators is not insignificant.

(II) The Reasonable Person and the Calculus of Negligence

Jed is required to demonstrate that Bill has fallen below the standard of care expected of a reasonable person. In order to establish this element, Jed must consider the calculus of negligence outlined in s 5B(2) of the Civil Liability Act 2002 (NSW).

a. The Probability of Harm

The factor, probability of harm, was outlined in Bolton v Stone where the court held that where the risk of danger is so small that a reasonable person, considering the matter from the point of view of safety, would have thought it right to refrain from making steps to prevent the danger, the defendant will not be liable. In applying this law to the facts, the risk of danger that a go-kart rider would sustain injury whilst using a race-course track with limited safety barriers was not so small that a reasonable person would have thought it right to refrain from making steps to prevent the danger.
b. Burden of Taking Precautions

The burden of taking precautions was examined in *Caledonian Collieries Ltd v Speirs* where the court held that where the risk of injury is serious and comparatively simple to avert, the defendant is more likely to be found negligent. In applying this law to the facts, it can be deduced that (i) the risk of injury was serious in light of the speeds in which go-karts can travel and the limited safety barriers; (ii) the risk of injury could have been averted by Bill installing safety barriers which would not be expensive in light of the liability that he now confronts; and (iii) the risk of injury could have been similarly averted by installing radiators in the go-karts.

**Conclusion**

Jed would most likely be able to establish that Bill has fallen below the standard of care of a reasonable council in light of the probability of harm and minimal burden of taking precautions. Hence, the court would most likely conclude that Bill 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. Section 5D(1)(a) establishes the necessary condition test for causation which allows the courts to adopt the common sense approach laid down in *March v E & M Stramare Pty Ltd*.

In applying this law to the facts, Jed would be able to easily demonstrate that Bill’s negligent acts of not installing safety barriers around the race-track and failing to install radiators in the go-kart was a necessary condition for his physical injury. This is supported by the fact that had Bill taken these safety precautions, the injury would not have occurred.

**Remoteness**

The law relating to remoteness of damage is covered by s 5D(1)(b) which enables the court to take into account the common law position on remoteness. Moreover, the
common law position is laid down in *Wagon Mound (No. 1)* where the court held that the defendant is only liable for damage that is reasonably foreseeable.

There are no issues in relation to remoteness because the physical injuries sustained by Jed are reasonably foreseeable consequences of a go-kart spinning out of control on a race-track and colliding with a tree.

**Defences: Voluntary Assumption of Risk**

Bill would argue that he should not be held liable for the materialization of an obvious risk in a dangerous recreational activity (s 5L of the *Civil Liability Act 2002 (NSW)*). Section 5K of the *Civil Liability Act 2002 (NSW)* defines a dangerous recreational activity as one that involves a significant risk of physical harm. This provision was judicially interpreted in *Falvo v Australian Oztag Sports Association* where Ipp JA (who was responsible for drafting the *Civil Liability Act*) held that a risk will be significant where (i) the potential harm is serious but the risk is low; or (ii) the risk is high but the potential harm is low.

In applying this law to the facts of the present situation, s 5L would operate to absolve Bill of liability because the damage suffered by the Plaintiff is the result of the materialization of an obvious risk of a dangerous recreational activity engaged in by the Plaintiff.

b) **Vincent vs Bill**

Vincent may be able to recover damages for his physical injuries caused by the negligence of Bruno on the basis of vicarious liability. The elements that he would need to satisfy include: (i) a relationship of employment between the Defendant and wrongdoer; (ii) the commission of a tort; and (iii) the tort must occur during the course of the relationship.
1. Relationship of Employment

Vincent must be able to establish a relationship of employment for the employer to be held vicariously liable because a principal will not be held liable for the tortious acts of an independent contractor (Hollis v Vabu Pty Ltd). Furthermore, the indicia of a contract of services (employment relationship) include the degree of control exercised over the putative employee, the method of remuneration, the right to exclusive services, the right to dictate place and hours of work and the right to terminate the putative employee’s contract (Stevens v Brodribb Pty Ltd).

