Note 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 January 2012 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.

ILEX is currently working with the Level 6 Chief Examiners to standardise the format and content of suggested answers and welcomes feedback from students and tutors with regard to the ‘helpfulness’ of the January 2012 Suggested Answers.

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

Section A

Question 1

The law of tort is often characterized as having four main objectives. They are: (a) the protection of legitimate interests, (b) the provision of compensation when those interests are infringed, (c) the establishing of normative standards of behaviour, and (d) providing those who have suffered harm with some form of retribution.

The legitimate interests recognised by the law of tort are the integrity of the person, of property and of reputation. They are protected by the provision of causes of action. For example, interests in land are protected by the torts of nuisance and trespass to land; reputation is protected by the tort of defamation; the integrity of the person is protected by the torts of trespass to the person; the tort of negligence serves to protect person, property and reputation from damage caused by the carelessness of others.

The standard remedy in tort is damages. Tortious damages are intended to place the victim in the position s/he would be in had the tort not been committed. Such damages may be seen as having a dual effect: they deter certain kinds of conduct in general; they compensate the individual whose interests have been infringed.

The alternative remedy of injunction is available to the court. Injunction may be awarded in lieu of or in conjunction with damages. Injunction may be granted in cases of defamation, nuisance and trespass. Such a remedy acts to prevent certain kinds of behaviour.
The symbolic stigma of a finding of liability coupled with the remedy of damages is said to encourage minimum standards of behaviour (normative rules). Those who fail to meet them are designated tortfeasors. Individuals who meet or exceed those standards escape liability in tort.

A good example of those standards in operation is to be found in the law of negligence, where potential tortfeasors are judged against the standards of ‘the reasonable man’. That is: ‘Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.’, per Alderson B, Blyth v Birmingham Waterworks Co (1856). The test for whether the standard has been attained is an objective one. Where a particular skill is in issue, the standard to be applied is that of ‘the reasonable man’ who was possessed of the skills in question. So (e.g.) learner car drivers are to be judged against the standard of the reasonably competent and experienced driver: see Nettleship v Weston [1971]. In the context of, say, the medical profession, the newly qualified doctor is to be judged against the standard of the reasonably competent and experienced practitioner. Where a recently qualified doctor exercises a role that is appropriate to one who is possessed of considerable skill and experience, the beginner’s conduct and competence is to be judged against what is expected of someone holding that post and not by what is appropriate to the beginner’s rank and experience: see Wilsher v Essex AHA [1987].

The deterrent/normative effect of an action in tort is complex. It encourages people to observe basic minimum standards and to take fewer risks, conducting their activities more carefully, mindful of their possible effects on other people and their property.

This effect is, however, mitigated where the tortfeasor is insured: the only likely direct financial consequence is an increase in the tortfeasor's insurance premium. Indirect effects may be experienced where professional or business reputation is an issue. Tort’s deterrent effect may then be considerable. It is sometimes said that the risk of being sued for defamation exercises a chilling effect on the media. The combination of substantial damages and harm to reputation may cause newspapers to conduct themselves more carefully.

Part of an analysis of the aims of tort must include the redistribution of loss suffered as a result of a tort. Damages compensate for the harm suffered by a claimant. The defendant will therefore have the loss suffered by the claimant redistributed to him. Such an analysis is, however, rather simplistic. In most cases the defendant is insured so the loss is redistributed to the insurer. In reality this means that the loss is redistributed to all policyholders, to all who pay for insurance. Alternatively, where tortfeasors engaged in business incur damages in tort they may pass on their costs to the buyers of goods and services. Indirectly, loss may thus be seen to be distributed to society at large.

In cases where insurance companies do not bear the costs of a successful claim, there may also be some element of retribution. Those who are likely to be exposed to liability in many instances of tort, such as driving incidents and professional malpractice will have insurance which diminishes this element. The symbolic stigma associated with a finding of liability also has an element of retribution.

The courts may award exemplary damages. This demonstrates that the court regards tortfeasor’s acts as particularly abhorrent. Such damages compensate
claimants for more than their actual losses. Though rarely awarded, they may increase tort’s normative and retributive functions.

The effectiveness of tort in discharging its functions is limited by the restricted availability of access to justice to those who have been a victim of a tort. The high costs of making a claim can mean that many will never get the compensation they deserve. Delay and the uncertainty of outcome in court actions also reduce the effectiveness of the system.

**Question 2**

(a) The phrase *res ipsa loquitur* means the thing speaks for itself and where this maxim applies there are two opinions on its effect.

