LEVEL 4 - UNIT 2 – THE LAW RELATING TO EMPLOYERS’ LIABILITY
SUGGESTED ANSWERS – JUNE 2015

Notes to Candidates and Tutors:

The purpose of the suggested answers is to provide students and tutors with guidance as to the key points students should have included in their answers to the June 2015 examinations. The suggested answers do not for all questions set out all the points which students may have included in their responses to the questions. Students will have received credit, where applicable, for other points not addressed by the suggested answers.

Students and tutors should review suggested answers in conjunction with the question papers and the Chief Examiner’s reports which provide feedback on student performance in the examination.

Section A

1. The mutual obligation test emerged due to a marked increase in the use of casual workers. The tribunal will look to see if there is sufficient obligation between employer and employee. This is a two part test. Firstly, the tribunal needs to be satisfied that there is an obligation to provide work by the employer and that there is also a corresponding obligation on the employee to accept work. Secondly, the tribunal will ask if there is an obligation to provide future work.

2. The effect of s.69 is that claimants can no longer allege a direct cause of action based on breaches of health and safety regulations where the accident occurs on or after 1 October 2013. Instead their claims will have to be for negligence based on their employer’s alleged breach of the common law duty of care owed by employers. The burden of proof will be on the claimant. However, there are some limited exceptions to this rule, such as where the breach relates to health and safety regulations which concern pregnant workers and new mothers.

3. In order for an employer to be vicariously liable for his employee’s actions, there must be an actionable tort committed by an employee (i.e. someone employed under a contract of service) in the course of his employment (i.e. there is a close connection between the employment and the tort).

4. The four elements of the employer’s duty were set out in Wilsons & Clyde Coal v English (1938). The duty to take ‘reasonable care’ requires an employer to exercise due care and skill in providing: competent staff; adequate plant and equipment; a safe system of work; and safe premises.

5. The leading case on this subject is Blyth v Birmingham Waterworks (1856). Here it was established a breach of duty occurs if the defendant ‘fails to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs;
would do; or does something which a prudent and reasonable man would not do’. This is therefore an objective test. Various factors are considered when applying the reasonable man test. These include practicality and cost, as demonstrated in *Latimer v AEC* (1953) and vulnerability of the claimant and probability of injury, as demonstrated in *Paris v Stepney* (1951). However, mere lack of skill through inexperience is not a relevant factor. This was demonstrated in *Nettleship v Weston* (1971), where the expected standard of care of a learner driver was the usual standard applied to competent drivers.

6. General Damages are monetary compensation for assessed future pecuniary loss and past and future non-pecuniary losses. The principal items will or may include ‘Pain, suffering & loss of amenity’ and loss of future earnings. Further examples include loss of congenial employment, future cost of medical expenses/care, lost pension and handicap in the employment market.

7. The claimant is expected to satisfy the court on the balance of probabilities, that but for the defendant’s breach of duty, he would not have suffered the injury complained of. If, for example, a failure to treat a patient has made no difference (as in *Barnett v Chelsea & Kensington Hospital* (1968)) because he would have died anyway, his death will not have been caused by defendant. So, if there is evidence that a third party has caused the injury, the ‘but for’ test may not be satisfied in relation to the defendant. Hence a clear link between cause and injury is needed to establish liability for negligence.

8. Contributory negligence is where the claimant is partly responsible for his own injuries. The result of successfully pleading this defence enables the court to reduce any damages payable to the claimant depending on the degree to which he is judged responsible: e.g. *Jones v Livox Quarries* (1952). Hence this defence only works as a partial defence as complete liability is not removed. In contrast *volenti non fit injuria* applies where the claimant freely consented to the negligent act. It amounts to an agreement by the claimant to exempt the defendant from a duty of care that he would otherwise owe: e.g. *ICI v Shatwell* (1965). It differs from contributory negligence as it acts as a complete defence.

9. There are a number of instances where an employee is excluded from bringing a claim under the new protocol. Cases that relate to employers’ liability for diseases involving more than one defendant are not included. If the injury/accident arose outside of England and Wales, it will also be excluded. Additionally, any claims relating to abuse or neglect of a child/protected party, mesothelioma and clinical negligence cannot be included within the protocol. Finally, where the claimant is bankrupt and where the defendant is insolvent and/or uninsured, exclusion will apply.