In applying this law to the facts of the present situation, it is clear that Bruno is an employee of Bill because (i) he has oversight obligations over the employees (i.e. control); (ii) Bruno is paid with deduction of income tax; (iii) Bruno must use Bill’s equipment; and (iv) Bruno must wear Bill’s uniform. Hence, a relationship of employment would be established between the Defendant and putative wrongdoer.

2. Commission of a Tort

Vincent would subsequently be required to establish that Bill’s employee, Bruno, has been negligent in failing to prevent Vincent from running onto the race-track and sustaining serious injuries.

Duty of care

The relationship between Jeff and the Council does not fall within the established categories of duty of care. Consequently, for the court to impose a duty of care, they would adopt the incremental approach based on reasonable foreseeability and salient features (Perre v Apand).

Reasonable Foreseeability

In Chapman v Hearse, the court held that reasonable foreseeability relates to (i) whether an injury to the class of persons in which the plaintiff was one, might reasonably be foreseen as a consequence of the defendant's negligence; and (ii) an event which is not unlikely. In applying this law to the facts, an injury to Vincent might be reasonably
foreseen as a consequence of running onto a race-track whilst the security guards are not closely observing for such acts.

**Salient Features**

The predominant salient features which would establish the existence of a duty of care is vulnerability of the Plaintiff and control of the Defendant. These salient features were examined in *Ryan v Great Lakes Shire Council* where the High Court identified that (i) a high degree of control exercised by the Defendant over the risk of harm that eventuated, may result in the imposition of a duty of care; and (ii) a high degree of vulnerability of the Plaintiff who relies on the care and skill of the Defendant, may further lead to the imposition of a duty of care.

In applying this decision in the present situation on the basis that it was intended to have general application in cases of this kind, the following inferences can be made: (i) the security guards exercised a high degree of control over the risk of harm that eventuated because they are responsible for crowd maintenance; and (ii) there was a high degree of vulnerability on behalf of Vincent because he was relying on the proper exercise of care and skill by the security guards. Thus, the relationship between Vincent and Bruno can be characterised by a high degree of control by Bruno and vulnerability by Vincent.

**Conclusion**

Bruno owes a general duty to exercise care to protect from foreseeable injury anyone who runs onto the race-track.

**Breach of the Duty**

Section 5B of the *Civil Liability Act 2002* (NSW) covers the breach stage of negligence. In order to establish breach, Vincent is required to prove (i) the risk was foreseeable and not insignificant; and (ii) Bruno did not exercise the standard of care and skill of the reasonable council according to the calculus of negligence.
(I) Risk was Foreseeable and Not Insignificant

Jeff is required to initially establish that the risk of injury to a person running onto the race-track whilst unattended by security guards was foreseeable and not insignificant. The notion of a foreseeable risk was laid down in *Wyong Shire Council v Shirt* where the High Court held that a foreseeable risk is one that is not far-fetched or fanciful. However, this has been altered by the *Civil Liability Act* which requires that the risk is not insignificant.

In order to ascertain the meaning of “not insignificant”, the court can have consideration to extrinsic materials pursuant to s 15AA of the *Acts Interpretation Act* (Cth). Consequently, the meaning of “not insignificant” was outlined in para 7.15 of the Ipp Report which stated that “the phrase ‘not insignificant’ is intended to indicate a risk that is of a higher probability than is indicated by the phrase ‘not far-fetched or fanciful’” but is not intended “to be a synonym for ‘significant’”.

In applying this law to the present fact situation, the risk of injury to a person running onto the race-track unattended by security guards was not insignificant in light of the high speeds of go-karts.

(II) The Reasonable Person and the Calculus of Negligence

Vincent is required to demonstrate that Bruno has fallen below the standard of care expected of a reasonable security guard. In order to establish this element, Vincent must consider the calculus of negligence outlined in s 5B(2) of the *Civil Liability Act 2002* (NSW).

a. The Probability of Harm

The factor, probability of harm, was outlined in *Bolton v Stone* where the court held that where the risk of danger is so small that a reasonable person, considering the matter from the point of view of safety, would have thought it right to refrain from making steps to prevent the danger, the defendant will not be liable. In applying this law to the facts, the risk of danger that a person would sustain injury whilst running onto a race-track...
unattended by security guards was not so small that a reasonable person would have thought it right to refrain from making steps to prevent the danger.

b. Burden of Taking Precautions

The burden of taking precautions was examined in *Caledonian Collieries Ltd v Speirs* where the court held that where the risk of injury is serious and comparatively simple to avert, the defendant is more likely to be found negligent. In applying this law to the facts, it can be deduced that (i) the risk of injury was serious in light of the high speeds of go-karts; and (ii) the risk could have been simply averted by Bruno paying attention to his professional duties in maintaining the crowd.