The first is that that a finding of *res ipsa loquitur* raises a prima facie inference of negligence. The court will, then, infer that the defendant was negligent without the claimant having to prove there was a lack of reasonable care: see *Colvilles Ltd v Devine* (1969).

The second is that whilst the general rule in negligence is that the claimant must prove a duty is owed to him and that the defendant failed to reach the required standard, thus breaching the duty in question, *res ipsa loquitur* has the effect of reversing the burden of proof so that the defendant must show that the damage was not caused by his failure to take reasonable care: see *Henderson v Henry E Jenkins & Sons* (1970) and *Ward v Tesco Stores Ltd* (1976). However, in *Ng Chun Pui v Lee Chuen Tat* (1988) the Privy Council were of the opinion that the burden of proof always remains with the claimant.

The rule is said to have three requirements. First, the thing causing the damage was under the exclusive control of the defendant: see (e.g.) *Gee v Metropolitan Railway* (1873) and *Easson v LNE Railway* (1944). Second, the accident must be of kind which does not normally happen in the absence of negligence: see (e.g.) *Scott v London & St Katherine’s Dock Co* (1865). Third, the cause of the accident must be unknown. *Res ipsa loquitur* is not relevant where there are sufficient facts to prove negligence: see *Barkway v South Wales Transport Board* (1950).

If it is accepted that the burden of proof is reversed by the maxim, then arguably it is easier for the claimant to prove negligence.

However, the maxim is more commonly used to infer negligence where the defendant was in control of the thing that caused the damage, the accident would not usually have occurred in the absence of negligence, and that there is no known cause of the accident. This means that if the test did not exist then a claimant would never succeed. If these requirements are not met then the traditional tests for breach of duty and causation cannot be satisfied.

The maxim therefore does not make it ‘easier’ for a claimant to prove negligence. Rather, it infers that in certain circumstances, harm could not have come to the claimant without there being negligence. The fact that the cause of the accident is unknown should not exclude the claimant from recovering damages if the accident in question is of a nature that would not have occurred but for negligence.

This argument was successful in the recent case of *George v Eagle Air Services* (2009) where a widow of an aircraft mechanic who was killed along
with the pilot successfully used the doctrine. Lord Mance, giving the judgment of the Privy Council, said: ‘This was the respondents’ aircraft, their flight and their pilot. Aircraft, even small aircraft do not usually crash...’ so it was ‘...not unreasonable to place on them the burden of producing an explanation which is at least consistent with any absence of fault on their part’.

(b) To establish liability in negligence the claimant must prove that, as a matter of fact, the defendant’s breach of duty caused the harm suffered.

Where there is a single likely cause of harm the appropriate test is the ‘but for’ test. That is, had the defendant’s breach not occurred then no harm would have been suffered by the claimant: see Barnett v Chelsea & Kensington Hospital Management Committee [1968].

The ‘but for’ test is inappropriate when attempting to establish causation in fact in situations in which there are multiple potential causes and the claimant is unable to establish which of those factors caused the damage suffered. In McGhee v National Coal Board (1973) the House of Lords decided that, where there were two possible causes of damage, the claimant need prove only that the defendant’s breach of duty materially increased the risk of the harm suffered.

However, in Wilsher v Essex Area Health Authority [1988] the doctor’s negligence was only one of five separate independent causes of a baby’s blindness and in the absence of conclusive evidence that the negligent excessive use of oxygen caused the blindness as opposed to any of the four other (non-negligent) causes, the hospital was found to be not negligent. This may demonstrate that even where there is a possibility that the doctor’s negligence caused the blindness of the baby the law is reluctant to impose liability.

Successive multiple causes are also problematic. In Performance Cars v Abraham (1962) there was a collision caused by the second defendant’s admitted negligence. This necessitated a re-spray of the claimant’s car, which was already in need of a re-spray because of a previous accident, which had been caused by the negligence of another party (the first defendant). It was held that the first defendant was responsible for the whole amount, thus absolving the appellant (the second defendant) of any liability.

In Baker v Willoughby [1969] the claimant’s left leg was injured as a result of the defendant’s negligence. This caused some loss of amenity and earning capacity. In the interval between the accident and trial the claimant visited a bank where, during the course of a bank robbery, he was shot in his left leg. As a result the leg was then amputated. The defendant argued that the second injury obliterated the first. The House of Lords held that the defendant was liable and that the second injury should be ignored. It did not remove the claimant’s disability; rather it became a concurrent cause. Per Lord Reid: ‘A man is not compensated for the physical injury: he is compensated for the loss which he suffers as a result of that injury. His loss is not having a stiff leg, it is the inability to lead a full life.’

