HI Nic

Following from our conversation regarding the student whom was left by an examiner after he decided the student had failed. I confirm the student was not informed and was unaware the examiner had left him and returned to the licenciing centre. I also confirm you are concerned about the duty of care owed to the student during and after testing, particularly in circumstances where the examined student has been abandoned by the examiner.

I advise as follows.

Pursuant to section 4 of the *Road Traffic (Authorisation to Drive) Act 2008* ("the Act") the CEO, through delegation, grants people licences to drive motor vehicles on roads. The part of the Act under which this section falls, is to be read in conjunction with the *Road Traffic (Authorisation to Drive) Regulations 2014* ("the Regulations").

Regulation 7 of the Regulations authorises the CEO to grant a person a licence authorising them to drive a motor vehicle (including motorbike) on the road. The person is required to meet certain criteria as provided for in Regulation 24 including demonstrating the ability to safely drive the vehicle as the class of licence authorises. Regulation 16 governs how the person can demonstrate the ability to safely drive. Relevant to this matter, this is done by satisfying the CEO the applicant is able to control the vehicle that the licence would authorise the holder to drive. This is achieved by sitting a driving test. Regulation 27 of the Regulations governs driving tests and includes the requirement to attend on a day and time allocated by the CEO and pay a fee.

Whilst undergoing the driving test, section 12 of the Act provides that whilst a person is undergoing a driving test, the person is authorised to drive *"i**n the course of the driving test**"* as if the person was the holder of the appropriate drivers licence. Therefore, this provision is relevant in circumstances, for example, where they may cause and accident and would provide for the insurance policy to respond as for the purpose of the test, they are licenced.

The problem arises, however, where the person is no longer ***in the course of the driving test***. In my view, once the examiner has decided the driving test has ended, the person is no longer in the course of the driving test. This would apply irrespective of whether the examiner has communicated it to the person sitting the test or not. There is no time limit in the regulations whereby a test is prescribed to take a certain period of time. The regulations simply state "in the course of the driving test".

Despite section 12, irrespective of whether the person is in the course of the driving test or the test has concluded, the examiner owes the person and other road users a duty of care at common law to

exercise reasonable care for the safety of the person undergoing the test and other road users. This means that if the person causes or is involved in an accident, the examiner is required to do all things reasonably necessary to exercise control over the person undergoing the test. I will come to the common law on learner drivers a bit later.

What that means for the instructor who has handed over their student to the examiner is that whilst the person is in the course of the driving test, the instructor has handed care and control of the person sitting the test to the examiner. The instructor is entitled to assume the examiner is competent. Once control has been handed over, the instructor has done everything reasonable in the circumstances and should an accident occur whilst the person sitting the test is under the care and control of the examiner, the instructor will bear no liability. (Note, there can be some exceptions to this which I won't go into here).

If, however, as occurred in this case, the examiner has terminated the driving test with the intention of failing the person sitting the test, and the person sitting the test is unaware of such, and the examiner has returned to the licencing centre without the knowledge of the person sitting the test, the examiner remains partially liable for any damage caused or suffered by the person sitting the test. If the instructor is present and aware the examiner has returned without the person sitting the test and the person sitting the test is still on the road, the instructor may also be considered partially liable for any damage caused to or by that person unless the instructor has done all he or she may reasonably do to get that person to stop riding without the examiner or the instructor. This may necessitate the instructor immediately getting on their bike to attempt to find the person sitting the test.

I will not turn to liability of instructors and examiners with learner drivers or those sitting the test. The person causing the accident, in this case the learner or person sitting the test, bears the bulk of the responsibility. However, the examiner or instructor would be considered to be contributorily negligent and will bear some responsibility. Contributory negligence is, broadly speaking, as follows.

1. In *Jocelyn v Berryman* (2003) 214 CLR 552 at [16], McHugh J stated:-

"..a plaintiff is guilty of contributory negligence when the plaintiff exposes himself to a risk of injury which might reasonably have been foreseen and avoided and suffers an injury within the class of risk to which the plaintiff was exposed".

2. The *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* allows an apportionment of damages to take into account any negligence on the part of the Plaintiff.

3. It is not necessary for the Plaintiff to owe the Defendant a duty of care to find contributory negligence. In *Commissioner of Railways v Ruprecht* (1979) 142 CLR 563 at 570, Mason J stated:-

"Contributory negligence differs from negligence. There is no duty of care owed to another person….and contributory negligence involves conduct which exposes the actor to the risk of injury without necessarily exposing others to risk".