**Conclusion**

Vincent would most likely be able to establish that Bruno has fallen below the standard of care of a reasonable security in light of the probability of harm and minimal burden of taking precautions. Hence, the court would most likely conclude that Bruno has breached his duty of care.

**Causation and Remoteness**

There are no issues in relation to causation and remoteness because it is clear that (i) Bruno’s negligent act in failing to supervise the crowd is a material cause of Vincent’s injuries; and (ii) the injury that was sustained by Vincent was foreseeable as a result of Bruno’s negligence.

**Defences: Contributory Negligence**

Although Bruno may be held liable for the commission of the tort and potentially expose Bill to vicarious liability, the defence of contributory negligence pursuant to s 5R of the *Civil Liability Act 2002* (NSW) would be raised. The elements of contributory negligence are outlined in *Froom v Butcher* including: (i) the Plaintiff failed to take the precautions a reasonable person would have taken for their own safety; and (ii) the damage was partly caused by the Plaintiff’s negligence and was reasonably foreseeable.
In applying this law to the facts of the present situation, the act of Vincent in running onto a race-track during the course of a race clearly amounts to failing to take the precautions a reasonable person would have taken for their own safety. Furthermore, this negligent act has contributed to his own injuries. Hence, the defence of contributory negligence would be established and his damages would be reduced proportionately according to the extent to which he contributed to his own injuries.

3. In the Course of Employment

For the employer to be vicariously liable, the employee must have been acting in the course of employment. The test is whether the employee was performing an authorised act, or an act incidental to employment in furtherance of the employer's interests. (Deatons v Flew). Here Bruno and Francesco were arguably engaging in an unauthorised act, however it could be argued that it is still in the ‘course of employment’ in that they were still on their shifts (Bugge v Brown) On the other hand, it could be argued that they were engaging in their own ‘frolic’ by smoking and chatting to other spectators. Thus it is most likely that they are not acting in the course of employment and thus Bill would not be held vicariously liable.
Question Three

NSW Roads Act 1965 (NSW) establishes the NSW Road Safety Authority (RSA) as a statutory authority with responsibility for the maintenance, upgrade and repair of roads in the NSW. The Act provides, inter alia,: 

1. The Authority is to have primary regard to submissions made by the public as to roads considered as dangerous to motorists and road users and which are in need of upgrade, maintenance or repair.

2. The Authority is to investigate and inspect roads for the purposes of determining whether work needs to be done to maintain public safety.

3. The Authority may make orders, where it considers appropriate to fulfill the purposes of the Act, to repair or upgrade roads as necessary.

Until 2006, the RSA was responsible for handling submissions, making investigations and authorising the necessary repair work. The Authority has in recent times found it hard to keep up with the number of complaints made, and its continually shrinking budget has made it hard to investigate and carry out work in all the claims made. Subsequently, it imposed a quota on the number of investigations carried out per month and prioritised projects according to their risk level. It also began to alert local councils of dangerous roads, leaving them to do all the necessary repair work. The policy states ‘in emergency cases identified as especially problematic, the Authority will carry out the necessary repair work’. At the same time, the RSA embarked on a major advertising campaign alerting the community about taking care on the roads, speeding, and safe driving.

Marie filed a complaint recently to the RSA on behalf of residents in her area about an intersection near her rural property. The two roads run at almost 45 degrees to each other with one road being straight, the other slightly bent. There is a ‘give way’ sign, but it has been smudged and rusted over time. There have been numerous accidents in the past few years. Marie and the other residents think that the intersection is ‘an accident waiting to happen’ as there have been ‘many near fatal misses’ where motorists have failed to give way. Marie herself had a near miss recently and she fears that someone will get seriously injured soon if something is not done. Marie consults other residents in the area and they agree that a roundabout needs to be built. Marie files a submission to
the RSA outlining the danger of the intersection and requests that a roundabout is built. The RSA replied with a letter stating that it ‘will look at the appropriate course of action in the near future’.