In Jobling v Associated Dairies (1982) the claimant suffered a slipped disk as a result of the defendant’s negligence. This resulted in a loss of earning capacity of 50%. Four years later the claimant developed a disease of the spine that rendered him totally incapable of work. The disease was unconnected with the injury. The House of Lords held that the defendant’s liability ended when the disease rendered the claimant incapacitated.
The decisions in *Baker v Willoughby* (1970) and *Jobling v Associated Dairies* (1982) are difficult to reconcile. The rationale appears to rest on *Baker* being authority for recovery where the second event is criminal or possibly tortious. In *Jobling* the spinal condition was considered to be a natural vicissitude of life. The defendant’s liability was restricted to paying damages only for the period prior to the onset of the disease.

The Court of Appeal considered these issues in *Rahman v Arearose Ltd* [2000]; per Laws LJ the two decisions could be reconciled once ‘... it is recognised that every tortfeasor should compensate the injured claimant in respect of that loss and damage for which he should justly be held responsible’.

The difficulties caused by the requirement of proving causation in fact are exacerbated where there are possible multiple defendants and it is impossible to ascertain which of them is liable for the harm suffered. In this instance it is possible that the court may hold all parties jointly and severally liable: see *Fairchild v Glenhaven Funeral Services* (2003).

One of the current issues relating to causation, where there are multiple possible defendants, relates to claims for exposure to asbestos and the resultant cancer caused by this. In *Fairchild v Glenhaven Funeral Services* (2003) experts could not identify which asbestos fibre from which employer, caused the cancerous tumour. Lord Nicholls, in the House of Lords, justified imposing joint liability on the employers on the ground that the alternative would be to deny the claimant compensation.

*Baker v Corus* (2006) partially reversed the *Fairchild* decision allowing joint liability only, but this decision was reversed by the Compensation Act 2006, s 3 of which restored the *Fairchild* position of joint and several liability in asbestos related cancer – mesothelioma. In this context see also *Bailey v Ministry of Defence* [2008].

The present state of the law can cause difficulties for claimants and practitioners alike, creating uncertainty of outcome and so difficulty in advising the client. It is arguable that a rule based approach may be preferable to a pragmatic or common sense approach based upon the difficulties associated with proof in this area: see *Rahman v Arearose Ltd*.

**Question 3**

Vicarious liability is legal liability that is imposed upon one person for torts (and in some circumstances crimes) committed by another.

Vicarious liability is most commonly based upon the employment relationship, making the employer liable for the acts of the employee. It may also be imposed as a result of the acts of agents and of independent contractors. It is a form of secondary liability: the person held so liable may be personally without fault.

Emphasis in this answer will be given to tortious acts committed within the context of the employment relationship.

Within that relationship, the requirements of vicarious liability are: that the tortfeasor was an employee, a tort was committed, and that the employee was acting in the course of employment when the tort was committed.

Traditionally the tests for this relationship were based upon control and integration into the ‘employer’s’ business. These tests have been largely
superseded by the economic reality or the multiple test established in *Ready Mixed Concrete v MPNI* (1968). *Per* McKenna J the criteria which should be used in coming to a decision are: (1) the employee agrees in return for a wage or other remuneration that he will provide work and skill for the employer; (2) the employee expressly or impliedly agrees to be subject to the control of the employer; and (3) there are no other terms of the contract that are inconsistent with a contract of employment.

The test was further considered in *Market Investigations Ltd v Minister of Social Security* (1969) where the court stated the relevant factors would include whether the person uses his own premises and equipment, whether he hires his own helpers, the degree of financial risk, the degree of responsibility, if any, for investment and management and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

Vicarious liability for an employee who is ‘lent’ or hired out has been considered on various occasions. Liability seems to attach to the one with sufficient control over the employee: see *Mersey Docks & Harbour Board v Coggins & Griffith* [1946]. The situation was considered more recently in *Hawley v Luminar* (2006) where an agency provided a nightclub door steward who, whilst in the course of employment, assaulted the claimant. The Court of Appeal held the nightclub liable for the acts of the steward rather than the agency, emphasising the control aspect of the relationship. The outcome may have been distorted by the fact the agency, which provided the steward, had subsequently gone into liquidation. It may consequently be argued that it proceeds from the court’s desire to do ‘justice’, which in this instance may be taken to mean providing a seriously injured person with a remedy which would have been denied had the nightclub been held vicariously liable. Such a decision may be said to support Lord Pearce’s comment in *ICI v Shatwell* [1964], that the doctrine of vicarious liability proceeds from social convenience and a desire to do justice rather than from clear, logical legal principle.

