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Sample Tort Law Problem Question

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- **Whether Autumn Bay High and Johnny owe a duty of care to Persephone and Aphrodite.**

Pure Nervous Shock

The question is whether Autumn Bay High or Johnny owed a duty of care to avoid inflicting psychiatric injury to Persephone and Aphrodite.

A duty is only owed to avoid inflicting recognisable psychiatric illnesses under both the common law[1] and Civil Liability Act ("*CLA*").[2] It is assumed that post traumatic stress disorder ("*PTSD*") is a recognised illness. However, the initial trauma suffered, and subsequent panic attacks and anxiety would be akin to grief and sorrow[3] which do not give rise to a duty.

The CLA prescribes that a duty of care is only owed to persons of normal fortitude.[4] As the CLA does not define what the requirement of normal fortitude is, the common law stance will be examined to predict how judges will interpret this requirement.

The reaction of the twins to the accident can scarcely be held to be "extreme or idiosyncratic"[5] such as to deny a duty arising. Objectively viewed[6], it is foreseeable that a reasonable person in the same position would likely be emotionally overwhelmed such that it is reasonably foreseeable that they may develop a psychiatric injury. Subjectively viewed[7], the twins exhibit no peculiar behavioural characteristics such that their response can be said to be the same as that of a person of normal fortitude.

Although dismissed as necessary pre-conditions to recovery under the common law[8], the CLA has reinstated the below control mechanisms as relevant discretionary factors in establishing a duty of care.[9]

Whether a duty is owed would depend on whether the mental harm suffered resulted from sudden shock.[10] A strict interpretation of the CLA consistent with the aim of the act would prejudice a duty arising, as the twins' PTSD was a result of the drawn out uncertainties of Mali's health and not the sudden shock of his initial fall, which had only caused trauma.

[1] *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317
[2] *Civil Liability Act* 2002 (NSW) s 31
[3] *Mt Isa Mines v Pusey* (1970) 125 CLR 383 at 394
[4] *Civil Liability Act* 2002 (NSW) s 32(1)
[5] *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317
[6] Ibid, per Gummow and Kirby JJ
[7] Ibid, per Gleeson CJ
[8] Ibid, per Gummow and Kirby JJ
[9] *Civil Liability Act* 2002 (NSW) s 32
[10] *Civil Liability Act* 2002 (NSW) s 32(2)(a)

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However, Gleeson CJ held that gradual realisation giving rise to nervous shock was no different to sudden shock.[11] Both would place the injured party in the same emotional situation, albeit one is protracted and the other immediate. Likewise, it should not matter that the nervous shock suffered was not the result of the sudden shock of Mali's fall – it is sufficient the initial negligence of the school and Johnny created a situation whereby it was reasonably foreseeable that the gradual realisation of Mali's injuries would give rise to the twins' PTSD.

The finding of a duty may be denied at the judge's discretion if the claimant was not a witness to the scene of injury.[12] This may deny a duty being owed to Persephone as she was not, strictly speaking, a witness to the event.

However under the common law, a duty is not determined simply by distinguishing between witnesses.[13] In *Annetts*, it was found that such a distinction would artificially deny recovery.[14] Given that the twins react to Mali's horrific injuries rather than the fall itself, whether the twins were witnesses should be irrelevant. The distinction is arbitrary since the twins, of similar emotional capacity and sensitivity, react to the same event and suffer the same injury, but one is perversely denied recovery because she did not witness the fall.

Whether a duty arises may turn on the nature of the relationship between the plaintiff and victim.[15] As the CLA only allows recovery for either witnesses or close family members[16], there may be no duty owed to Persephone given that she was not a witness, and her relationship with the victim did not fall under the recognised relationships capable of recovery.[17] Likewise, no duty is owed to Aphrodite as she was not a close family member. If a duty of care were owed to friends of the victim, the scope of liability would increase, which is inconsistent with the aim of the CLA.

However the common law has accepted "close and intimate" relationships as sufficient to give rise to a duty.[18] The relationship of best friends would undoubtedly be a relationship of this kind. To restrict liability to "close family members" would arbitrarily restrict the duty owed by the defendant.

The pre-existing relationship[19] between the twins and Johnny would favour a duty being found given that the twins were under his direct supervision and control. The twins' relationship with the school would likewise favour a duty of care being found.

A consideration of the above discretionary factors would favour a duty of care arising. However, if the CLA was construed strictly, the twins may have their claim struck out on the basis of their prolonged realisation of shock. Also, Persephone may not be

[11] *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317
[12] *Civil Liability Act* 2002 (NSW) s 32(2)(b)
[13] *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 211 CLR 317 per Gleeson CJ
[14] Ibid
[15] *Civil Liability Act* 2002 (NSW) s 32(2)(c)
[16] *Civil Liability Act* 2002 (NSW) s 30(2)
[17] *Civil Liability Act* 2002 (NSW) s 30(5)
[18] *Jaensch v Coffey* (1984) 155 CLR 549
[19] *Civil Liability Act* 2002 (NSW) s 32(2)(d)

owed a duty because she did not witness the event. However, as the twins' potential arguments are stronger, the school and Johnny may indeed owe a duty of care to Persephone and Aphrodite.

