FACULTY OF BUSINESS AND ECONOMICS
ACCG851 BUSINESS LAW
UNIT OUTLINE— SEMESTER 1, 2010

STUDENTS IN THIS UNIT ARE REQUIRED TO READ THIS UNIT OUTLINE CAREFULLY AT THE START OF THE TRIMESTER. IT CONTAINS IMPORTANT INFORMATION ABOUT THE UNIT. IF ANYTHING IS UNCLEAR PLEASE SPEAK WITH YOUR LECTURER.

Unit Description

All commercial activity is regulated by a complex legal regime. This unit of study examines the Australian legal system as it pertains to the government of business activity, and includes an introductory study of the following broad areas:

- An introduction to law
- Historical context of Australian law, common law and statute law
- Statutory interpretation
- Australian legal system, civil/criminal law, court personnel, hierarchies, state and federal systems
- Business entities, including sole traders, partnerships, companies, trusts, associations
- Contract law
- Torts, particularly negligence
- Agency
- Bankruptcy and Debt Recovery
- Consumer protection and the Trade Practices Act

In addition to introducing the above areas, the unit aims to develop a range of generic skills in:

- Legal research, writing, and presentation
- Communication and interpersonal skills
- Group work and cooperation
- Problem-solving, analysis, and logical argumentation
- Legal issue resolution
- Understanding of different viewpoints and perspectives

THE LAW SEQUENCE

You are now commencing the law sequence in the Macquarie Postgraduate Diploma in Accounting and Master of Accounting program. There are 3 law units in these programs:

ACCG851 Business Law	ACCG854 Company and Associations Law	ACCG857 Taxation Law

Carrying on any type of business requires an understanding of applicable law. Advising individuals or companies on business and tax matters also requires an understanding of the impact an area of law may have on proposed business activities or arrangements.

Although the three units are different, they interrelate and build upon each other. Many issues and concepts overlap between the units and there is material in each that is helpful to a clearer understanding of the others.

- Business Law introduces students to the general framework and structure of law in Australia. It provides an outline of the historical context of the Australian legal system and describes key features of the system at both State and Federal levels. The unit examines the difference between criminal and civil law and outlines court personnel, the hierarchy of courts, common law, statute law, and statutory interpretation.

  It is important that students understand the frameworks and key concepts that underpin the manner in which the legal system deals with many of the substantive legal issues covered later in the unit and in subsequent units (ACCG854 & ACCG857). For many students, this unit will provide new but important fundamental knowledge that will underpin understanding of the way law interacts with and impacts on the regulation of accounting and business entities.

  Building on the foundation of the material in the first two weeks, the remainder of the unit introduces students to particular areas of law including: introduction to business entities (sole traders, partnerships, companies, trusts, associations); contract law; torts (particularly negligence), agency, bankruptcy, and consumer protection and the Trade Practices Act.

  Material and concepts covered in the first three weeks of the course are essential to successfully undertaking both the remainder of ACCG851 and the later law subjects ACCG854 and ACCG857.

- Company and Associations Law deals with the structure and function of business entities such as partnerships and particularly, companies. Students will consider how companies are formed, the position and responsibilities of management and the issues relevant to insolvency, restructuring and liquidation.

- Taxation Law examines the various principles relating to assessable income and deductions. The unit focuses on the Income Tax Assessment Act (1936 and 1997), enabling students to familiarise themselves with the use of the legislation. Students learn how to calculate tax payable and how to deal with Capital Gains, Fringe Benefits, and Goods & Services taxes.

Although you will not be legal practitioners upon the completion of your course you will nonetheless be prepared to become accounting professionals in a highly, and increasingly, legally regulated and litigious environment. You may be relied upon for accurate business advice, and the overall effect of these three law units should greatly assist in your ability to recognise and deal with legal issues. In addition, your knowledge base should also alert you to situations where the legal regime/issues are so complex that the most responsible and professional course of action to undertake is to seek further advice, either from an organisation's "in-house" lawyers or other specialist legal practitioners.

Remember your studies. You will be accountable for professional advice you give (or fail to give)!

On this page are just some examples of how each of the units relate to each other and to various aspects of professional practice.

Accountants use partnership structures, as do many other professionals. Partnership is also a common form of small business structure.

- Business Entities — ACCG851
- Agency — ACCG851/ACCG854
- Accounting for partnerships — ACCG857

Corporate investment is fuelled by a dual profit motive.

1. *Revenue gain by way of dividends*
   - Rules as to payment of dividends — ACCG857
   - The franking account — ACCG854
2. *Capital gain by way of sale of shares*
   - Takeovers — Financial Services and Markets — ACCG854
   - Capital gains tax — ACCG857

Professional practice as an accountant involves a substantial amount of restructuring and insolvency

- Bankruptcy — ACCG851
- Receivership, Administration, Liquidation — ACCG854

Making deals underpins the marketplace. Contracting is the most common means of business interaction

- Contracts — ACCG851
- The company and contracts
  Directors as agents
  The effect of the company constitution
  ACCG854

Companies incur liability as individuals. This is an important factor in providing corporate advice

- FTRA
  Tort (negligence) and Vicarious liability
  ACCG851
- Company liability in tort and crime — ACCG854

Financial planning involves the ability to make use of appropriate vehicles such as the trust structure

- Business Entities
  Trusts
  ACCG851
- Trading trusts
  Directors' liability re trusts
  ACCG854
- Trust accounting — ACCG857

Teaching and Learning Strategy

Class contact will consist of a single, three-hour seminar session each week, incorporating lecture and tutorial style components. Approximately two-thirds of the time each week will be devoted to lecture and other presentations (including audio-visual material, if appropriate); the other one-third of the time will be spent in tutorial or discussion mode. The course is designed to foster a useful learning pedagogy, therefore group work and general discussions may impact on the time-frame outlined in the Syllabus. Individual lecturers may also to choose to emphasise some areas of the weekly reading over others.

Each class will centre on the assigned reading material. Seminar activities will be based on materials contained in the text or on other material to be introduced in lectures on a week-by-week basis, including questions identified by the lecturer and /or problem based case studies. Specific questions for discussion in seminars will be advised during class. Questions and case studies in the text book may not always be utilised, although students are strongly advised to at least consider these materials on a weekly basis. Copies of overheads which may be used by the lecturer are available online, however, the ultimate authority for weekly material presented is the relevant chapter of the textbook.

Teaching Staff and Classes

Students must attend the seminar time for which they are enrolled, as indicated in the following table. The seminars are not interchangeable, as each class may work at a different pace. If on the odd occasion you are unable to make your allotted class, you may attend a substitute seminar but please speak with the lecturer prior to commencement of the class.

The timetable for classes can be found on the University web site at:
http://www.timetables.mq.edu.au/

Lecturer contact details

Gordon Floyd	Email — floydcbg@ozemail.com.au
Vijaya Nagarajan	Email - Vijaya.Nagarajan@law.mq.edu.au
Chip Van Dyk (Unit Coordinator)	Email — cvandyk@efs.mq.edu.au

Unless advised otherwise, lecturers are available for consultation by appointment only.