Whether or not a tort has been committed is established using the general tests and definitions applicable within the law of tort.

The more difficult issue is satisfying the criterion that the employee must have committed the tort whilst in the course of employment. An influential and long standing test is to be found in *Joel v Morrison* (1834), which states that the employee must be on his master’s business and not engaged on a ‘frolic of his own’. This, apparently, simple and logical test has sometimes proved problematic in its application, possibly making it difficult to detect the operation of clear, logical legal principle.

In *Century Insurance v Northern Ireland Road Transport Board* (1942) a petrol tanker driver who lit a cigarette whilst delivering fuel to a petrol station and carelessly threw away the lighted match was held to be acting in the course of his employment, rendering his employer liable for the effects of the ensuing explosion. In *Beard v London General Omnibus Co* (1900) a bus conductor who turned a bus around was held to be acting outside the course of his employment, whilst in *Limpus v London General Omnibus* (1862) horse-bus drivers, specifically ordered not to race between stops (in order to pick up more passengers) were held within the course of employment when they did so. The test is therefore very fact-sensitive and possibly provides further justification for Lord Pearce’s remark in *Shatwell*.

The well-established test in *Salmond* stipulates that an employer will usually be held liable for (a) wrongful acts actually authorised by him, and (b) acts which
are wrongful ways of doing something authorised by him, even if the acts themselves are expressly forbidden by the employer. This would seem to tie the act more closely to the relationship, thus providing greater justification for the doctrine. It may be supported by an examination of cases on express prohibition. In *Rose v Plenty* (1976) allowing a child to assist in delivering milk, which was expressly prohibited by the employer was held by a majority of the Court of Appeal to be within the course of employment: the use of the child by the employee was said to benefit the employer’s business. Consequently the injured child could claim from the employer. This was not the case in *Twine v Bean’s Express* (1946) where the claimant’s husband, an unauthorised passenger in a van, was killed by an employee’s careless driving. Here the employer was not vicariously liable as the passenger’s presence was of no benefit to him. Whilst this demonstrates some clarity of principle, it is not necessarily a logical distinction.

Such difficulties are discernible in the ‘deviation cases’, which involve employees driving company vehicles and deviating from their authorised journey. In *Harvey v RG O’Dell* (1958) a five mile journey from work to buy some lunch where the workplace did not have a canteen was within the course of employment. In *Hilton v Thomas Burton (Rhodes) Ltd* (1961) driving employees to a café for refreshments was held to be outside the course of employment. In *Storey v Ashton* (1869) a deviation in a business journey to visit relatives was held to be outside the course of employment. Such a lack of consistency would seem to support Lord Pearce’s view.

Claims relating to vicarious liability in relation to intentional torts, historically, tended to fail. In *Warren v Henlys* (1948) and *Keppel v Ahmad* (1974), claims were brought in damages as a result of physical attacks by employees; it was held that vicarious liability did not arise: the employees were not within the scope of their employment. There are, however counter examples: see *Poland v Parr & Sons* [1927]

Cases involving intentional torts should now be considered in the light of the House of Lords decision in *Lister v Hesley Hall* (2002). Here their Lordships stated that in such cases the Salmond test should be replaced by that of whether the act is so closely connected with what the employee was employed to do that it would be fair and just to hold the employer liable. In *Lister* the systematic sexual abuse by the warden of a home for boys with emotional and behavioural problems was found to be sufficiently closely connected to his duties for liability to arise. Once again, the decision does not apparently have any clear logical or legal principle. The court ‘s concern must be taken to be the provision of a remedy for victims, which may otherwise have been denied.

Various arguments have been advanced in justification of vicarious liability. The court is confronted with two ‘innocent’ parties: the claimant and the employer (or principal). The claimant is less likely to have any control over events. The employer is able to exercise some initial choice over the question of whether to employ the tortfeasor in the first place.

In the context of the employment relationship, the notion has been advanced that the employer will have ‘deeper pockets’ than his employees. The development of the law has been dependent upon the defendant’s access to resources, particularly through insurance. An employer is more likely than an employee to have greater assets and means by which to offset his losses.

