LAWS1002 SEMESTER 2 2007 FINAL EXAMINATION

QUESTION TWO

Australian Quarantine Services Pty Ltd is a private business engaged by the Australian Government to check and quarantine animals being imported into Australia. In June 2007, one of its workers, Tom, deliberately ignored express instructions he had been given by his supervisor and allowed a number of horses being imported from America to pass directly through the quarantine facility without being properly checked. The horses were carrying a virulent disease, resulting in a disastrous outbreak of the infection on a farm in Northern Queensland owned by John. The Queensland Government moved quickly under statutory powers to ban all sales and transportation of livestock throughout the State and ordered the destruction of all infected animals.

(a) John has had to destroy 50 of his horses and is unable to sell any of the rest of his stock whilst the sales ban is in place. This is costing him, on average, $100,000 per month. He is uninsured against the outbreak of infectious disease.

(b) In May 2007, Louise contracted to buy a horse from John for $50,000 as a present for her daughter, but the horse was one of those that became infected and is scheduled to be destroyed. Louise has no recourse under her contract with John, because the contract contained a clause under which she agreed to bear the risk of any medical conditions contracted by the horse after the date the contract was signed.

(c) Rik runs a horse-racing track which is situated closely adjacent to the infected farm. It is one of only three such tracks in Queensland. He has had to cancel all horse racing activities for the foreseeable future and faces financial ruin.

Realising that what he did was not simply contrary to his instructions, but also a serious criminal offence, Tom has fled the country and is nowhere to be found.

Advise John, Louise and Rik.

EXAMPLE ANSWER ONE

There are several issues in the present case that will be addressed:

The prospective claimants are aiming to be compensated for economic loss and to receive this compensation they will endeavour to make Australian Quarantine Services (AQS) – the defendant – vicariously liable for the acts of Tom. Since Tom has absconded, this issue will be dealt with first in order to ascertain whether there is actually claim to be pursued and a defendant who can pay for the plaintiff's losses.

Vicarious liability

1. It is assumed that Tom is an employee of AQS. In absence of information regarding his remuneration, provision of tools and equipment, obligation to work, hours, holidays and taxation arrangements, we can deduce this from the fact that he is given "express instructions", and is therefore under the close control of his employer (*Zuijs v Wirth Bros*). This factor sits alongside the other indicia mentioned in *Hollis v Vabu* and *Sweeney v Boylan*. AQS can therefore in principle be held vicariously liable for the acts of Tom since he is, from what can be determined, an employee (*Hollis v Vabu*).

2. However in order for AQS to be liable, Tom must have been acting in the scope of his employment. AQS will argue that Tom was expressly prohibited from allowing a number of horses to pass through without inspection, thereby taking him outside the scope of his employment. However, following *Bugge v Brown* and *Limpus v London Omnibus*, this argument is unlikely to succeed. Tom was merely completing an authorised act (quarantine inspections) in an unauthorised or improper manner (*Century Insurance v NI Transport Board*).

Conclusion: The plaintiffs can sue AQS as vicariously liable for any negligence of Tom.

Economic Loss

The significant issue now is whether the various plaintiffs will succeed in their claims for recovery for financial loss not consequent upon physical or personal harm.

(a) John v AQS

Duty

The present case (at least as regards loss of sales) can be seen as a novel pure economic loss case and thus will be governed by the 'salient features' approach set out by McHugh J in *Perre v Apand*.

1. Was the harm reasonably foreseeable? John will argue that harm in the nature suffered by him was foreseeable because it is reasonable to expect that negligent behaviour at a quarantine facility could lead to the outbreak of disease that could infect stock and require it to be slaughtered or render it unworthy of sale.

2. Indeterminacy issues
   John will submit that he is a member of a specific and identifiable class of claimants whom the defendant would have been aware as likely to suffer economic detriment. This is because he is a victim who suffers loss not as part of the 'ripple effect' or as a second line victim, but directly because of the negligence in question. A possible problem, is that the identity of John or the class to which he belongs (people suffering losses of sales due to the sales ban) may well not be identifiable by Tom. In *Perre*, it was said that the defendants could work out who would be affected by their negligence, given their knowledge of the location of the farm to whom the

infected potatoes were supplied and the terms of the relevant regulations. Here, Tom may have known the destination of the particular horses concerned (?), but may not have known the likely terms or width of any ban. This matter would have to be further determined.

