

**LEGAL PROFESSION ADMISSION BOARD**

**MARCH 2013**

**TORTS**

**Time: Three Hours** This paper consists of **three** questions.

Candidates are required to attempt all **three** questions.

**Answer each question in a separate booklet**, and indicate clearly on the front of the booklet the number of the question you are answering and also your student number.

Candidates must write their answers clearly. Lack of legibility may lead to a delay in the candidate's results being given and could, in some circumstances, result in the candidate receiving a fail grade.

**This examination is worth 80% of the total marks in this subject.**

**Permitted Materials:** This is an open book examination. Candidates may refer to any books and any printed or handwritten material they have brought into the examination room.

**As some instances of cheating, plagiarism and of bringing unauthorised material into the examination room have come to the attention of the Admission Board, candidates are warned that such conduct may result in instant expulsion from the examination and may result in exclusion from all further examinations.**

*This examination should not be relied on as a guide to the form or content of future examinations in this subject.*

## Question 1

On the evening of 17 December 2012, Mrs Simpson, together with her husband and children, attended a concert at the Springfield Elementary School in Chatswood, Sydney. Her children, Lisa (9) and Bart (6) were students at the school and Bart had performed a rendition of Chopin's *Nocturne in E Flat Minor*.

During the concert there was some drizzling rain, but it had stopped by the time the concert finished, which was at 8:00pm, just as it was getting dark.

The roads around the school were asphalt. All of the carparks and roadways in the school grounds were uncovered and were open to the weather and the elements. All the roads were built and maintained by the school.

There was a pedestrian crossing across one two-lane road in the school which led from the carpark where the Simpsons had parked to near the main entrance to the recital hall. The pedestrian crossing was a very convenient route for people walking within the school grounds, and was frequently travelled over the seven years it had been there.

The pedestrian crossing was first painted by the school's groundskeeper, Willy, in mid 2007. The paint that was used was the same one as had been used on all roads around the school, and to mark the basketball courts as well. It was a white outdoor paint that Willy had purchased from the local Bunnings, but not the same one that the NSW Roads and Maritime Services uses.

The pedestrian crossing had been repainted in February 2011. Willy later accepted that although he attempted to get an even surface when he used the paint by hand, he could not guarantee that he achieved a precisely even coat of paint. He agreed that when he was repainting the crossing in 2011, because he did not remove all of the paint that had been there from 2007, and the paint had worn unevenly, it was entirely possible that the paint applied by him in 2011 would not have resulted in a precisely even surface.

Immediately after the concert, Mr Simpson waited for Lisa to go to the bathroom. Mrs Simpson said she'd meet them at the car. At 8:07pm, Mrs Simpson crossed the road in the grounds of the school where there was the marked pedestrian crossing discussed above, holding Bart's hand. She was wearing shoes that had a high-heel of about 5cm.

As she did so, she fell and smashed her face on the gutter, knocking a number of her teeth out and causing a lot of blood to run from her mouth and onto her white dress. She claimed that she had been walking carefully and that the painted sections of the crossing were very slippery. She claimed that she did not have any opportunity to regain her balance before she fell.

At the time Mrs Simpson was walking across the road, it was not drizzling, but the crossing was slightly damp from the previous drizzle.

**(Question 1 continues)**

**(Question 1 continued)**

At 8.11pm, Mr Simpson had heard the voice of a child he knew to be Bart's, screaming "Mummy!!" He arrived at the scene to see his wife on the ground and his son in inconsolable tears. Mr Simpson went into shock and later suffered post-traumatic stress disorder.

The school denies that her fall was caused by anything that they did or did not do.

**(a) Advise Mrs Simpson of her possible actions in tort against the Springfield Elementary School.**

**(b) Advise Mr Simpson of his possible actions in tort against Springfield Elementary School.**

***Do not discuss damages for either part (a) or (b).***

**(30 marks)**

**(Question 2 follows)**

## Question 2

Wayne was born in August 1962 and lives in Roseville, Sydney. He was a fairly active person. In 2008 he resumed playing soccer having not played since the early 1990s. He continued to play each season but did not attend midweek training sessions.