Prescribed text

Andy Gibson and Douglas Fraser, *Business Law,* Fourth edition, Pearson Eduction Australia, 2009.

The text has an online component, "activebook", which requires a student access key code. This code is specific to Course Compass, the website where the online material for this course can be accessed. Online material is not accessible without a Course Compass code.

The activebook is an online interactive version of the textbook, with chapter warm-up quizzes, concept checks within the chapter, hyperlinks to cases referenced and interactive essay questions. Students should use this feature for each assigned chapter in addition to reading and highlighting each chapter, and then taking notes on the most important sections of each chapter.

Other useful parallel material may be found in the current editions of:

- Gillies, Business Law, Federation Press
- Latimer, Australian Business Law, CCH.
- Pentony, Lennard, Graw & Parker, Understanding Business Law, Butterworths.
- Terry & Guigni, Business Society and the Law, Harcourt Brace.
- Vermeesch & Lindgren Business Law of Australia, Butterworths.

Assessment

The compulsory assessment for the unit will consist of the following components:

• Mid-trimester Examination	45%
• Final Examination	45%
• Online Assessment	10%
Total	100%

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- *Online Assessment*

  Students will be required to take 12 online assessments consisting of multiple choice questions. The result will be available immediately. Students must achieve a minimum of 80% to receive credit for each assessment. The assessment may be taken as often as necessary to achieve the minimum level. Students who take all the assessments and achieve the required results will receive ten (10) points. Students who do not take all the assessments, or do not achieve the required results on all assessments will receive a grade of ZERO (0).

  Relationship between Assessment and Desired Learning Outcomes:

  The online assessments are designed to reinforce comprehension of key concepts from each week. The requirement to achieve 80% ensures that a high level of comprehension is achieved. The ability to retake the test relieves any pressure from the assessment. The requirement to take all the assessments in order

to receive credit ensures that students receive continuous feedback on their comprehension throughout the semester.

- *Mid- trimester and Final Examinations*
  The compulsory mid-trimester examination will be held after the completion of Week 6. It will be a three hour examination (plus reading time). The exam will cover material from the first 6 weeks of the course. It may consist of multiple choice, short answer, essay, and problem-based questions. More information will be available closer to the exam date

  The compulsory final examination will be held during the official examination period after the completion of Week 12. The examination will be three hours in duration (plus reading time). The exam may consist of multiple choice, short answer, essay, and problem-based questions, covering material considered throughout the final six weeks of the course. Further details will be provided closer to the exam date.

  Relationship between Exam Assessments and Learning Outcomes:

  The exam will test not only memorized knowledge of course material, but also comprehension of substantive course concepts. The written (non-multiple choice portion) of the exam will evaluate students' critical analysis skills, and their ability to express their arguments logically and coherently.

  Students MUST achieve a satisfactory result on the written portion of their exams. Students will not receive a passing grade based on their performance on multiple chpice questions alone.

  Students who do not, on average, pass the written portion of the exams will not receive a passing grade for the unit.

  Examination Rules and Procedures: University exam rules and procedures apply. Please familiarise yourself with these: http://www.accg.mq.edu.au/ss/macc/examinations. Take special notice that electronic dictionaries are not allowed. Paper translation or English dictionaries are allowed, however, dictionaries containing business or law content are not permitted.

  - Cheating is a serious academic offense. Penalties include, but are not limited to, failure, and exclusion from the University.

The Mid-Trimester Examination period in S1 2010 is from 5 to 16 April. Final exams are from 7 to 28 June.

You are expected to present yourself for examination at the time and place designated in the University Examination Timetable. The timetable will be available in Draft form approximately eight weeks before the commencement of the examinations and in Final form approximately four weeks before the commencement of the examinations.
http://www.timetables.mq.edu.au/exam

The only exception to not sitting an examination at the designated time is because of documented illness or unavoidable disruption. In these circumstances you may wish to consider applying for Special Consideration. Information about unavoidable disruption and the special consideration process is available at http://www.reg.mq.edu.au/Forms/APSCon.pdf

If a Supplementary Examination is granted as a result of the Special Consideration process the examination will be scheduled after the conclusion of the official examination period. (Individual Divisions may wish to signal when the Division's Supplementaries are normally scheduled.)

You are advised that it is Macquarie University policy not to set early examinations for individuals or groups of students. All students are expected to ensure that they are available until the end of the teaching semester, that is the final day of the official examination period.

Preparation *and* materials provided

☺ ***Regular attendance*** *at seminars* is an expectation of the course. Weekly reading is to be done prior to class. It is suggested that students take notes as they read, as a memory aide. Students should also summarise key cases as they progress through weekly readings. Students often ask how much time they should spend on this subject. There is no hard and fast rule, however you need to read *and* summarise/take notes in order to really understand the material. If this is your first introduction to matters legal and/or you are from overseas or a non-English speaking background then clearly a quick read will not be enough. Somewhere in the order of 6–10 hours outside of class time per week is probably required.

☺ ***Weekly seminar overheads*** are provided. These summarise key points in the area of law under consideration and are a ***guide only***. They are based on the material from the textbook. It is suggested that students use these as an indication as to required content, and that you supplement them with your own notes, taken from both the textbook, and from lectures each week. Individual lecturers may diverge from the overheads as they choose the manner in which they treat key concepts for each topic, however, it should be noted that the textbook provides the consistent core content for each topic. Questions in the weekly tutorial outline are suggestions only and your lecturer retains discretion as to whether any or all are used.

☺ ***Support services*** are available for international students. If you experience study-related difficulties, do not hesitate to contact the International Office or the Master of Accounting office. In addition, the Unit Coordinator, Chip Van Dyk, may be contacted regarding course-related questions. There is also an on-campus counselling service. Your individual lecturer should be consulted if the matter relates to weekly material or to organise a consultation to discuss progress or problems in understanding lecture/textbook material.

Macquarie University provides a range of Academic Student Support Services. Details of these services can accessed at http://www.student.mq.edu.au.

☺ Students should remember that this is a post graduate qualification where the ability to organise and independently study is an accepted part of academic life. All students entering this program have completed a prior degree (across a range of academic disciplines) and are therefore expected to possess analytical and study skills superior to those of an undergraduate student.

☺ Students should be aware that the University takes ***plagiarism*** very seriously. The University defines plagiarism in its rules: "Plagiarism involves using the work of another person and presenting it as one's own". Plagiarism is a serious breach of the University's rules and carries significant penalties. You must read the University's practices and procedures on plagiarism.

The policies and procedures explain what plagiarism is, how to avoid it, the procedures that will be taken in cases of suspected plagiarism, and the penalties if you are found guilty. Penalties may include a deduction of marks, failure in the unit, and/or referral to the University Discipline Committee.

Do not use the words of another person or even their ideas without referencing the source. Paraphrasing is fine but you must still appropriately cite the source of the idea. For a fuller explanation and examples see the source below.