3. Autonomy issues
   John should submit that imposing liability on AQS would not impinge on the commercial or individual freedom or autonomy of the defendant. He would succeed on this point because AQS and its employers have no right to 'freely' do the wrong thing with respect to quarantine procedures, any more than the defendant in *Perre* had the right to "freely" supply infected potatoes to the market.

4. Vulnerability of the plaintiff must be considered. The question here is whether John could reasonably have protected himself. The issue regarding insurance and whether John was able to protect himself by this means is contentious. Whilst judges in *Caltex v Willemstad* and *Perre v Apand* indicate that ability of a plaintiff to obtain insurance is "generally" irrelevant, these dicta are confused by comments in *Johnson Tiles v Esso* (Gillard J) and somewhat also by *Woolcock Street Investments*. In the present situation John will argue, following McHugh J in *Perre*, that he was vulnerable could not *reasonably* protect himself from the infection, even if he could have mitigated the loss by having insurance.

5. Knowledge of plaintiff:
   Arguably, AQS as the defendant knew or ought to have known the address to which the (infected) horses were to be delivered; and they must have known about the possibility of a ban on horse sales being imposed. They then ought to have known that John, as a member of a specific class of plaintiffs (farmers or horse traders in the region) would be affected by the negligent act of their employee by becoming subject to a sales ban. John can also submit that AQS, as well as being able to identify him as a plaintiff, would be able to know that pure economic loss would befall him.

Breach

S9 of the CLA supports the argument that once AQS owed a duty to John they had breached that duty as the harm was foreseeable, the risk was not insignificant, the probability and magnitude of the gravity of risk was high, the practicability of removing the risk was low and there was no social utility to allow the risk.

Causation and Remoteness

John submits that but for the negligence on behalf of AQS he would not have suffered loss and the extent of his loss, once found to be reasonably foreseeable, is irrelevant (*Hughes v Lord Advocate*).

Conclusion

There is a reasonable chance that John can recover.

(b) Louise v AQS

Louise has no remedy against John because, similar to "*The Aliakmon*" case, she has allocated her risks contractually. Therefore John will not be liable to Louise.

Louise might however claim against AQS although the possibility of success is dubious because the imposition of a tortious duty of care where risks have already been contractually allocated might create a contradiction the courts are unlikely to accept (*Perre v Apand*).

Louise could attempt redress from AQS under the category of relational economic loss, where harm to property in which she has financial interest but at present does not own, occurs. (*Caltex v Willemstad*). Applying Stephen J's salient features in that case (high likelihood of loss; knowledge of the specific plaintiff affected; the close relationship between the harm to third party property and the plaintiff's economic loss) it is still unlikely Louise would succeed. The *Caltex* test is very narrow and Louise is unlikely to be a plaintiff specifically identifiable by Tom or AQS. In any event, she probably would not be classed as vulnerable under *Perre*, as she could have protected herself better under her contract of purchase. Therefore AQS is unlikely to owe a duty to Louise.

(c) <u>Rik v AQS</u>

The present situation is similar to *Weller v Foot and Mouth Disease Research Institute* where an auctioneer was held not to recover for economic loss caused by the outbreak of a disease. However that decision was a UK decision made prior to *Perre v Apand* and so Rik has a greater chance of success under the salient features approach of McHugh J.

Rik could argue that his property is in very close physical propinquity (*Jacobs J – Caltex*) to John's infected farm and that his loss is therefore very closely related to the damage to third party property in the way the plaintiff's was in *Caltex*. Moreover, due to his being only one of three such race tracks in Queensland very likely to be affected by a ban, he is a specific and easily identifiable plaintiff (*Perre v Apand, Caltex*) and specifically very likely to suffer harm.

Although the economic loss to Rik was foreseeable and there are no autonomy or knowledge of plaintiff issues, AQS may argue that Rik should not be classed as a vulnerable plaintiff due to the commercial nature of his operation (*Woolcock, Johnson Tiles*- he should have protected himself, perhaps by insurance) or that Rik is a second line victim and should not therefore be in the legal contemplation of the defendant (*Perre v Apand*).