Six months later, with no action haven been taken, Marie’s son Nikita was driving home from a party. It was 2.30am and Nikita was feeling especially tired. Due to his diminishing alertness Nikita did not catch the ‘give way’, instead speeding through and clipping the back of another vehicle. The car spun and hit a light pole, Nikita suffering severe injuries. The driver of the other car calls the Ambulance and accompanies Nikita to the hospital. Nikita’s injuries were more severe than first thought; he is now a quadriplegic and is told that he can never walk again.

1. Discuss any claims that Nikita may bring, and the principles upon which his damages will be assessed if he is successful (Do not consider contributory negligence).

**Answer**

**Nikita vs RSA**

Nikita may be able to commence legal proceedings pursuant to the *Civil Liability Act 2002* (NSW) on the basis that the RSA have negligently breached their statutory powers.

**Duty of Care and Breach**

(I) Section 41 of the *Civil Liability Act 2002* (NSW)

Nikita would initially be required to establish that the RSA is a public authority for the purposes of the *Civil Liability Act 2002* (NSW). Consequently, Nikita would be able to establish this requirement because the RSA is a public motor-way authority established pursuant to statute which is responsible for the maintenance of roads in NSW.
(II) Section 44 of the Civil Liability Act 2002 (NSW)

Nikita would be required to overcome s 44 of the Civil Liability Act 2002 (NSW) which provides that a Defendant authority will not be liable for failing to exercise a regulatory function unless the Plaintiff could require the authority to exercise that function. Moreover, Nikita must demonstrate that he has the ability to issue a writ of mandamus. In applying this law to the facts of the current situation, Nikita would have the ability to issue a writ of mandamus because the RSA are responsible for the maintenance of NSW roads.

(III) Section 42 of the Civil Liability Act 2002 (NSW)

Section 42 outlines the factors that the court must take into account when determining the imposition of a duty of care and the breach of such a duty, including: (i) the limited financial and other resources available to the authority; (ii) the allocation of financial resources cannot be challenged; (iii) the authority's functions are to be determined by reference to the broad range of its activities; and (iv) the authority may rely upon compliance with general procedures and applicable standards.

In applying this law to the present situation, the court would take into account (i) the limited financial resources of the RSA; (ii) their allocation of financial resources in prioritizing projects cannot be challenged; (iii) the function of the RSA are to be determined by reference to the broad range of its activities; and (iv) the RSA may rely upon compliance with general procedures and applicable standards. Hence, these factors may rebut any argument concerning the imposition of a duty of care and/or breach of such a duty.

(IV) Common Law Factors

The common law factors were laid down in Crimmins v Stevedoring Industry Finance Committee where the High Court held that these factors include (i) reasonable foreseeability of the injury to the plaintiff; (ii) control of the authority; (iii) vulnerability by the plaintiff; (iv) actual or constructive knowledge of a risk of harm to the plaintiff; (v) imposition of liability for administrative and not policy decisions; and (vi) other policy considerations that deny a duty of care.
In applying this law to the facts, the following inferences can be made: (i) the risk of injury to Nikita was foreseeable in light of the RSA’s knowledge, through Marie’s submission, that a roundabout was required in the area; (ii) the RSA had control over the risk of harm that eventuated because they are responsible for determining which road projects are to be undertaken; (iii) the Plaintiff was in a position of vulnerability as he relied on the proper exercise of care and skill by the RSA; (iv) the RSA had actual knowledge of the risk of harm through Marie’s submission; and (v) the policy considerations of minimal resources and increased workload of the RSA would be considered.

Conclusion

It is arguable that the Defendant authority owes a duty of care to the Plaintiff to prevent injuries on dangerous NSW roads and have subsequently breached this duty through their failure to act in preventing the danger. However, the limited resources and prioritization of the Defendant authority provide reasonable justification for their failure to act and, consequently, would lead to the conclusion that they have not breached any duty of care which may or may not be owed to the Plaintiff.

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