A further note of caution: in a recent Supreme Court of Qld Appeal Case (Liveri, Re 2006 QCA 152 (12 May)) a law student applied for admission to practice upon completion of her studies. The legal Practices Admission Board opposed her registration for practice on the grounds that she had engaged in plagiarism whilst a student at James Cook University. A key factor was the dishonesty and lack of remorse the student demonstrated bringing into question whether she was a "fit and proper person" to act as a legal practioner. So for those of you who intend to seek professional registration remember fitness to hold office/registration is often an important consideration. This case may set a precedent for other professional bodies when considering applications from students who have been guilty of plagiarism.
The case referred to above is accessible via —
http://www. Austlii.edu.au/au/cases/qld/QCA/2006/152.html

The University policy on plagiarism and examples of plagiarism, scaled from the mildest to the most serious offences is available at: http://www.student.mq.edu.au/plagiarism

☺ Applications for ***Special Consideration*** in the case of illness, accident, or unavoidable disruption must be made on the appropriate form and be accompanied by supporting evidence and documentation. Further information is available from the administrative staff in the Postgraduate Accounting Program office on Level 2 of building C4A.

See http://www.reg.mq.edu.au/Forms/APSCons.pdf for further details.

University Policy on Grading

Academic Senate has a set of guidelines on the distribution of grades across the range from fail to high distinction. Your final result will include one of these grades plus a standardised numerical grade (SNG).

On occasion your raw mark for a unit (i.e. the total of your marks for each assessment item) may not be the same as the SNG which you receive. Under the Senate guidelines, results may be scaled to ensure that there is a degree of comparability across the university, so that units with the same past performances of their students should achieve similar results.

It is important that you realise that the policy does not require that a minimum number of students are to be failed in any unit. In fact, it does something like the opposite, in requiring examiners to explain their actions if more than 20% of students fail in a unit.

These are the official descriptions of the various grades, as published by the University:

☺ *HD High Distinction* (SNG 85–100)—performance that meets all unit objectives in such an exceptional way and with such marked excellence that it deserves the highest level of recognition

☺ *D* *Distinction* (SNG 75–84)—performance that clearly deserves a very high level of recognition as an excellent achievement in the unit

☺ *Cr* *Credit* (SNG 65–74)—performance that is substantially better than would normally be expected of competent students in the unit

☺ *P* *Pass* (SNG 50–64)—performance that satisfies unit objectives

😐 *PC* *Conceded Pass* (SNG 45–49)—performance that meets unit objectives only marginally

☹ *F* *Fail* (SNG 0–44)—failure to complete the unit satisfactorily.

Syllabus

Week	WeekCommencing*	Topics
1	22 February	Legal Framework (Part A). **Legal foundations; major sources of law; levels of government and separation of powers; the Constitution and Commonwealth jurisdiction.** (G&F Chs 1-2)
2	1March	The Legal System (Part B). **The courts: state and federal, legal personnel and trial participants; the adversary system and case law; standard/burden of proof; government tribunals, Ombudsman and related bodies; statute law, case law and precedent; statutory interpretation.** (G&F Chs 3-4)
3	8 March	**Contract Law**. Essential elements of a contract; vitiating elements; terms; discharge; remedies. **(G&F Chs 12-21)** Note: Your lecturer will indicate which of these chapters should be prioritized
4	15 March	**Contract Law (cont.)**
5	22 March	**Contract Law (cont.)**
6	29 March	**Contract Law (cont.)**
	5-16 April	**Compulsory Mid-Semester Examination: 45% of final grade**
7	19 April	**The law of Torts: Introduction to Torts and Negligence (G&F Chs 7-9)**
8	26 April	**Torts (cont.): Applications of Negligence to Business**
9	3 May	**Agency Law (G&F Ch 27)**
10	10 May	**Company Law and Business Entities (G&F Chs 28,30)**
11	17 May	**Bankruptcy and Debt Recovery (G&F Ch 33)**
12	24 May	**Consumer Protection: Sales of Goods Act, Implied Terms, and the Trade Practices Act (G&F Chs 22-24)**
13	31 May	**Trade Practices Act (cont.)**
	7-28 June	**Final Exam Period**

***Public Holidays: If your regularly scheduled class falls on a public holiday, please attend one of the other classes during the week.**

Schedule of Tutorial Questions and Discussion Guide

Week	Topics	Tutorial Tasks
1	**How to study Law** **The Legal System (Part A)**	Chapter 1: Review Questions 13,14,15 Chapter 2: Review Questions 17,18,19
2	**The Legal System (Part B)**	Chapter 3: Review Questions 24,27 Chapter 4: Review Questions 8,10 Problem-based Question: Jacques and the Firearms Offences Act (Included in this Outline)
3	**Contract Law** (Note: Your lecturer will advise of precise timing of the progress through the chapters)	Chapter 12: Review Questions 2,3 Chapter 13: Review Questions 10,14 Chapter 14: Review Questions 8,9,10
4		Chapter 15: Review Questions 5,7 Chapter 16: Review Questions 4,9,10
5		Chapter 17: Review Questions 4,5,16,17 Chapter 18:none Chapter 19: Review Questions 2,5,10,11 PLUS Problem-based Question: Choi and the Nursery (Included in this Outline
6		Chapter 20: Review Questions 5,6 Chapter 21: Review Questions 2,4,10,11
7	**The law of torts: Negligence**	Chapter7: Review Questions 1,3,4 and Problem-based Question: The Smouldering Stump (Included in this Outline)
8		Chapter 8: Review Questions 7,8,17 Chapter 9: Review Questions 3,8,10,14
9	**Agency**	Chapter 27: Review Questions 3,7,12,13, CT#1-3, plus short problem question (included in this outline)
10	**Companies and Choosing Business Entities**	Chapter 28:Review Questions 6,7 - PLUS Problem Question: Wagon Wheels (Included in this Outline) Chapter 30: Review Questions CT#1
11	**Bankruptcy** and **debt recovery**	Chapter 33: Review Questions 1,2,10 plus short problem question (included in this outline)
12	**Consumer protection** and Sale of Goods	Chapter 22: none Ch 23: Review Questions 6,8; CT#1
13		Chapter 24: Review Questions 5,8,9 and Problem question in Unit Outline

The above cited Review Questions are to be used as a guide only. Your lecturer will use his/her discretion in determining how these are treated. Some may be set for homework whilst others may be tackled in class. Some may not be covered at all however it is advisable as a method of independent study that you at least consider these questions to help you focus your reading on a weekly basis. Do not expect that written answers to these will be provided. At this level of study it is an expectation that you should be able to take your own notes from a class discussion or from the textbook. These notes will form an important study resource for the final exam.

The Legal System—
Statutory Interpretation

Problem-based Question (Week 1)

Jacques and Firearms Offences Act

Statutory Interpretation

Jacques was charged with an offence under section 8 of the *Firearms Offences Act 2006(NSW) [fictional]*. This section provides:

> It is an offence for a person to have in his possession a weapon in the vicinity of a bank

The preamble to the Act states:

> Whereas the number of crimes involving dangerous weapons has increased, the New South Wales Parliament declares it to be a crime to carry a firearm in or in the vicinity of various business houses.