10. (a) Type A fixed costs relate to legal representation for the hearing and are set at £250.

(b) Type B fixed costs relate to additional advocate costs for conducting a stage 3 hearing and are set at £250.
(c) Type C fixed costs cover specialist advice required to value the claim where the claimant is a child and are set at £150.

Section B

Scenario 1 Questions

(a) In order to assess liability for Manor Care Home (MCH) it is important to discuss the law relating to an employer’s duty to take reasonable care of their employee’s health and safety. Employers have a duty of care at common law as explained by reference to the case of Wilson’s & Clyde Coal v English (1938). The duty of care is also seen as an implied term that is incorporated into every contract of employment. There are four particular aspects of the duty of care of an employer, and the most appropriate and relevant area in relation to Dave is the ‘duty to maintain safe premises’. The duty to provide safe premises applies to premises occupied by the employer.

The second issue is whether there has been a breach of duty, i.e. has the employer fallen below the required standard of care? This is assessed by the courts by reference to the concept of reasonableness. The court would decide liability by considering whether the employer ‘knew or ought to have known’ that the trailing lead could result in an injury. Applying this to the scenario, it is likely that MCH should have known that a trailing lead could result in harm. Equally, the presence of the nail is a hazard, and it will be necessary to establish whether a reasonable employer would have discovered it and remedied it.

The next issue is causation. Clearly Dave’s initial injury was caused by his fall and by the nail. While the evidence suggests that much of the harm suffered by Dave was not due to breach of duty in relation to safe premises but to the reaction to the injection, the principle of “you must take your victim as you find them” e.g. Robinson v Post Office (1974) can apply here. The question is whether MCH ‘ought to have foreseen’ that as a result of the wrongful act Dave may require treatment and the consequences of that treatment. If so, even though MCH could not foresee the precise chain of events, they will still be liable.

Because the incident took place before October 2013, there may be an additional claim for a breach of a statutory duty. Following the requirement of regular use of risk assessments, MCH should have identified the trailing lead. This indicates a breach on the part of MCH. On this basis both common law duties and statutory duties could be grounds for a claim.

The work done by the maintenance team was not done to the required standard and under the concept of vicarious liability, an employer may be liable for the injuries caused as a result of employee’s error. Such liability arises when a tort is committed by an employee in the course of employment. It would appear that the maintenance team have been negligent in leaving the protruding nail exposed, and that this work was carried out in the course of their employment. Thus, assuming that the team are employees of MCH, their employer is vicariously liable.
This incident also involves the law relating to employers’ common law duty of care, as explained in *Wilsons & Clyde Coal v English* (1938). The most appropriate area here would be the duty in relation to ‘adequate plant & machinery’. This area of law applies to the bicycle that Anita’s employers have provided for her. The common law duty of care exists as part of an implied term in the contract of employment. Anita is an employee with a contract and can therefore rely on protection given by this implied term.

As discussed above in the advice to Dave, Anita must also show that the duty of care was breached. The court would ask whether a reasonable employer would have checked the equipment before allowing employees to use it, and whether it has been properly maintained.

Assuming the court did find that MCH acted unreasonably in failing to inspect or maintain the equipment, the next element of Anita's claim is to show that this caused her injury. Following the ruling in *Barnett v Chelsea Kensington* (1968), it must be demonstrated that, on the balance of probabilities, ‘but for’ MCH’s negligence Anita would not have suffered the injury. It could be argued by MCH that Anita’s serious injuries and subsequent death were the result of Dr Cook’s negligence, rather than their own, thus breaking the chain of causation. However, as in the case of *Barnett*, it appears that Anita would have died even if Dr Cook had noticed the blood clot on the initial X-Ray, thus he cannot be said to have caused her death. The operative cause remains the faulty brakes on the bicycle.