Last Saturday, Wayne was playing soccer when he felt an agonisingly sharp pain at the back of his foot after attempting to make a tackle for the ball. He was helped from the field by his team mates and his wife took him to Royal Prince Alfred Hospital in Sydney. Later that afternoon Wayne was advised that he had ruptured his right Achilles tendon and would require an operation to repair the tendon.

Dr Phil, who was a specialist surgeon, performed the surgery.

Before the operation Dr Phil said to Wayne that the surgery was necessary. However, in addition to the risk of infection the surgery also carried a small risk of deep vein thrombosis or clot (DVT). Aware of these risks, Wayne decided to have the surgery.

Whilst Dr Phil was operating on Wayne he noticed a small tattoo on Wayne's left leg, which was an illustration of a chisel. Dr Phil knew it to be the symbol of a fraternal group called the "Chisel Cutters." Years ago, Dr Phil was barred from entry to the Chisel Cutters, unfairly he thought, so he took the chance to get his little piece of revenge. Dr Phil surgically removed the tattoo. When Wayne awoke after the surgery, he noticed the tattoo had been removed. Wayne was furious.

Dr Phil's standard practice was to ensure that all patients who underwent Achilles tendon repair surgery received Clexane, an anti-coagulant or blood-thinning agent used to prevent DVT.

Dr Phil decided that Wayne needed just a single dose of Clexane. It was Dr Phil's opinion that Wayne was nothing more than a low risk patient for a DVT.

Medical practice varied on Clexane drug administration, and different doctors prescribed anything between one to 20 doses of the drug. Dr Phil pointed to the opinion of Dr Tom, an American physician, who wrote an article in the 2005 journal *Chest*, an American publication for chest physicians which stated that only one dose is necessary for Achilles heel repair surgeries.

Contrarily, there is an Australian physician, Dr Jerry, who wrote an article in 2012 for *The Medical Journal of Australia* called "Australian Guidelines for the Prevention of Venous Thromboembolism." Dr Jerry stressed that to reduce the risk of developing DVT men over 40 having surgery on a lower limb should have the drug Clexane administered every second day for three weeks afterwards.

Two weeks later when Wayne was at home, he complained to his wife of acute chest pain. He was admitted to hospital. The doctor said he had pulmonary embolism which was potentially life threatening. This resulted from the development of DVT in his leg, which would have been prevented if he had been on regular doses of Clexane.

He survived after three weeks in hospital, but the recovery was lengthy and Wayne is now no longer able to play soccer.

**(Question 2 continues)**

**(Question 2 continued)**

**Advise Wayne what action or actions in tort he may have against Dr Phil.**

***Do not discuss damages.***

**(20 marks)**

### **Question 3**

Ronald is an 80 year old man who owns a farm in Dubbo, NSW, across the road from Jackie, who owns a poultry farm. Jackie has about 5,000 chickens on her farm at any one time. Jackie has always been a bit lazy with her farm, and sometimes it would emit a strong smell from the chicken manure, which would drift onto Ronald's farm.

Jackie's farm had been in the family for years and proudly displayed the sign "Sander's Poultry and Manure Farm" at the front. This sign could be seen from Ronald's farm.

Ronald thought it was a good economic decision to turn his farm into a building estate, and started asking developers to come to the property to see it. He started to find that the developers became more disinterested when they saw the chicken farm sign. Ronald would say, *"They're just chickens! They don't make any noise, and they only stink when the wind blows my way!"* It didn't matter. The three developers he brought out to inspect the property felt they'd never be able to sell the sub-developments because people wouldn't understand.

Ronald went to visit Jackie three months ago to ask if she could remove the sign so he had a better chance of selling his farm. She was furious, *"Go away right this minute you silly old man, or I will punch you in the face!"* she screamed, shaking her fist at him, *"You know, darned well, that my father put that sign up with his bare hands, and over my cold body will I tear it down! Go on, get out!"*

Ronald, who was concerned for his safety, muttered under his breath as he was leaving *"I'll show that witch and those bloody chickens!"*

The next breeding season, Ronald thought the rabbits in the area needed culling, so would go out hunting them with his 12-gauge shotgun. Jackie claimed that this reduced the number of chickens that were to be bred by about 500 on the previous year, as the chickens took fright from the constant shooting.

**Advise what action or actions in tort, if any, Ronald may take against Jackie?**

**(10 marks)**

**END OF PAPER**