Jacques was arrested while carrying a wooden replica of a handgun in the Macquarie University branch of a credit union. On his person, he also wore a homemade belt and wristband with stainless steel studs which had been filed to knife-point-like sharpness.

Required:

Advise Jacques as to whether he may be guilty of an offence under s.8 of the *Firearms Offences Act 2006 (NSW)*.

Contract Law

Problem-based Question (Week 4)

Choi and the Nursery

Choi is the head of a fast growing inner city church that raises most of its funding from commercial plant nurseries staffed by church members who include Mr and Mrs Fung. They have asked to be excused from nursery work because they are in excess of 70 years old and have various aches and pains. Choi agreed on condition that they both signed documents in which they guaranteed to repay a mortgage over a new nursery if the church defaulted. Choi failed to mention that the nurseries were doing poorly and in fact were in debt due to a plague of locusts. In addition he did not suggest that the Fungs should seek independent advice.

One of the documents the couple signed was a deed transferring ownership of their new Commodore to Choi in return for payment of $10.00.

A year later the *Bank of Sukudry* is calling in the mortgage from the Fungs (the church has defaulted) and Choi has claimed their car to assist with the payment to the Bank.

Required:

Advise the Fungs of their legal rights, what action/s they could take, and their likely chance of success.

Torts - Negligence

Problem Question (Week 7)

Cameron Brown was ten years old when he stayed overnight with his friend Joel, also ten, at Joel's home. Joel's parents are the owners and occupiers of the home. Joel slept on the top bunk of a two-tier bunk bed that his parents had bought two years earlier. When they purchased it, in compliance with mandatory safety standards applying to their manufacture and sale, it was fitted with a ladder that hooked on to the frame of the bed, and with a guardrail on the top bunk. A year after purchasing it, the guardrail broke and Joel's parents removed it. They also removed the ladder because they believed the design was poor; it was not firmly connected to the bed, and they were worried that someone might fall while climbing. They were unaware of the mandatory safety standards for bunk beds and the standard only applied to the manufacture and sale — not their use.

Cameron slept on the bottom bunk of the bunk bed that night. When he awoke in the morning he climbed up the end of the bed to the top bunk and sat on the top bunk with his legs dangling over the edge as he talked to Joel. He was wearing socks. Then, instead of climbing down the same way he got up, and, being too scared to jump, and with no guardrail to hang onto, he slid down and put one foot on a chest of drawers next to the bed, while searching with his other foot for the bottom bunk. While doing this, his foot slipped from the chest of drawers, and he fell forward and struck his head on the floor, suffering a fractured skull. This was the first time such an accident had occurred.

Cameron has suffered permanent brain damage which was discovered only two years ago. Now, five years after the accident, he has had to drop out of high school because of an inability to concentrate, although before the accident he was always top of his class.

Required:

Advise Cameron's parents of their likely success in bringing an action against Joel's parents for negligence. Cite case examples, relevant statutes, appropriate tests and defences to support your answer.

$800,000 payout after bunk bed fall
Bellinda Kontominas
June 26, 2009

A teenager has been awarded more than $800,000 in damages after he fell from a bunk bed during a sleepover at a friend's house.

It is a decision which is likely to concern parents across the country whose children invite friends home to stay overnight.

Cameron Brock Thomas was 10-years-old when he suffered a fractured skull after the fall at his friend's family home at Bilambil Heights on the north coast of NSW in April 2004.

He suffered "immediate and significant" changes in his behaviour following the fall, could no longer stand noise, was impulsive and unpredictable and later became depressed and suicidal, according the evidence at a Supreme Court hearing earlier this year.

Cameron sued William and Susan Shaw, the parents of his friend Joel, claiming the accident occurred after the Shaw family failed to provide a safe environment for him, including the removal of the ladder and guardrail on the bunk bed.

The Shaw family argued that Cameron had been "skylarking" in an accident that had nothing to do with the bed.

Joel had told the court his friend had slid from the bunk to a nearby chest of drawers before shouting something like "Geronimo" as he jumped to the floor.

In his judgement Justice David Kirby accepted Cameron's account - that he had slid down the bed and tried to use the chest of drawers as a foothold - as "more plausible" than Joel's.

He found the Shaws were negligent in not assessing the risk of a fall from the bunk.

"I accept ... that it was foreseeable that young children of of Cameron's age would climb onto the top bunk and may improvise in getting down," he said. "The occupier ought to have known that there was the risk of harm, absent a ladder and guardrail."

"It was predictable to a reasonable person that a fall whilst descending from a bunk bed was likely to cause serious harm."

Justice Kirby awarded Cameron $853, 396 in damages, including future economic loss and medical expenses, and ordered the Shaw's to pay costs.

Bellinda Kontominas is the Herald's Court Reporter.

Source: smh.com.au

Thomas v Shaw [2009] NSWSC 510 (26 June 2009)

Last Updated: 26 June 2009

NEW SOUTH WALES SUPREME COURT

JURISDICTION:
Common Law

HEARING DATE(S):
16/2/09 - 20/2/09
30/3/09

JUDGMENT DATE:
26 June 2009

PARTIES:
Cameron Brock **Thomas**
(by his tutor Doreen **Thomas**) (Pl)

William Richard **Shaw** (1st Def)
Susan Joyce **Shaw** (2nd Def)

JUDGMENT OF:
Kirby J

The *Civil Liability Act* 2002.

75 Cameron was a ten year old boy given into the charge of the **Shaws** on his first sleep over. The sleep over was in a room with bunk beds. Section 5B of the *Civil Liability Act* is in these terms:

"**General principles**
5B(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm."

76 Section 5C(a) is as follows:

"**5C** In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, ..."

77 The defendants, in helpful written submissions, addressed each limb of that section. Was the risk foreseeable? What did the defendants know, or what ought they to have known? The defendants drew attention to the following, amongst other matters (paraphrasing their arguments): (DS: p 18, paras [45]/[46])

Cameron had never climbed from the top bunk before via the chest of drawers.

The defendants had not seen him perform that manoeuvre.

There was no evidence that anyone had done it before.

Cameron had always used the end of the bunk bed to get up and down in the past.

There had never been an accident before.

Cameron's parents had not seen fit to check out the hazards in the house.

78 Mrs **Shaw** gave evidence that children used to stay quite often on sleep overs (T 264). She knew, of course, that the bunk had no ladder and no guardrail. The bed base of the top bunk was

approximately 1.22 metres high, with the mattress resting on top (Exhibit A: p 140). Mrs **Shaw** said that she had seen boys use the end of the bunk to climb up (T 264). She never saw them climb down (T 265). She only ever saw them jump down: “Boys do a lot of jumping” (T 265). She recognised that boys had a proclivity to climb (T 282). She said: “I would guess that boys will be boys” (T 282). She also recognised that boys can be impulsive (T 282). Indeed, she knew from observation that Cameron was somewhat impulsive (T 283). He was, in her words, “very lively” (T 283). She had seen boys on the top bunk from time to time (T 267).