As the incident takes place before October 2013, there may also be liability for breach of statutory regulations. The Provision and Use of Work Equipment Regulations 1998 require work equipment to be kept in good repair and inspected at suitable intervals. Therefore, if MCH have failed to inspect or maintain the bicycle, they may be liable for both common law negligence and breach of statutory duty.

2. Special damages relate to quantifiable financial losses and cover loss of earnings to trial. He may also recover the cost of taxis to the clinic at £20.00 per week. There may possibly be other plausible items under special damages, such as the cost of employing third parties to carry out household tasks such as gardening.

General damages will cover non-pecuniary and future losses. The pain and suffering which maybe on-going is recoverable, and he may also claim for his loss of amenity, in this case golfing.

3. Section 1 of the Fatal Accidents Act 1976, allows dependants of the deceased to bring an action for damages, as long as the deceased would have been entitled to maintain an action and recover damages. From the discussion above, it would appear that Anita would have a valid claim, and her husband and daughter’s familial relationship with her means that they meet the Act’s definition of a dependant. It should be noted that Anita’s possible contributory negligence may diminish the amount they may be awarded.
There are three main heads of damages that may be claimed under the Fatal Accidents Act 1976. Firstly, a dependent may claim for financial losses, but must show that there is a probability that they will suffer such losses as a result of the death of the deceased, i.e. that they were financially dependent on that person. As Anita was the sole earner in the household, it is likely that both her husband and daughter can demonstrate such a loss. The amount they may claim will be calculated by deducting from Anita’s earnings what she would have spent for her own personal living expenses. The remaining balance will be considered to be the dependency figure. It is also possible that Anita’s good performance may have led to an increase in her earnings, and this may be taken into consideration by the court.

The second head of damages is the ‘bereavement award’, which is a fixed sum that can only be claimed by a spouse or the parents of an unmarried child. Anita’s husband may make a claim under this head. The amount of the award is currently fixed at £12,980. Finally, a claim may also be made under s.3(5) for funeral expenses.

4. The partial defence of contributory negligence is set out in s.1 of the Law Reform (Contributory Negligence) Act 1945. In order to establish contributory negligence, the defendant must show that the claimant contributed to the harm suffered, i.e. that the injury (rather than the accident itself) was partially their fault. If so, and it is just and equitable to do so, the damages awarded to the claimant will be reduced in proportion to their responsibility for their injury.

MCH will need to show Anita contributed to the harm suffered. Anita may have failed to inspect or maintain the bicycle while in her possession. This may contribute to the accident and thus to the harm. Anita was using the bicycle without a helmet. It can be argued that this makes it reasonably foreseeable that additional harm would occur, as it would be fair and reasonable to expect employees to wear a helmet. For example, in Froom v Butcher (1976) failure to wear a seatbelt constituted contributory negligence. Anita's actions will not be a complete defence; but it is likely that damages will be reduced.

Section B

Scenario 2 Questions

1. Vicarious liability is the principle by which an employer can be responsible for acts carried out by its employees. For liability to exist, the person responsible must commit an actionable tort, as an ‘employee’ of the employer, in the course of their employment. Julie appears to be an employee and exceeding the speed limit is clearly negligent.

The question that must then be considered is whether Julie was acting in the course of her employment, when her speeding caused the injuries to 10 passengers. Driving the train appears to be part of her employment, and so it would be fair and reasonable to consider actions as closely connected to the employment. If Kempston Railway argue that driving the
train at this speed was not part of Julie’s employment, they are still liable as carrying out authorised acts in a wrongful mode remains within the course of employment, e.g. *Limpus v London Omnibus Co* (1862) when employees broke internal rules but the employer remained liable. The further case of *Rose v Plenty* (1976) emphasises the point that Kempston Railway could be liable for Julie’s actions even though she was breaking the speed limit. The ruling in *Rose v Plenty* (1976) held the milkman was doing an authorised act, delivering milk, but in an unauthorised way. Kempston Railway can only escape liability if they are able to demonstrate Julie acted on a ‘frolic of her own un-connected to employment’. However, there is no evidence of this and thus liability for injuries suffered by the passengers will sit with Kempston Railway.