Vicarious liability encourages employers to put into practice measures to ensure that employees are not negligent in the course of their employment. It provides
the employer with a financial interest in requiring employees to undertake their work without negligence.

It is also argued that the employer makes a profit from the activities of employees and therefore should bear the brunt of liability for losses caused by those employees.

On the basis of the above it would seem that there are justifiable reasons for imposing vicarious liability. However, the way the doctrine is implemented leaves room for criticism and Lord Pearce’s comment in Shatwell has considerable justification.

**Question 4**

Defamation has been defined as: ‘The publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him’ (Winfield & Jolowicz ‘On Tort’).

Statements which may amount to defamation have taken many and varied forms. They range from allegations that a woman had been the subject of rape (Youssouppoff v MGM (1934)) to implications that an amateur golfer had received money in return for the use of his image (Tolley v Fry [1931]); from imputations of mercenary motives (Keays v Murdoch Magazines (1992) to imputations that a well-known authoress had produced serialised stories of a cheap and vulgar kind (Humphreys v Thompson [1905-1910]).

Vulgar abuse or mere insults have traditionally been held to fall short of this. However, in the case of Berkoff v Burchill (1996) it was held that although insults which did not affect a person’s reputation would not be defamatory, such a statement could be defamatory if it resulted in the claimant being subject to contempt, scorn or ridicule.

Every fresh publication of a defamatory statement gives rise to a new right of action against each successive publisher and it may not be necessary to show the defendant was aware of the risk of repetition only that a reasonable person would foresee damage to the claimant’s repetition was likely: see McManus v Beckham (2002).

The classes of those who can claim are limited. Only living people can sue: a person’s reputation can no longer be affected once he or she is dead.

Members of a group or class referred to in a defamatory statement cannot generally bring an action (see Knupffer v London Express Newspapers [1944]); where, however, the class of persons to which the statement refers is sufficiently small it may be possible to demonstrate that the defamatory meaning refers to the claimant: see Foxcroft v Lacey (1613).

Local authorities and government bodies cannot sue. The House of Lords has held that to allow central or local government to sue for defamation would inevitably have a chilling effect on freedom of speech. In Derbyshire County Council v Times Newspapers (1993) Lord Keith stated ‘It is of the highest public importance that a democratically elected body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of expression’. Similarly political parties cannot sue: Goldsmith v Bhoyrul (1997).
Other than reporting matters regarding local and central government, there will inevitably be instances where the media reports matters deemed to be of public interest. Various defences may attach to such publications.

The most obvious of these defences is consent, or assent to publication, either expressly or impliedly given by the claimant: see *Cookson v Harewood* [1932]. Thus where a person has given a newspaper interview, that will amount to a good defence even if some may interpret the statement in a sense that is far more damaging than was intended by the claimant. Winfield & Jolowicz suggests that this is a form of *volenti non fit injuria* and is to be distinguished from qualified privilege.

Justification is a complete defence. It amounts to a claim that the defendant’s statement was true. As such, it cannot be argued that the statement of the defendant has lowered the claimant in the eyes of right thinking people. The claimant’s own actions have had that effect. The defence protects those who are prepared to speak out. It serves to guard against the chilling effects of the law of defamation.

In order to take advantage of this defence it is not necessary to prove that the facts alleged were literally true. It is sufficient that they are substantially true: see, for example, *Alexander v North Eastern Railway* (1865), where the defendant alleged that the plaintiff had been convicted of an offence of dishonesty and sentenced to three weeks imprisonment upon his failure to pay a fine. This was not literally true: the plaintiff had been imprisoned for two weeks rather than three. It was held that the defendant’s statement could be justified by proving the conviction and subsequent imprisonment for two weeks.

Allegations of a general type are more difficult to justify than those that are specific. Where a journalist accused another of being a ‘libellous journalist’, establishing that the plaintiff had been successfully sued for libel in the past was not sufficient and the court took the view that words, in context, carried the meaning that the plaintiff libelled people habitually. The fact that the plaintiff had been found guilty of libel on one occasion was not sufficient to justify the statement made: *Wakley v Cooke and Healey* (1868). This serves to demonstrate that even where there is substantial evidence to support the statement the court may still find that it is defamatory, which can be said to put limits on freedom of expression, and thus to ‘chill’ the reporting of events of public interest.

Other defences available include absolute privilege and qualified privilege. Absolute privilege protects any statements made in Parliament, in judicial proceedings and in official communications. Common law qualified privilege applies where information is passed under a public or private legal, social or moral duty to another individual with an interest in or duty to receive it.