79 Joel gave evidence that he jumped down from the top bunk. He also acknowledged using the chest of drawers to assist him in getting onto the bunk bed (T 298). He agreed that Cameron would have seen him do that (T 298). I accept, in the circumstances, that it was foreseeable that young children of Cameron’s age would climb onto the top bunk and may improvise in getting down. The occupier ought to have known that there was the risk of harm, absent a ladder and guardrail.

80 Section 5B(1)(b) requires that the risk should not be insignificant. Here, according to the plaintiff, the risk was so significant that, since 2002, there had been a mandatory Australian Standard in respect of bunk beds. The publication by the Australian Competition and Consumer Commission of that Standard included these words: (Exhibit A: p 165)

“**All bunk beds sold in Australia must meet the mandatory consumer product safety standard for bunk beds administered by the ACCC.**
In place since 2002, this mandatory standard requires bunk beds sold in Australia to comply with the Australian/New Zealand Standard 4220: 1994, bunk beds (with variations).
Bunk beds have been associated with many injuries to children. Hazards include falling from the top bunk or small heads and limbs being trapped in the bed framework, often leading to serious or even fatal injuries.
Studies show that in Australia at least 3850 bunk bed-related injuries to children under 15 are treated every year by hospital emergency departments or by general practitioners. Of these cases, about 390 are estimated to result in hospital admission. Almost half of all bunk bed injury cases are in the five-to nine-year age group and, of these, at least 180 need to be admitted to hospital.
The mandatory standard requires bunk beds to comply with various design, performance and marking provisions, including requirements to: ...”

81 The requirements of the Standard included guardrails and a ladder, as a means of access and egress. The expert who provided a report (and who was not required for cross examination), said this: (Exhibit A: p 141)

“21. Both a guard rail as well as a ladder would provide support for someone attempting to climb down from the top bunk. The guard rail offers a hand hold whilst the ladder would provide a foothold. The number of hand holds and footholds are greatly reduced if both of these items are removed.”

82 The defendants submitted that “clearly the risk could be regarded as insignificant”, because Cameron had never descended from the top bunk in this manner before, but had always used the end of the bunk to get up and down. There was no expectation that he would use the chest of drawers in the manner he did (DS: p 20/21, para [49]). However, I am satisfied that the risk was not insignificant.

83 The plaintiff, in these circumstances, suggested that a reasonable person in the position of the **Shaws** would have taken the following precautions:

First, provided a ladder.

Secondly, provided a guardrail.

Thirdly, warned Cameron of the danger and that he must not climb onto the bed or, if he did, he must descend over the back of the bunk.

84 The plaintiff's expert, having examined the bunk and having referred to the Australian Standard, stated the following conclusions: (Exhibit A: p 143/144)

"27. It is considered that the circumstances of the accident accord to the fact that at the time of the accident, Cameron would at most, have only 2 functional points of support available to him. This runs counter to the widespread principal that three functional points of support should have been available.
28. It is considered that if the ladder and guardrail had been installed at the time of the accident, then Cameron would have had three functional points of support available to him as he descended from the top bunk, at the time of the accident. Furthermore, it is considered that this would have made it far less likely that he would have (fallen) and may have obviated his need to place his foot on the chest of drawers, all together.
29. Based on the information that is currently available to me, it is considered that a ladder and guard rail had been installed prior to the accident, however they had been left off at the time of the accident.
30. The requirement to provide a guardrail and ladder for mattresses 800 mm above floor height is clearly enumerated in AS4220:1994."

85 Mrs **Shaw**, in cross examination, was asked whether, when the bolt securing the railing stripped, she considered replacing it with a larger bolt and washer. She said that she had not. As to the ladder, it was put to her that she could have bound or otherwise secured the ladder fitted to the bunk to prevent it wobbling or slipping. She acknowledged that she could have done so. However, her children were older and did not particularly need it (T 281). The Act requires that, in determining whether a reasonable person would have taken precautions against the risk of harm, the Court must consider the matters in s 5B(2), amongst other relevant matters. The defendants argued that, for many of the reasons already given, the probability of harm was extremely low. Cameron had never done this before. He had always descended using the end of the bed. There was no expectation that he would use the chest of drawers.

86 It cannot be said that, absent a guardrail and ladder, harm was probable each time a child climbed up and down. No doubt many such journeys could be made without incident. But the risk of a fall from height onto a hard floor remained, awaiting a misjudgement or mishap. Cameron was young. As a ten year old, he was just outside what may be termed "the vulnerable age bracket" (five years to nine years) (Exhibit A: p 165). But he was, I believe, still vulnerable. It was highly predictable that a child on the top bunk may improvise in getting down, absent a ladder. Indeed, a child of his age, sitting on the side of the bed, chatting to his friend, would be likely to improvise in getting down when seated in that position. The alternative was to climb back up onto the bed, walk the length of it, and climb down the back. More often than not, a child could be expected to get down successfully. However, there was the real possibility of harm, as recognised by the mandatory Standard.

87 Section 5B(2)(b) requires a consideration of the likely seriousness of harm. Here the risk was of a fall from a reasonable height onto a hard surface. There was a significant risk that such a fall by a child may involve an injury to the head, as happened here. Accidents of that kind inevitably carry the risk of serious harm, again as happened here. A child may fall awkwardly or land on furniture or hit their head. Where they do so, serious consequences could be expected. In short, it was predictable to a reasonable person that a fall whilst descending from a bunk bed was likely to cause serious harm.

88 What was the burden of taking precautions to avoid the risk of harm (s 5B(2)(c)), and similar risks for which the person may be responsible (s 5C(a))? Here the bunk beds, on purchase, had guardrails and ladders, supplied by the manufacturer, which the **Shaws** regarded as unsatisfactory and which they removed. There was no specific evidence of the cost of refixing them or replacing them. The plaintiff submitted that the ladder could have been simply lashed to the tubular steel at no expense. The guardrail could have been refixed with a replacement bolt and washer (cf T 280). According to the plaintiff, this was a well known hazard which was considered sufficiently bad and important to justify a mandatory Australian Standard, requiring both a guardrail and a ladder (T 381). The defendants submitted that the burden, in the circumstances, was unreasonable (DS: p 24, para [57]).

89 Clearly there was some burden and some cost in taking the suggested precautions. That must be part of the calculus in determining whether the precautions were reasonable.

90 The last specific matter which the Act identifies is the social utility of the activity which creates the risk (s 5B(2)(d)). On that issue, the defendants said this: (DS: p 24)

"59. The **Shaws** were essentially providing Cameron's parents with unpaid childcare. Unpaid childcare plays an enormous role in our society. This is particularly so with the prevalence of the 'single parent' family and the 'two parent working' family. The extreme difficulties faced by many of these families are further magnified by the current economic climate. Of course Mrs **Thomas** was the sole working parent in Cameron's family with his father unable to work as a result of injuries and disabilities suffered in an accident. Quite simply, many families in the low socio-economic level and indeed the **Thomas** family would struggle to survive without the assistance of friends and neighbours providing unpaid childcare. There can be no doubt that a finding adverse to the **Shaws** is one which will impact significantly on our current society's use of unpaid childcare."