Kempston Railway could also be Liable for injuries incurred by Peter. The ruling from *Wallbank v Wallbank Fox Designs* (2012) makes clear that even violent acts may be part of the course of employment if closely related to the employment in both time and space. Hence liability for Peter’s injuries would be owed by Kempston Railway.

2. The date of the incident was June 2010 and Ali waited until his niece qualified in law in June 2014. Section 11 of the Limitation Act 1980 states the limitation period for a claim of personal injury is three years, from either the date of the accident or the date of knowledge of the injury. As the accident took place four years ago, whether Ali can claim will depend on the date he had such 'knowledge'. Knowledge that the injury suffered is both significant and attributable to the negligent driving is needed. There is evidence that Ali suspected his walking was affected by the sudden braking. Here the injury could be attributable to the sudden use of brakes. Attributable means ‘capable of being attributed to & not necessarily caused by’. This suggests that soon after the accident Ali knew he had a significant injury attributable to the accident, and so the three year limitation period has expired. On the facts given, it is unlikely any discretion under s.33 can be relied upon by Ali either.

3. The issue here is whether Fred is an employee, or an independent contractor. When determining employment status, tribunals will apply the ruling in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National insurance* (1968). This ‘multiple’ test depends heavily upon the individual facts of each case.

Factors that indicate an employment relationship exists include being subject to internal rules and processes. It would appear that Fred is expected to do so. He is also required to wear uniform and hence be identified as belonging to Kempston Railway. There is evidence of control as his availability needs to be made clear and the fact that this is a longstanding arrangement points towards employee status. However, factors indicating Fred is not an employee include the fact that he is only paid for hours worked and free to do work elsewhere.

Overall, the older common law tests such as the control and integration tests suggest Fred’s employment status is more likely to be that of an employee. Applying the various factors of the multiple test also suggests that he is an employee of Kempston Railway.
4. Fred must demonstrate there has been a breach of the common law duty of care. This duty has been extended to include liability for psychiatric illness in the same way as physical injury. Therefore there is a requirement to demonstrate harm was reasonably foreseeable and that injury could result. Foreseeability is assessed by what Kempston Railway 'knew or ought to have known'. When assessing this, the court will also consider the type of work that is being carried out and the demands placed on the employee, in comparison to others.

An excessive workload may foreseeably cause psychiatric harm, as in Walker v Northumberland County Council (1994). In that case, it was held that while an employer may not reasonably foresee a first mental breakdown, once this had happened they had knowledge of the potential harm that could result from maintaining an excessive workload and would be liable for subsequent psychiatric harm. Applying this ruling to Fred, there is evidence to suggest Kempston Railway should have foreseen the impact of working long hours on Fred’s health as the sick-notes he had submitted had clearly indicated anxiety. This is further supported by the case of Barber v Somerset (2004) where a teacher had given his employer sufficient indication he was struggling. Application of the law also suggests that as Fred is a train driver there is an additional public duty to the public at large. If his health is suffering not only could he cause harm to himself but also others.

If Kempston Railway took reasonable steps to support Fred, this could enable them to escape liability. The evidence in the question would indicate the employer merely suggested a 'nice holiday'. Would this be considered reasonable? A better response would be to conduct risk assessments, referral to a GP and/or medical check-ups. Using the legal authority from the cases above and application of rules on foreseeability it is likely Kempston Railway would be liable for his current psychiatric condition, which may prevent him from working in the future.

5. The claim is proceeding in the claims Portal and as Kempston Railway have agreed to settlement and thus admitted liability, it will be considered under Stage 2. The next part of the process is to establish the value of the claim. In an employer’s liability claim, Kempston Railway must, within 20 days of admission of liability, provide earnings details to verify the claims for loss of earnings. Medical reports and other items can also be used to assist with the settlement claim. These can include photos, evidence of special damages, receipts for additional costs and witness statements. The medical report is likely to be of particular relevance here. These documents, along with the offer of settlement, will be sent to Fred’s insurers.

His insurers would need to respond to the settlement pack within 15 days and then there is a period of negotiation. If an insurer does not respond then automatically the claim exits the employers’ liability protocol. As the employers’ (Kempston Railway) are keen to settle, the Stage 2 fixed costs and disbursements will apply.