Examples of qualified privilege are references for potential employers, and statements required or volunteered regarding crime. Qualified privilege is also found as a conditional defence in the Defamation Act 1996. Qualified privilege is defeated by malice: see *Horrocks v Lowe* (1975).

The courts have been reluctant to extend qualified privilege to provide the media with a ‘public interest’ defence. In *Reynolds v Times Newspapers* (1999) the House of Lords rejected the special category of ‘political information’ as a genus of qualified privilege requiring specific protection. It was, however, prepared to extend the law’s protection to ‘responsible journalism’. Lord Nicholls identified ten factors, which though not exhaustive, should be taken into account in
determining whether qualified privilege should apply in such cases. These factors are the seriousness of the allegation, the nature of the information, the source of the information, the steps taken to verify the information, the status of the information, the urgency of the matter, whether the claimant was invited to comment, whether the article contained the gist of the claimant’s story, the tone of the article and the circumstances and timing of the publication. Although it is only relevant to the media, the Reynolds test for responsible journalism applies to any matter of public interest.

The Reynolds test was applied in Loutchansky v Times Newspapers (2002) where the defence failed because, although the article published fell within the public interest, the information had not been investigated adequately for accuracy and as with Reynolds, the claimant’s side of the story had not been sought. See also Galloway v The Telegraph (2006).

The issue of neutral reportage was considered in Roberts v Gable (2008), where it was held that all of the principles of reportage applied and in all the circumstances the article was a piece of responsible journalism. The article was in the public interest and the defendants did not adopt the allegation of wrongdoing in it. Essentially this extended the defence of qualified privilege to the repetition rule in the form of neutral reportage. The repetition rule traditionally states that where the defendant repeats a defamatory statement that was made to him, the defendant must show that the allegation was true, not that it was true that he had heard the allegation from another: see (e.g.) ’Truth’ (NZ) v Holloway (1960). In Jameel v Wall Street Journal (2005) the fact the claimant was not given an opportunity to respond prior to publication was not considered critical by House of Lords.

Fair comment on a matter of public interest (now renamed ‘honest opinion’ by the Court of Appeal and later ‘honest comment’ by the Supreme Court in Spiller v Joseph (2010)) is another important defence in this area.

The defence cannot be used to justify unsubstantiated or dishonestly held views. A number of requirements limit its scope.

First, the comment in question must be on a matter of public interest. Two classes of what might amount to public interest were discussed in London Artists v Littler (1969). The first example given was where the public in general may have a legitimate interest, for instance in the conduct of politicians and public servants. The second class consists of matters that are expressly or impliedly subject to public criticism or attention (e.g. theatre productions). The opinion expressed must be based on fact to amount to fair comment. Mere honest belief is insufficient. In Campbell v Spottiswoode (1863) the defendant accused the plaintiff of proposing a scheme to disseminate religious truth among the Chinese as a means of increasing the circulation of his paper, ‘The British Ensign’, and so of enriching himself. It was held that, although the defendant honestly believed his allegation to be true it was not supported by fact. The defence failed. The facts supporting the comment do not have to be expressed in the material complained of: see Kemsley v Foot (1952).

Distinguishing between opinion and fact is sometime difficult and the defence will fail where it is not clear that the material complained of is opinion. In this instance the defendant will be forced to rely on the defence of justification.

Two tests must be satisfied in order for a comment to be regarded as ‘fair’. In Turner v Metro-Goldwyn-Mayer (1950) an objective test was formulated by Lord
Porter, who asked: “would any honest man, however prejudiced ... exaggerated or obstinate his views, have written this criticism?”.

The second test is subjective and turns to the state of mind or motive of the defendant. Malice will destroy the defence and in this context ‘malice’ is defined as a statement made out of spite or with evil intent. In the case of *Thomas v Bradbury, Agnew & Co* (1906) the defendant’s claim that his very critical review of the plaintiff’s book was fair comment failed because of his malice, which was demonstrated in the review complained of and in the witness box.

Liability in defamation is wide and clearly places limits on freedom of expression in order to protect the rights of individuals. In America defamation claims rarely succeed and we have seen many claimants from other jurisdictions take advantage of the strict rules the UK has on defamation. However, it is arguable this balancing exercise is necessary and so these limits are not necessarily ‘chilling’ but rather essential to a civilised society. The available defences, particularly since *Reynolds* ensures that where there are matters of public importance, liability in defamation is limited and so where there are matters of genuine public interest the available defences limit the ‘chilling effect’ of the law of defamation.