91 Were the Court to determine that the **Shaws** were liable, a safety audit of all premises and some form of induction would become necessary (DS: p 26, para [63]). The submissions asked the following rhetorical question: (DS: p 27)

"68. An acceptance of the plaintiff's case would have far reaching social implications. Would it mean the end of childhood sleep overs? Would it mean the end of unpaid childcare? Would it mean the end of childhood fun as we knew it?"

92 The plaintiff said that such claims were "nonsense". If one's children were put in the care of other parents, those parents had to be careful. They had to take reasonable precautions to avoid foreseeable risks of injury. If they had something dangerous on their premises, like a bunk bed without a guardrail or ladder, they had responsibilities. There is nothing wrong with sleep overs. What is wrong is the failure to take reasonable precautions in the circumstances identified by the *Civil Liability Act* (T 380).

93 The submission by the defendants is not unlike that made by the defendants in *Doubleday v Kelly* [2005] NSWCA 151, a case involving a child of eight years who used a trampoline, unsupervised, whilst wearing roller skates. Bryson JA, in a passage quoted by the defendants in their submissions, said this:

"[17] In a domestic situation, the response of a householder occupant to a foreseeable risk of injury to a child for whom the occupant is exercising parental responsibilities (as for a brief period Mrs Urquhart was) necessarily involves acceptance of many foreseeable risks of injury to the child. A house has much furniture and other effects which can cause injury, according to the way children use them; children could climb on tables and fall off, and they could tip furniture over. A household could be full of things which children might foreseeably break so as to cut themselves, drop on their

feet, swallow or otherwise cause injury. See the comment in the judgment of the High Court in *Thompson v Woolworths (Queensland) Pty Ltd* [2005] HCA 19 at [36]. ..."

94 However, the judgment continued as follows:

"... Counsel for the appellants gave many examples, including the obvious risk that children might leave the premises and expose themselves to danger on the road outside. In his written submissions, counsel wrote: 'What were the appellants to do? Short of locking the children in the house (where, it must be remembered, all kinds of potential hazards are present), the children would have had to have been constantly monitored.' ... This was a contention in relation to supervision, which was not the ground on which the Trial Judge found negligence."

95 Bryson JA later made the following comment:

"[20] ... Counsel's reference to the supposed need to keep the children locked in the house was an unfortunately extravagant piece of advocacy; the problem could be solved by much simpler means."

96 Here, I believe, counsel's claims were likewise extravagant. There were a number of solutions to the potential hazard. Obviously the ladder and guardrail were safety features which the **Shaws** chose to remove, rather than address the issues which they saw in relation to them. Various possibilities were identified, including the replacement of the bolt securing the guardrail, as well as lashing the ladder to prevent movement. I infer that a handyman could have dealt with the issue, without significant cost. And if that be thought onerous, it was open to the **Shaws**, especially when young children slept over (such as Cameron), to arrange for them to sleep in the lounge room on mattresses. That in fact was done when a number of children were sleeping over (T 285). In the circumstances, I believe that a reasonable person in the position of the **Shaws** would have taken such precautions (s 5B(1)(c)).

Causation.

97 The Act makes the following provision in respect of causation:

"**General principles**
5D(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm ('factual causation'), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ('scope of liability').

(2) ...
(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

98 The defendants described the issue of causation as "probably the greatest difficulty the plaintiff" faced. The defendants said that the absence of a secured ladder was not causative of the fall for many reasons, including the following, again paraphrasing: (DS: p 28, para [72])

Cameron had been on the top bunk a number of times before, each time using the bars at the end of the bed to get up and down.
He had no difficulty doing this.
He recognised that means of egress was available to him.
For no apparent reason, he chose to get down via the chest of drawers.
The bunk had been used for six years previously without incident."

99 However, for the reasons given, and notwithstanding what had happened in the past, it was foreseeable that, absent a ladder, a child may improvise when climbing down from the top bunk. Joel, for instance, usually jumped down, as Mrs **Shaw** acknowledged. A child sitting on the edge of the bunk may well choose to get down another way, rather than climb back onto the bed, walk along to the end and then climb down. Such behaviour could not be described as unusual or unpredictable. Had a ladder been available, it would have been a simple matter for the child, sitting on the bed, to swing onto the ladder and descend. Alternatively, had a guardrail been available, and had the child slid off the bed, as he lowered himself down he could have held onto the guardrail to steady his descent. A hand hold would have been available, whereas none was available because it had been removed. But for the absence of one or other or both of these safeguards, the harm probably would not have occurred. Had there been a ladder, Cameron I believe would have used it. He said he was scared of jumping down. The bunk beds he had at home were fitted with ladders, which he used (T 17). Absent a ladder, but assuming a guardrail, it would have been a sensible and obvious thing to use the guardrail to lower himself to a position close to the floor. I am satisfied that factual causation has been demonstrated.

100 Is it appropriate that the scope of the negligent person's liability extend to the harm so caused? The Australian Standard was introduced because it was recognised that bunk beds have a significant potential for serious harm to children, absent precautions. There is a need for precautions, amongst other things, in respect of the type of accident that occurred here, that is, a fall from a height. Here there was no evidence that the defendants were aware of the Australian Standard. However, the bunk beds they had purchased had guardrails and ladders. They were clearly provided for reasons of safety. As stated, when they encountered problems, they chose to remove these safety features rather than address the problems. And they did that whilst still permitting children, significantly younger than their own, to have access to the beds. The potential for accident to a young child climbing from the bed was both foreseeable and preventable.

101 In the description provided by Mrs **Shaw**, a bolt securing the guardrail on one of the two bunk beds stripped (T 263). She and her husband then removed both guardrails and both ladders. It would have been better, more logical, and certainly much safer, had they replaced the stripped bolt. The decision to dismantle the safety equipment on the beds rendered them potentially unsafe for young children of Cameron's age, or less.

102 In these circumstances, I believe it is appropriate that the responsibilities of the defendants should extend to the harm so caused. I believe s 5D(1)(b) has been satisfied.

Obvious risks.

103 The defendants submitted that the risk Cameron faced was an obvious risk, as defined by s 5F of the Act. According to the defendants, objectively Cameron's attempt to get down from the top bunk in the manner he described was an obvious risk (DS: p 32, para [78]). He is presumed to have been aware of such risks, unless he satisfied the Court, as a matter of probability, that he was not aware. It was submitted that the plaintiff had not discharged that onus (DS: p 32, para [79]).

104 The plaintiff answered these submissions by asserting two things. First, if the defendants wished to rely upon the suggestion that the risk was obvious, then it had an obligation to plead it

under the *Uniform Civil Procedure Rules* 2005 (r 14.14(2)) (see *Port Stephens Council v Theodorakakis* [2006] NSWCA 70; and *MD v Sydney South West Area Health Service* [2009] NSWDC 22, per Goldring DCJ). They had not done so. Had it been in issue, the plaintiff could have addressed the onus of demonstrating that, even though the risk was obvious, he (as a ten year old) was not conscious of it. No such questions were put because it was not an issue.