If Rik can overcome these issues he, along with John, may be able to succeed in a claim against AQS, but it seems unlikely.

GRADE AWARDED: 7

EXAMPLE ANSWER TWO

(a)In advising John, I would advise him that he may have an action in negligence against the employee (assuming he can be found) and, potentially against AQS Pty Ltd (providing vicarious liability can be established.

The damage to John's horses is straightforward damage to property and can be determined with reference to the ordinary principles of negligence (*Donoghue v Stevenson*). His inability to sell his other horses on the other hand is pure economic loss. The relevant approach is that of McHugh J in *Perre v Apand,* where His Honour states that one must first reason by analogy with similar cases before applying a 6 step approach. This case is, on its facts, analogous with the facts of *Perre*. The most appropriate step is therefore to apply the reasoning in the case, i.e. the 6 stage approach, being:

-Reasonable foreseeability of harm.
-Indeterminate liability for the defendant ?
-Inhibition of legitimate commercial activity ? (autonomy)
-Vulnerability ?
-Knowledge ?
-Conflict/incoherence ?

Harm in this case was clearly foreseeable as a result of a virus breaking out, where the Government would act to ban all sales. Indeterminate liability in *Perre* was said to require the foreseeability of harm to an ascertainable and specific class. Given that any potential ban would be statewide, the class would be extremely broad, although the size of the class is not the real problem, as McHugh makes clear in *Perre* (see also *Johnston Tiles*). It may also be difficult to ascertain all those who own and sell horses. Defining the class specifically presents another difficulty: the ban affects all those who sell livestock across the entire state. However, such a class, whilst broad, is nonetheless arguably distinct, and specific. Furthermore, AQS is likely to have the means of establishing the identity of such persons (although this is a significant assumption, and at present not supported on the given facts). I would thus advise John that, unless this assumption can be made out with further information (i.e. that AQS at least had the means of ascertaining the specific class) unfortunately, there is a significant chance his claim may fail at the indeterminacy stage.

If it does not, there is no inhibition of commercial legitimate commercial activity. Tom and/or AQS are required only to carry out their duties with care and skill. Tom is clearly vulnerable to harm (not having a means of protection against the virulent disease, hence the quarantine), and the facts also make fairly clear that Tom/AQS would have knowledge of this vulnerability (otherwise there would be no quarantine regime if owners of livestock were not vulnerable). In John's case, there is also no question of liability producing any conflict with contracts.

I would thus advise John that, provided his claim can overcome the question of indeterminacy (a significant qualification), then he may well have a good claim. The duty has clearly been breached and John has suffered harm as a result of the outbreak of the disease.

(b) In advising Louise, I would argue that she has a potential claim in negligence against Tom, and/or AQS.

Louise's case is one of relational economic loss, as she has suffered loss by virtue of John's property being damaged. The modern approach in such cases is to follow *Perre*, noting the special concerns under indeterminacy. Louise could overcome such a hurdle under the theory of transferred loss expressed in *The Aliakmon*, as she has contracted to purchase the horse, she has in effect assumed John's loss. There is no question of legitimate competition being inhibited, however there is a

question as to whether Louise is truly vulnerable to harm. Vulnerability is defined by McHugh J in *Perre* as the absence of alternative means of protection. In this case, Louise could have contractually protected herself against loss, however not enough is known on the facts as to whether this would be reasonable (that she assumed such a risk suggests that it was not). There are more serious questions as to Tom/AQS's knowledge of Louise's vulnerability. They would certainly not have had actual knowledge of Louise's vulnerability, and it is unreasonable to impose constructive knowledge (to do so would require that AQS be deemed to have constructive knowledge of EVERY contract of sale for livestock in the state). Even if such hurdles could be overcome, I would advise Louise that in her claim, she is likely to fail at the sixth stage of the duty inquiry in *Perre*; she has contractually assumed the risk. To impose any liability in tort would conflict with such a contractual term, the current High Court has stated that where a contractual term clashes with tort, contract will prevail (*Heyden v NRMA*, although it is by no means certain that this precedent could be applied in cases of economic loss).

