

Semester 1 2017 Commercial Law

Additional Revision Questions

Question 1

Sally Bowles owns and operates a very successful song and dance club called the Kit Kat Klub. One evening, her sophisticated sound system breaks down. She contracts with a sound technician, Clif Bradshaw, to repair it. The faulty parts of the system have to be taken to his workshop but he promises that he will return the next day and have the system up and running so she will not have to close the club. Unfortunately, because of Clif's carelessness, and lack of respect for punctuality, the sound system is not returned for three days. Sally looks but is unable to find a substitute system so she has no choice but to close the club for those three nights. She now seeks compensation for the lost profits (approximately \$6500) for the first two nights she had to close the club. On the third night she had contracted with Cosmo Brown, a famous American tap dancer, to perform and expected to earn an additional \$15,000 profit from his appearance. Clif was not aware that Cosmo was appearing at the Kit Kat Klub. Sally is also seeking damages to compensate her for the embarrassment she has suffered as a result of having to cancel the contract with Cosmo and disappoint his many fans.

Please advise Sally whether you believe she would succeed in her claims for damages against Clif.

When Sally contacts Clif (sound technician), there is a contract in between them. The events that occur after the initial contract raise many issues.

In the contract between Sally and Clif, time is of essence, as the number of days taken to repair impacts on the club operating hours. While Clif initially promises to repair within the next day, this is a term of the contract, in this case he fails to repair it within the next day, hence, this is a breach of a condition of the contract. Therefore, Sally can terminate the contract and seek for remedies. Termination by breach in performance, specifically this is a breach of a condition. In order to determine the damages that Sally can receive, there are three principles that must be tested. First principle as in Robinson and Harman, where it puts the innocent party in the same position he/she would have been in if the contract had been performed properly. This means that Sally can prove reliance on the contract, her club opening hours was completely dependent on the repair of the sound system. Secondly, the causation principle, Sally must be able to prove that the loss or damage occurred due to the breach, if not the breach the loss would not have occurred. In this case, Sally can prove the 'but-for' test and claim for the damages that she has incurred. Thirdly, the remoteness principle, which explains that the loss must be reasonably foreseeable at the time of contracting and falls in either of the two limbs of Hadley and Baxendale. Sally would be able to claim the first limb, as it was a loss arising naturally from the breach and is within reasonable contemplation of the parties. Hence, means that she would be able to claim for lost profits of \$6500 for the two nights. However, the second limb which is loss that is actually contemplated by the parties, Sally would not be able

to claim for as she had not informed or given notice to Clif about the Cosmo's appearance on the third night and the loss she would incur if the sound system was not ready. Therefore, she cannot claim the loss of \$15,000. Sally is able to claim under the first limb but not the second, even though she did mitigate to reduce the loss from her side.

Therefore, Sally will be able to claim for damages under the first limb of Hadley and Baxendale, where by it is a loss that naturally rose due to the breach (\$6500+\$3250= \$9750).

Question 2

Joanna's boyfriend is into rock-climbing and he asks Joanna to come with him on a rock-climbing expedition run by Rock and Rolls Safaris to the Arapiles in the Grampians in the West of Victoria. The cost is \$500 for 5 nights. As Joanna does not have appropriate shoes, she goes to Boots 4 U. After explaining her intention to climb in the Arapiles, the sales assistant recommends a pair of 'Matterhorn' boots for the expedition. Joanna takes note of the advice, examines the boots, sees that on the box they are called the 'Matterhorn-the best Swiss rock-grippers', and buys a pair for \$300. However, unfortunately for Joanna, the boots do not grip well on the granite rocks of the Arapiles and she is forced to abandon the rock climbing. She spends her time on the ground reading a book.

Advise Joanna of any remedies she may have against Boots 4 U under Part 3-2 of the Australian Consumer Law.

Question 3

Giorgio experiences a heart murmur, so he consults with his GP, Dr Kee. Dr Kee tells Giorgio not to worry and decides not to send Giorgio for further tests. Shortly thereafter, Giorgio suffers a cardiac arrest and as a result is brain damaged. Giorgio now intends to claim damages for negligence, arguing that Dr Kee should have taken a possible cardiac problem into account when the heart murmur was detected and arranged an ECG and referral to a cardiologist. Dr Kee admits he owes Giorgio a duty of care.

Please advise Giorgio whether his claim is likely to succeed.

Under the common law there is a standard of care expected from professionals. Since it is clearly stated that the GP owes Giorgio a duty of care, the breach of duty of care is to be analyzed.

The breach of duty of care depends upon whether the defendant met the standard of care required by the law. There are three tests that must be met to determine if there was a breach of duty of care. Firstly, the risk must be foreseeable, meaning the person knew or ought reasonably have known, Dr Kee

is ought to reasonably have known that a heart murmur can lead to a cardiac arrest. Secondly, the risk was not insignificant; the negligence of Dr Kee was at the cost of Georgio's life, which is clearly a significant risk. Thirdly, in the circumstances a reasonable person would have taken precautions, a GP who was in the position of Dr Kee would have taken precautions and is likely to have taken further action. All the three tests have been met which clearly indicates that there is a breach of duty of care.

Where the plaintiff is able to prove that the defendant has not exercised reasonable care in their professional duties, the defendant is liable. However, if the defendant is able to show as a way of defense that the defendant acted in a manner that satisfies the test in s59 of the wrongs act- this depends D providing evidence from his peers that he acted in a manner that was 'widely accepted in Australia by a significant number of respected practitioners in the field as competent professional practice in the circumstances'. This is not easy to establish and it is possible that the court may disregard it despite of the opinion given by professionals. Thus, it is all dependent upon where Dr Kee may be found to have breached the duty of care and then attempt to rely on s59 defense.

This case is similar to that of Mules and Ferguson,

Where the plaintiff proves that the defendant professional has not exercised reasonable care in the discharge

- Rogers and Whitaker
- Mules and Ferguson

Question 4

Jacob Farook's company, JF Solar Panels Pty Ltd, has been running a solar panel business for many years. Jacob is the sole director and the sole shareholder. In July 2016, Jacob ordered glass panels to the value of \$1 m from Glass Makers Pty Ltd, a glass wholesaler, as he had done on many occasions. At around the time the order was placed, the company was experiencing serious cash-flow problems and was unable to pay its debts. Jacob, who was immersed in the research and development side of the business, did not pay sufficient attention to the company's accounts and only realised it was in serious trouble a month later. When the glass was delivered in September, the company could not pay the account and it has remained unpaid. The manufacturer is now suing both the company and Jacob.

Advise Jacob of the extent (if any) of his liability.