Non-delegable duty

Assuming that the school did not owe a duty to avoid infliction of psychiatric injury on the twins, it must be considered whether they owed the twins a non-delegable duty to ensure that reasonable care was taken for their safety.

Firstly, it must be considered whether the school had control over the class of persons which included the twins such that they owed them a duty to avoid a reasonably foreseeable risk of injury.[20]

Given that the school excursion took the students outside of school premises, it can be inferred from the absence of parents and the presence of teachers that the school had a degree of control over the students. The school would have assumed such a position of control in relation to the care and supervision of the students that it would be reasonably expected that due care be exercised.[21] It would indeed be curious if the school did not control the students which they were taking on a school excursion. Secondly, it must be considered whether the twins were especially vulnerable.[22]

The students were vulnerable given that they were placed in unfamiliar territory and may not have been experienced skiers. As in *Lepore*, the "immaturity and inexperience of pupils, and their need for protection"[23] placed them in a vulnerable position such that they were reliant upon the school to ensure that reasonable care was taken for their safety. The students were not adults capable of looking after themselves, and given their exposure to an unfamiliar sport and territory, they were "specially dependent upon [the school] to ensure that such reasonable precautions are in fact taken."[24]

Having satisfied the elements giving rise to a non-delegable duty, it is likely that the school owed a non-delegable duty to the twins to ensure that reasonable care was taken for their safety.

- **Whether Autumn Bay High was vicariously liable for Johnny's actions.**

Whether Autumn Bay High is vicariously liable will depend on whether the relationship between Johnny and the school was one of employer and employee.

[20] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 550
[21] *Kondis v State Transport Authority* (1984) 154 CLR 672 at 687
[22] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551
[23] *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511 at para 25
[24] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 551

Johnny may be considered an employee given that he was employed in a core function of the school[25], as a teacher and supervisor of the students. He was also a representative, identifiable as an emanation of the school through the logo on his jacket. His remuneration included sick leave and related expenses, which independent contractors are not entitled to. He was consistently and exclusively employed by the school. He was also under the school's command and control, as he had to ask for permission before taking students on a harder course.

Conversely, Johnny was temporarily hired and was free to teach other people when not employed by the school. He was providing skilled labour which could form the basis of a business. It would be unlikely that a school would hire a ski instructor as an employee who only worked for a few weeks a year. Johnny was also economically independent as he pays his own taxes.[26] The isolated instance of paid sick leave was merely a sign of the school's goodwill.

Whether Johnny provided equipment for his students may be a deciding factor. If he provided skis for his students, he may be seen as an independent contractor engaged in his own business, given that an employee would not be expected to carry such prohibitive costs as part of their employment. However, if Johnny merely provided skis for himself, which could be used in leisure, provision of equipment would not be important.[27]

Given the stronger arguments, a consideration of the totality of the relationship would suggest that Johnny was actually an independent contractor.

If Johnny was actually an employee, it must be considered whether Johnny's act was "in the course of employment"[28] such that it was "improper mode of doing an authorised act."[29]

Johnny's act of taking the students to the intermediate slope was undoubtedly "in the course of employment" in teaching the students to ski. His intentions were to challenge the students and thus allow them to develop their skiing skills, which would constitute an authorised act. It is irrelevant that he broke workplace rules by neglecting to ask for the teacher's permission, or that he took the students away from the official course, especially since the school benefits from his conduct had the students not been harmed.[30]

However, the authorised act of teaching may have implied that the students were only to be exposed to low risk slopes; hence the need for permission. Johnny was employed in a specific capacity that implied certain limits on his teaching, such that these limits were breached when he took students off the official course and onto a higher slope.[31]

[25] *Hollis v Vabu* (2001) 207 CLR 21
[26] Ibid
[27] Ibid
[28] *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [2000] 1 AC 486 (HL)
[29] *Salmond on Torts*, 9th ed (1936) at 94-95
[30] *Limpus v London General Omnibus Co* (1962) 1 H & C 526
[31] *Beard v London General Omnibus Co* [1900] 2 QB 530 (CA)

Given the strength of the argument, it is likely that Johnny was acting in the course of employment.

It also must be considered whether Johnny's wrongful act caused the injury. It is clear that "but-for" Johnny's decision to take the students to the higher slope, they would not have been exposed to the higher risk and Mali would not have suffered such serious injuries, nor would the twins have suffered nervous shock.

As Johnny was considered to be an independent contractor, Autumn Bay High would not be vicariously liable for his actions.

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