I would thus advise Louise that, given the significant problems at the knowledge, vulnerability and conflict stages of the duty inquiry, it is unlikely that a claim in negligence will succeed.

(c) In advising Rik, I would argue that he has a potential claim in negligence against Tom, and/or AQS.

Rik's claim is also analogous to the facts of *Perre*, in particular those plaintiffs who suffered by virtue of being within the quarantine zone. Applying *Perre*, therefore, harm was clearly foreseeable to Rik in the event of a viral outbreak. On the question of indeterminacy, the class of plaintiffs is ascertainable (racing tracks, which are registered and as such much more ascertainable than farmers) and extremely specific (limited to three tracks such as Rik's). There is little question of inhibiting legitimate competition: the defendants are only being asked to carry out their duties with care and skill. As a horse-racing track, Rik is clearly extremely vulnerable to a viral outbreak affecting livestock, and without reasonable means of protection (obtaining insurance against such a possibility is likely to be both extremely difficult and expensive). AQS/Tom, on the facts, at least ought to have known that track owners such as Rik were vulnerable to an outbreak that would deprive them of anything to race! Nothing on the facts of Rik's case raises the possibility of conflict within the law. I would thus advise Rik that he has a good claim in negligence.

Common to all three cases is the issue of vicarious liability; I would advise both John and Rik that, whilst they have potentially good claims, Tom has fled, and thus there is no defendant unless AQS is found vicariously liable for his actions. To prove such, they would need to prove that Tom was a) an employee of AQS, and b) that Tom's tort was committed in the course of employment.

On the facts, little is known of Tom's conditions of work: pay, holidays, hours of work and so on. It cannot thus be determined with any certainty (per the conditions in *Brodribb Sawmilling*, and also with reference to *Hollis v Vabu* and *Sweeney v Boylan Nominees*) whether or not Tom is under a contract of employment, although the facts suggest that he is, this is somewhat sketchy, and I would advise John and Rik that further information is needed on this point. Assuming that such information confirms that Tom is an employee, it is not relevant that Tom was expressly directed to check horses (*Limpus v London General Omnibus*). However, there is a significant question as to whether Tom's action was an intentional, negligent one that AQS, as his employer, would never have sanctioned in any form. This is likely to be the case (per *NSW v Lepore*), particularly as the facts state that Tom has committed a 'serious criminal offence', indeed, it is why he fled the country.

My final advice to John and Rik would thus be that, whilst they may have good claims, they are unlikely to succeed as there is no defendant against whom they can be argued.

GRADE AWARDED: 6

EXAMINERS' FEEDBACK AND MARKING GUIDE

Students' 4 most common methodological errors were:

- Failure to substantiate claims with appropriate authority. Far too many answers asserted a position in law without citing the *relevant authority* for that assertion. Many answers cited less than five cases, and some tried to answer the entire question without citing a single case!

- Failure to set out an argument or to substantiate a conclusion. For example, simply stating that "The facts of the case clearly show that AQS is vicariously liable" is NOT an argument, it is an unsupported assertion. Similarly, far too many students simply set out each of the five considerations McHugh J set out in *Perre v Apand* and then simply said "yes" or "no" for each, or something to that effect, without substantiating how they came to that conclusion. Saying something like "the first step is obviously satisfied" does not show the examiner that you actually know this to be the case, or how you have come to this conclusion. Show your reasoning.

- Failure to indicate who the defendant in a particular scenario was. This was most common with regard to Louise's claim, where, in many answers, it is not at all clear whether John or AQS was the intended defendant. Try to structure your answer clearly!

- Writing style. The answer to a law exam is part of your professional development and training, and your answer should reflect this. Writing "I am not here and this is not happening to me" at the top of your answer, or drawing smiley faces after "I can't remember the case name but …", does not reflect a professional approach to your studies. Try to get into good habits early.