**Section B**

**Question 1**

**Anil v Bobby**

Bobby has provided a report, requested by Anil, which contains inaccurate and misleading information. Anil acted upon the information provided by Bobby and incurred a loss as a result. The question that needs to be asked is whether or not Anil can successfully bring an action against Bobby and recover his losses.

There is no contractual nexus between Anil and Bobby. Therefore Anil must bring his claim in tort rather than in contract. There is no evidence that Bobby deliberately misled Anil. The appropriate cause of action therefore lies in negligence.

Anil’s claim is in ‘pure economic loss’. As a matter of policy, this type of loss is generally not recoverable in negligence. An exception to this is where the claimant can demonstrate that the loss was the result of a negligent misstatement.

As in all claims for negligence, it is necessary to establish that the claimant was owed a duty of care by the defendant, that the defendant was in breach of that duty, and that breach caused the claimant to suffer damage that is not too remote.

The leading case on negligent misstatement is *Hedley Byrne v Heller* [1964], in which the House of Lords decided that a duty of care might arise in negligent misstatement cases if it could be shown that a special relationship existed between the parties. Such a special relationship may be established by showing:

1. That the defendant possessed some special skill or knowledge
2. That the claimant reasonably relied upon the advice of the defendant
3. That the defendant knew that the advice would be relied upon.
The question of when a party may be possessed of a special skill was considered in Mutual Life & Citizens Assurance Co v Evans [1971] in which a majority of the Privy Council held that an insurance company was not liable for giving negligent investment advice because it was not in the business of providing such advice and it did not hold itself out as being so. A minority of the Privy Council took the view that the company did owe a duty of care because it knew that its advice would be reasonably relied upon. The minority view has been preferred by the English courts: see Esso Petroleum v Marden [1976] and Midland Bank Trust Co v Hett Stubbs & Kemp [1976].

The questions then arise of whether the advice is reasonably relied upon and whether the defendant knew the advice would be relied upon.

In Caparo v Dickman [1989] accounts of a public company were audited by the defendants. The plaintiffs relied upon the audited accounts when purchasing shares in the company. The plaintiffs subsequently alleged that the accounts had been misleading (they showed substantial profits instead of a loss) and had been negligently prepared. The question arose as to whether auditors of public company accounts owed a duty of care to those purchasing shares on the stock market. The House of Lords held unanimously that no duty of care to potential shareholders existed in such situations. In order to establish that a duty of care was owed it was necessary to establish that it was foreseeable that the plaintiff or someone in the plaintiff's position would rely upon the statement and that there was sufficient proximity between the parties. In this instance proximity might be something akin to contract; it might take the form of a voluntary assumption of risk. Whilst there was sufficient proximity between auditors and company members there was not sufficient proximity between auditors and potential investors; and the fact that it was foreseeable that the accounts would fall into the hands of potential investors did not create sufficient proximity.

Given the nature of the relationship between Bobby and Anil, it is eminently foreseeable that Anil would rely on Bobby’s report. Bobby may then be said to owe Anil a duty of care.

Anil then needs to establish that the duty of care owed by Bobby was breached. In order to do this Anil must show that Bobby failed to reach the objective standard of care set out by Alderson B in Blyth v Birmingham Waterworks Co (1856): he must show that Bobby failed to act as a reasonable person would in the situation in question.

The act complained of involves Bobby acting in the course of his trade or profession. Anil must then show that Bobby failed to show the knowledge or skill normally possessed by a person doing that kind of work, that he lacked the degree of knowledge and skill he held himself out as possessing.

The test is an objective one. It is irrelevant that Bobby is new to the profession: Nettleship v Weston (1971). If it can be shown that a reasonable business consultant would have inspected the CDE Ltd's accounts and would have been aware of an important trade journal and would have referred to that journal, things that Bobby omitted to do, then he is in breach of duty.

It is necessary to establish that Anil’s loss was caused, in fact, by Bobby’s breach of his duty of care. The ‘but for’ test as set out in Barnett v Kensington & Chelsea Hospital (1969) requires causation to be shown on that basis that ‘but for’ Bobby’s negligent advice, Anil would not have purchased the business and thus incurred his losses. In absence of any evidence indicating that Anil would
have purchased the business in any event it would seem that Bobby’s advice has caused the damage suffered by Anil.