4. Contributory negligence is a question of fact judged by an objective standard: ***Jocelyn v Berryman*** supra.

5. It is assessed against the same objective standard that applies in establishing breach of any duty of care.

6. Evidence must show that the Plaintiffs failure to take reasonable care caused or contributed to their loss. A Plaintiffs conduct is causally relevant if the Plaintiffs own conduct is the cause of the accident (***Griffiths v Doolan*** [1959] Qd R 30), the Plaintiffs conduct increased the risk of harm (***Azzopardi v State Transport Authority (Railway Division)*** (1982) 30 SASR 74 or the plaintiffs conduct aggravated the damage caused by the defendants negligence (***Eagle v Orth*** [1975] Qd R 30).

7. In ***Pennington v Norris*** (1956) 96 CLR 10, the Plaintiff claimed damages for personal injuries sustained when he was struck by a motor vehicle driven by the defendant. The court apportioned contributory negligence 50/50 at trial. This was changed to 80/20 in favour of the Plaintiff on appeal. The court said:-

"Here, in our opinion, the negligence of the defendant was in a high degree more culpable, more gross, than that of the plaintiff. The Plaintiff's conduct was ex hypothesi careless and unreasonable but, after all, it was the sort of thing that is very commonly done: he simply did not look when a reasonably careful man would have looked. We think too that in this case the very fact that his conduct did not endanger the defendant or anybody else is a material consideration. The defendant's position was entirely different".

8. In ***Schimke v Clements*** (2011) 58 MVR 390, the Plaintiffs husband was killed when the car he was driving collided with a trailer being towed by the defendant's vehicle. In apportioning liability 65/35 in favour of the defendant, the court said:-

"I accept that the negligence of each driver arose, in part, because of the errors of judgment about the conduct of the other vehicle and, unreasonably in the circumstances, each driver assumed that he was not required to yield way to the other. However, the task of apportioning liability is not resolved simply by characterizing each driver as having committed a similar, serious error of judgement. I do not accept the Plaintiff's submission that this is a case that calls for equal apportionment once I find that the deceased was not entitled to proceed across the bridge in the circumstances. I consider that the deceased's departure from the standard of care required of him was greater than the departure from the standard of care required of the first defendant".

With respect to learner drivers, the following applies.

9. In ***Perrotta v Cavalla*** (1971) SASR 163, the court said that a passenger, who owned the vehicle being driven by a learner driver, the *"presumption is that* (the driver)*was driving as* (the passengers) *agent and hence* (the passenger) *would be vicariously liable to a third*

party for the result of (the drivers) *negligence*" (164) but the effect that had on the Perrotta's rights was of no consequence as against the driver so no apportionment of liability was made.

10. In ***Cook v Cook*** [1986] HCA 73 the court said *"actions which are fairly to be seen as the result of* [a learner driver's] *inexperience and lack of qualification rather than as having been caused by superimposed or independent carelessness did not, of themselves, constitute a breach of duty of care*" [16] which a learner driver owed to a licenced driver who was supervising the learner.

11. In ***McNeilly v Imbree*** [2008] HCA 40, the court summarised the lower court's assessment of liability between the learner driver and the passenger instructor, as *"Basten JA assessed the appellant's contribution as two-thirds; Beazley JA assessed his contribution at one-half. Tobias JA, who had concluded that the driver was not negligent, went on to consider contributory negligence and agreed with Basten JA that the appellant's contribution should be assessed as two-thirds"* [36].

12. In ***McNeilly*** the court further said at [68]:-

If the conclusion were to be based upon how the supervisor could influence (even direct) the learner driver, it would be based upon considerations that are more appropriately considered in connection with contributory negligence. If the supervisor could have influenced the outcome it may be that the supervisor failed to take reasonable care for his or her own safety. That is a matter which goes directly to questions of contributory negligence; it does not touch the question of the driver's negligence. And if the supervisor could not have influenced the outcome, what is the relevance of the supervisory role to the standard of care the learner should exercise in operating the vehicle?"

13. Further the Court fund in ***McNeilly*** that ***Cook*** was no longer applicable and that the standard owed by a learner driver to anyone was that of a reasonable driver [72].

Therefore, an instructor must be satisfied they are handing the learner driver to a competent examiner and remain vigilant to ensure the person sitting the test returns with the examiner. If not, then despite the instructors confidence in the ability of the learner driver, the instructor should take all reasonable steps to find and supervise the learner driver.

I hope this assists you in your deliberations. I would be happy to come and talk to the group if you feel it would be of assistance. I am happy for you to use this information in any response you have to the department.