Students' 5 most common substantive errors were:

- The inability of many students to identify problems concerning indeterminacy in the case of all three claimants and to deal with this problem appropriately. Far too many students simply concluded that John, Louise and Rik were all identifiable either individually or as a member of an ascertainable class without any further discussion or reference to cases such as *McMullin v ICI Australia*, *Fortuna Seafoods v The Ship 'Eternal Wind', Johnson Tiles v Esso Australia, Christopher v MV Fiji Gas* and /or *Ball v Consolidated Rutile*.
- While vicarious liability was, on the whole, dealt with well, many students failed to address the criminal nature of Tom's actions and the effect that might have on vicarious liability of AQS.
- Many students considered John's losses to constitute pure economic loss, and failed to identify that the destruction of 50 of his horses was simply damage to his property, to be dealt with on the basis of *Donoghue v Stevenson*. Very few students saw the analogy of the facts of this scenario with *McMullin v ICI Australia.* Those that did generally scored highly.
- The question quite clearly indicated that AQS was a private business, yet some students regarded AQS as a statutory authority, and therefore, inappropriately, dealt with cases such as *Crimmins v Stevedoring Industry Finance Committee*.
- In addressing the possible conflict between Louise's contractual undertakings and a duty of care in tort, many students' analysis was confusing primarily because it was not clear whether John or AQS was the intended defendant.

MARKING GUIDE:

Please note- this is NOT a "MODEL" ANSWER, merely a brief outline of the main issues and possible solutions.

1. Vicarious Liability of AQS

Tom is simply described as a worker, so students should indicate that there may be some doubt about his employee status and demonstrate that they know some of the factors which will be key in determining his status set out in *Bodribb*, *Sweeney* and *Hollis*. These include: (*Bodribb*):

- 1 how he is remunerated (not known)
- 2 who provides/ maintains inspection equipment/facilities (not known but likely to be AQS)
- 3 whether Tom and APQ are under reciprocal obligations to do/provide work (not known)
- 4 who determines working hours and holidays (not known)
- 5 taxation position (not known)
- 6 whether Tom is free to delegate (not known)
- 7 who controls the mode of work (the way it is done) (Tom is subject to supervision, but the level of supervision is not specified)

Hollis adds:

- 8 whether Tom's job involves specialised skills (not clear)
- 9 whether Tom has any goodwill/ financial interest in the business (not known)
- 10 whether Tom is represented to the public as a manifestation of the company ? (eg through logos uniform etc)(not known)

Very little if any information is given on any of this, so the best students can do is speculate reasonably and indicate the kind of further information that will be needed. Given the uncertainty, they should go on to assess whether or not Tom was acting within the course of his employment. It seems likely here, since he was still doing that which he was employed to do, merely contrary to instructions (compare any of C*entury Insurance; Cavenagh, Limpus*) .The criminal nature of his act, though significant, is again likely to be inconclusive (*Canterbury Bankstown RFC*). It is relevant only to the question of whether his was no longer engaged in the function for which he was employed. On balance the case looks more like *Bankstown* than *Deatons v Flew*.

Conclusion: provided Tom was actually employed (more info is needed) AQS is likely to be vicariously liable for any tort he committed. This then requires an assessment as to whether Tom committed any such tort.

2. Liability to John - Negligence

Infected Horses -

Liability for the value of the infected horses which have had to be destroyed and loss of profit on the sales of those horses is likely to be unproblematic- a duty of care is owed regarding physical damage and consequential economic loss provided it is foreseeable. See *Spartan Steel and Alloys v Martin*. One or two misguided students argued that Tom was guilty only of an omission. But any omission was of course within the context of a course of conduct and therefore caught by the *Donoghue v Stevenson* principle. There is direct analogy with the successful claimants in *McMullin* whose cattle were contaminated.

Conclusion- clearly recoverable

Loss of Sales –

These are unlikely to be recoverable through any direct application of the principles in *Spartan Steel*, but subsequent Australian developments in *Caltex* , *Perre* and *McMullin* might offer more hope to John. Students should demonstrate knowledge of McHugh's multifactoral approach in *Perre* and make sensible comparisons with both *Perre* itself and *Caltex*. They could also draw on *McMullin*, *Fortuna Seafoods*, J*ohnson* and /or *Ball v Rutile*.