105 Secondly, it was said that, in any event, the risk of descending as described, perhaps slipping because he was wearing socks, was not an obvious risk to a ten year old child.

106 I accept both submissions by the plaintiff.

Contributory negligence.

107 The defendants did plead contributory negligence. Section 5R of the Act is in these terms:

"Standard of contributory negligence
5R(1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.
(2) For that purpose:

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and

(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time."

108 The defendants submitted that, were liability found, any damages awarded should be significantly discounted (DS: p 33, para [83]). The plaintiff submitted that no such finding should be made. Cameron's age was relevant (*Doubleday v Kelly* (supra) paras [93]-[95]). The plaintiff made the following submission: (PS: p 11/12)

"36. The plaintiff was aged 10 at the time of the accident. He was faced with the challenge of descending from the top bunk. He was accustomed to using a ladder. His friend Joel **Shaw** got down from the top bunk by jumping but the plaintiff was too afraid to do this. The method of lowering himself onto the chest of drawers and then to the lower bunk (or lowering himself onto the chest of drawers and jumping) was a reasonable response by the plaintiff to overcome the challenge he faced. Bearing in mind the plaintiff's age and his situation, no contributory negligence should be apportioned against him."

109 Again, I accept the plaintiff's submission. I am not satisfied that a finding should be made that Cameron was guilty of contributory negligence.

110 Having established liability, Cameron is entitled to damages. I now turn to that issue.

2. DAMAGES

Award for non economic loss.

270 What amount should be awarded under s 16 of the Act for General Damages? What is the appropriate percentage of the most extreme case (s 16(3))? The plaintiff, in submissions, suggested 55% of the most extreme case. The defendants, whilst acknowledging that it was a "serious injury" (DS: para [55]) and a "nasty injury" (DS: para [81]), suggested that the Court would not be satisfied that the plaintiff had suffered organic brain damage and 30% of the most extreme case was appropriate (DS: para [103]).

271 Unquestionably, Cameron suffered a significant head injury (cf Dr McMaster: report 17.12.04) (supra para [144]). His skull was fractured and his nose dislocated. It is also clear that his brain was injured, as revealed by abnormal scans during the period 23 April 2004 (supra para [130]) and 28 November 2004 (supra para [132]). The only issue is whether that injury caused permanent damage, contributing to Cameron's disablement. I believe it did. I take that view for a number of reasons.

272 First, I accept that before the accident Cameron was a normal, happy child. He was doing well at school and, like his siblings, was full of promise. I reject the suggestion that he came from a family that was dysfunctional (supra para [127]).

273 Secondly, the impact upon Cameron of his injuries was immediate and profound. His personality changed. He became aggressive. He suffered from mood swings. He could not concentrate. He was angry and disruptive. He lost friends and became reclusive, spending many hours at home at his computer (supra para [170]). He was also acutely aware of these changes and bewildered by them (supra para [171]). Although ten years old, he felt that life was not worth living and threatened suicide (supra para [171]).

274 Thirdly, his symptoms have persisted for more than five years, apart from his depression which has fluctuated. The evidence does not suggest that the change in the scan in January 2005 was accompanied by an improvement in these symptoms. Indeed, Cameron's symptoms became worse as he made the transition from the structured environment of primary school to the more demanding environment of high school. The worsening of symptoms may, in part, have been the product of fear and psychological factors described by Dr Roberts (supra para [218]). However, they were also consistent with frontal lobe damage which, on the evidence, I believe was also present. The manifestation of such damage was difficulty with executive function, that is, the capacity to plan, organise and follow through (supra paras [216]/[217]).

278 The symptoms manifested by Cameron have now been present for more than five years. These were crucial years in his development. Although some of his fears may abate with maturity, the broad picture is unlikely to change. I repeat the opinion of Associate Professor Quadrio concerning the prognosis, which is plausible and which I accept: (supra para [261]) (T 232)

"**I think in terms of his prognosis the prognosis is poor** no matter what the balance of organic versus psychological because he's - the train has left the station really in terms of his reaching his developmental milestones. He has fallen behind his peers academically and socially and in all kinds of ways. It is going to be extremely difficult for him, if not - I think it is getting close to impossible for him to get back on to a normal track because he's dropped out so much."

(emphasis added)

279 Associate Professor Quadrio and Dr Lee, in their joint report, stated that the impact of this accident upon Cameron and his life has been very serious. I accept that view. It is the more serious because Cameron is acutely aware of his limitations and what he has lost. His disabilities are likely to interfere with many aspects of his life, including employment and relationships. He is still, obviously, a very young man. He will be especially vulnerable as he passes through adolescence and early adulthood (supra para [223]). Although he has real strengths, including an intellect which is largely intact, his loss has been very significant. I believe that loss should be regarded as 50% of the most extreme case ($225,000).

Economic loss.

280 In view of the plaintiff's age at the time of the accident, no claim is made for past economic loss.

281 What, then, of the future? Section 13 of the *Civil Liability Act* 2002 is in these terms:

13 Future economic loss—claimant's prospects and adjustments
(1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
(2) When a court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury.
(3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted."

282 What would Cameron have been likely to earn had he not been injured? Cameron, even at the present time, presents as a personable, articulate and intelligent young man. I accept (and repeat) the following opinion expressed by Associate Professor Quadrio: (supra para [262]) (T 234)

"I agree completely that he is functioning better, that **he has moved down from the first division to the third division. He was obviously a boy who was well capable of tertiary level education and he has now had to drop out of high school** and it is only one or two weeks into the TAFE course. Goodness knows how he'll progress. But I think, yes, he's dropped down considerably from his pre-morbid level of function and also by comparison with his three brothers too. That may also be a very relevant factor in the future, that his performance has - four of them, as functioning below the level that others obtained. That too will be significant."

(emphasis added)

283 I accept that Cameron would certainly have obtained the Higher School Certificate. I also believe it very likely that he would have obtained tertiary qualifications. The plaintiff, in supplementary submissions, drew attention to the average earnings of an adult male, working fulltime in Queensland, in the period after 1 September 2008 (cf *Evidence Act* 1995, s 159). The Bureau of Statistics suggests that such a person would earn $1,260.30 gross per week ($992.64 net). I believe that figure is conservative. The plaintiff may well have earned significantly more than that, especially if he had a tertiary education. Again being conservative, I will assume a figure of $1,000 net per week. In reaching that figure, I have taken into account that there is no certainty that Cameron would have obtained tertiary qualifications.