Applying *Perre*- The harm was clearly foreseeable; there is no objection from the point of view of the defendant's autonomy, since Tom was presumably obliged by the criminal law to carry out competent inspection in any event. Tom was not engaged in any legitimate competitive activity. John was probably vulnerable. He had no reasonable way of protecting himself from the risk of outbreak and insurance is supposedly (per McHugh at least in *Perre*) "generally" irrelevant to the issue of his vulnerability (though *Johnson Tiles* does seem to take a different line at least in cases where first party insurance is widely available and in fact held). Indeterminacy and the associated issue of knowledge may prove more problematic. The indeterminacy issue will probably turn on the terms of the relevant regulations (which we do not know). In *Perre*, these were relatively specific and in *Caltex*, the map clearly defined the group (individual) at risk of economic damage. Here, the regulations may simply stipulate powers for the Government to shut down businesses at its discretion on a State-wide basis. The group affected may therefore be less determinate and even if it is determinate, John may not be a member of a group which is (per McHugh) also sufficiently "specific" (in the sense of being sufficiently distinguishable from others within that broader group) (compare *Ball v Rutile*?). His best argument may turn out to be that his other horses were in close "physical propinquity" to those which were infected (in the way that P's oil in *Caltex* was in close physical proximity to the damaged pipe) and that he in fact owned those other, infected horses. Another way of arguing this might be to argue that he is a "first line victim" because he did not sustain his economic loss as a result of economic loss being caused to any other person (McHugh J in *Perre*, *Fortuna Seafoods*); and he might also point to *McMullin*, where those in possession of actually infected stock were able to recover for some financial losses. Assuming that John was a member of a sufficiently determinate and *specific* group, Tom is likely to have had constructive, if not actual knowledge of that group from the terms of the relevant regulations.

Conclusion - Some prospect of success, though current authority undoubtedly remains unclear as to the precise boundaries of the indeterminacy concern. This makes the result in this case speculative.

3. Liability to Louise- Negligence

This case is one of "transferred loss", as in *The Aliakmon* and *McMullin v ICI*. If the latter case is followed, there is a good chance of success. The existence of a specific contractual right to own the infected goods (short of actual ownership) seems to be regarded as sufficient in Australia to render a plaintiff part of a sufficiently ascertainable group to defeat the indeterminacy concern. The *Aliakmon* is probably distinguishable as a case in which the court was concerned about upsetting the way risks had been allocated by international convention. Students might legitimately raise the question whether Louise was vulnerable or whether she could reasonably have protected herself through her contract of purchase (as in *Woolcock*). This is good thinking and raises the tricky question of whether *Woolcock* undermines recovery in cases like *McMullin* (1997). One suspects not and in any event *Woolcock* concerned commercial purchasers who are likely to be in better position to obtain favourable negotiated outcomes in the contract's terms.

Conclusion- high chance of recovery.

4. Liability to Rik- Negligence:

The case is likely to fail on indeterminacy grounds and/or lack of knowledge and/or lack of vulnerability.

Indeterminacy and Knowledge:

The fact that there are only 3 racecourses in Queensland is something of a red herring. The question is whether Rik's business is part of a sufficiently ascertainable and specific class of businesses that might be affected. Racecourses are unlikely to be a sufficiently "distinct" class from other businesses (in the same way that the group of affected fishermen were insufficiently distinct from other fishermen in *Ball v Rutile*?). Arguably also Rik's is not a first line victim but has sustained his losses only because others (horse owners) are unable to operate their own businesses (distinguish *Fortuna Seafoods*, *Perre*). The best hope regarding determinacy is *Johnson Tiles*, but there the defendants were in possession of facts (customer records) which supposedly made the identity of businesses and consumers affected reasonably identifiable. This is not the case here. Similarly, although this racecourse is close to the farm where the outbreak happened, there is not the same kind of physical propinquity as existed in *Caltex* and in any event in *Caltex*, liability was said not to extend to consequential loss of business profits, only to immediate costs of making alternative arrangements for transporting the oil. Rik's position is probably most closely analogous to that of the businesses who failed in *McMullin.*

Vulnerability:

As in *Johnson Tiles*, it may be that Rik would also fail on the grounds that first party insurance against this type of harm is readily available. But we do not know whether this is actually the case and in *Johnson*, the court seems to have only been prepared to take into account insurance where that information is clearly available before the court. So the case is more likely to fail on the other grounds mentioned above.

Conclusion- very little chance of recovery.