290 It would be unrealistic, in these circumstances, to assume that (apart from vicissitudes) Cameron is now likely to earn $500 net week in, week out. That figure should be discounted to $400 per week, so that the likely net loss is $600. That amount must be further adjusted because it would take time (perhaps six years) to complete the Higher School Certificate and obtain qualifications. Completing TAFE and being in a position to commence animal husbandry will take perhaps two years. It was said that Cameron had expressed interest in working in a wildlife sanctuary, where the commencement age is 18 years (which would involve a three year deferral). However, the likelihood is he could work somewhere, in some capacity, in the year before that. Hence, comparing his likely wage earning future, had he not been injured, and what is now likely to happen, the loss should be deferred four years. It is also subject to a discount of 15% for vicissitudes. A retirement age of 65 years is assumed (44 years after qualifying). On the 5% table, the plaintiff's loss is $396,435 (being 944.5 x $600 x .823 x .85).

291 The defendants submitted that it was impossible to calculate any future economic loss based upon a continuing weekly loss (DS: para [108]). Rather, a cushion of $50,000 should be allowed, representing two years net earnings in the employment that Cameron is now likely to pursue.

292 I readily agree that it is difficult with one so young, and with so many variables, to arrive at a figure. Nonetheless, I believe that approaching the matter in the way that I have set out above provides a more realistic assessment of the loss of earning capacity suffered by Cameron, and more closely reflects the methodology contemplated by s 13 (cf *Kallouf v Middis* [2008] NSWCA 61 (McColl JA and Hall J at para [7])).

Future superannuation.

293 The allowance for the loss of future superannuation should be 9% of the amount awarded for loss of earning capacity, namely $35,679 (s 15C(2) of the Act).

Future out of pocket expenses.

Possibility of septoplasty	$1,500.00
Brain injury specialist x 2 per annum	$4,374.66
GP visit x 4 per annum	$4,612.53
Medication for life	$12,375.00
Counselling	$20,000.00
Psychiatric acute care	$25,000.00
Total future out of pocket expenses	**$67,862.19**

314 The plaintiff's verdict (subject to the slip rule) should therefore include the following:

General Damages	$225,000
Past economic loss	nil
Future economic loss	$396,435
Future superannuation	$35,679
Out of pocket expenses	$5,268
Future out of pocket expenses	$67,862
Past care	$45,360
Future care	$77,792
Total	$853,396

Orders.

315 I therefore make the following orders:

1. There should be a verdict for the plaintiff in the sum of $853,396, subject to order (3) below.
2. The defendants should pay the plaintiff's costs.
3. I give the parties leave to mention the matter within 14 days in respect of funds management and interest.

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LAST UPDATED:
26 June 2009

Agency Law

Problem Question (Week 9)

A is a licensed real estate agent who represents P, the vendor of a property. The buyer, TP, is unable to pay the full asking price. A is concerned he will not get his commission and convinces P to lend TP part of the purchase price through a loan agreement, which A knows is unenforceable. A tells TP that the loan agreement is unenforceable in order to complete the sale. TP and P sign the loan agreement, and the sale of the property is completed. A receives his commission from P.

Required

Discuss the common law duties and rights of agents and principals in this example.

Business Entities

Problem-based Question (Week 10)

Wagon Wheels

Harry, Peter and Fred were the directors of a company called *Wagon Wheels Pty Ltd*. Harry and Fred were non-executive directors and Peter was the Chief Executive Officer (CEO). Just prior to its incorporation in 1998, *Wagon Wheels Pty Ltd* obtained a number of loans from *Ascot Trading Company* to the total value of $200,000.

In the year ended June 30 2000 *Wagon Wheels Pty Ltd* paid a dividend to its shareholders, even though there were insufficient company profits and it could not meet all its debts. The debt to *Ascot Trading Company*, for instance, was still outstanding.

By 2001, it was clear to most financial analysts the company was in trouble. There was a growing list of angry creditors but Peter was still actively seeking commercial contracts both in Australia and overseas and the company was trading as usual.

Required:

Explain and outline the legal liability of the company and its directors.
Make reference to relevant case and statute law to justify and illustrate your answer.

Bankruptcy and Debt Recovery

Problem Question (Week 11)

Simon is the proprietor of car dealership, selling new Holden cars . Due to competition from Japanese cars, and poor management decisions, his business has been performing poorly although he continues to enjoy a luxury lifestyle financed by debt. He is warned by his accountant in early 2002 that he is headed for insolvency unless he starts to live more modestly but he ignores the advice.

In March, 2002 by way of a deed, Simon transfers the family home, and his Mercedes car, registered in his name, to his wife, "in consideration of her love and affection".

In April, 2004, Simon sells his hobby-farm property, worth $850,000 to his accountant for an amount of $200,000

On 1 March, 2007, Simon failed to respond to a bankruptcy notice that was served on him on 1 February 2007.

On 5 March, 2007, a creditor of Simon, who knew that he owed large sums of money to various creditors, demanded payment of a debt of $12,000. Simon sold his valuable wine collection and paid the full amount of the debt one week later.

A creditor's petition was presented on 12 May, 2007 and on 14 June, 2007 he was made bankrupt by a sequestration order.

Required

Advise the trustee in bankruptcy concerning these transactions.

Consumer Protection

Problem-based Question (Week 12)

Kathy Greene, who is worried about global warming, reads the following newspaper advertisement for Mike's Appliances Pty Ltd, a retailer of electrical appliances.

> **Special Offer: ANCO G100 environmentally friendly air conditioners, just $535, marked down from $750 for one day only on Saturday, 5 January.**

Kathy goes to the store on Saturday, 5 January, arriving half an hour after it opens, and is told by the sales staff that they have sold out of the reduced-price ANCO air conditioners, but they have a better air conditioner, the Earthcare G200, also manufactured by ANCO Ltd and also environmentally friendly, which cost $799. The salesperson hands her a manufacturer's brochure in which it is written:

- the EARTHCARE G200 is a revolutionary environmentally-friendly air conditioner
- EARTHCARE G200 is designed for minimal environmental impact
- the production process for the EARTHCARE G200 results in reduced carbon dioxide emissions

Kathy is impressed with the environmental claims of the manufacturer and buys an Earthcare G200, which is delivered to her house the following week and it is installed by a technician. The technician tells her that he knows with certainty that the ANCO G100 model has never sold for more than $550.

Kathy leaves the air conditioner running all day and all night on a very hot day. When she rises the next morning she finds a puddle of water on the table under the unit and an expensive water-colour painting, worth $3000, that she left on the table, has been ruined by water dripping onto it from the unit.

When she gets the air-conditioning technician in to find out what happened, she learns that there is a defect in the air conditioner causing water to flow out of the front of the unit. She also learns that the air conditioner contains a fluorocarbon gas called R407C, which is a potent greenhouse gas that will contribute to global warming if released into the atmosphere, although it is less harmful to the environment than certain other fluorocarbon gases. She also learns that ANCO is unable to substantiate the claims concerning the reduced carbon dioxide emissions in the production process.

Required:

Advise Kathy what her rights might be under the *Trade Practices Act* and what remedies are available to her?.

Who else has remedies against Mikes Appliances Pty Ltd and ANCO Ltd and what are they? Make reference to relevant sections of the *Act* and to relevant case law in your answer