Finally, it is necessary to show causation in law. That is, that Anil’s loss was not too remote. In order to do so it is necessary to show that the nature of the harm suffered was reasonably foreseeable: see The Wagon Mound (no1)[1961]. This would seem to present little difficulty to Anil.

It is therefore arguable that Anil has a good claim against Bobby. No defences appear to be available to Bobby.

The Bank v Bobby

As above, this is a claim for pure economic loss. The tests set out above need to be applied to the Bank’s relationship with Bobby. It would appear that no evidence exists to suggest a ‘special relationship’ exists between Bobby and the Bank. The Bank did not rely on Bobby’s advice and made its own independent enquiries.

Although Anil made it clear that potential investors would be shown the report it is arguable that Bobby would not have known the bank would be shown the report – either specifically or as an ascertained class of persons.

He could not have expected the bank to rely on his advice without independent enquiry. On this basis it would seem that Bobby owed no duty to the bank, and thus there is no need to consider breach or damage.

Clive v Bobby

In relation to establishing a duty of care (owed by Bobby to Clive), it should be noted that Caparo v Dickman has been distinguished on several occasions. In Morgan Crucible v Hill Samuel [1991] directors and financial advisors made statements as to the accuracy of accounts and profit forecasts that they intended the purchaser should rely on. Those representations had been made after the plaintiff had emerged as an identifiable bidder.

Similarly in Galoo v Bright Grahame Murray [1995] the Court of Appeal took the view that where an auditor confirms the accuracy of accounts after being informed that an identifiable bidder will rely on those accounts a duty of care will arise.

It is then arguable that a duty exists on the basis of the special relationship: Clive is a potential investor, the class of which was specifically mentioned as a potential recipient of the report. The court may therefore decide that a duty of care was owed by Bobby to Clive. If that is the position then breach, causation and remoteness are established as above.

Question 2

Katie v Jake

In order to recover damages in negligence, Kate will need to establish that Jake owed her a duty of care, that Jake was in breach of that duty, that she suffered consequential damage as a result of the breach, and that that damage was not too remote in law.
A road user’s duty of care to other road users is one of the long established categories of duty situations. A road user in this context includes passengers.

In order to establish breach of duty it must be shown that Jake failed to reach the standard of a reasonable person: *Blyth v Birmingham Waterworks Co* (1856), *Per Alderson B*. A reasonable person would not undertake an activity with such a high magnitude of risk as mobile phone whilst driving, particularly as it is likely to have little or no social utility and is a criminal offence.

A number of tests may be used to establish causation in fact. The most commonly applied is the ‘but for’ test: see *Barnett v Chelsea Hospital Management Committee* [1968]. It is necessary to ask: ‘but for’ Jake using his phone whilst driving, would the accident have occurred? Jake admits that talking on his phone caused his driving to be careless.

Should the ‘but for’ argument not succeed then it is possible to argue that Jake’s breach materially increased the risk of the harm suffered by Kate: see *McGhee v NCB* [1973]. Jake’s actions quite clearly materially increased the risk of injury. It is therefore possible to demonstrate causation in fact.

In order to establish whether or not the damage suffered is too remote it is necessary to ask whether the harm suffered was a reasonably foreseeable consequence of the breach in question. Personal injury is a type of damage which is reasonably foreseeable in such circumstances and so satisfies the remoteness of damage test set out in *The Wagon Mound (No 1)* [1961].

Katie was not wearing her seat belt at the time of the accident. The defence of contributory negligence could therefore be raised: see the Law Reform (Contributory Negligence) Act 1945. Katie has failed to take care for her own safety and the court will thus reduce her damages to the extent that it is ‘just and equitable’. In this case the reduction is likely to be 25%. Her injuries could have been avoided by wearing her seat belt: see *Froom v Butcher* [1975]. The defence of *volenti non fit injuria* is excluded by the Road Traffic Act 1988.

**Liam v Jake**

Liam may also be able to bring an action against Jake on the basis of the tests set out above. He too will need to establish that he was owed a duty of care by Jake and that Jake breached that duty, causing damage that is not too remote. As with Katie, Liam is owed a duty. That duty was breached. The damage he suffered was to his arm, which resulted in amputation. The question is whether or not the actions of the junior doctor make this damage (the amputation) too remote?

Jake may claim that the amputation of the arm was a *novus actus interveniens*. This would break the chain of causation, thus preventing him from being liable for the full extent of Liam’s injury. Jake could argue it was the negligence of the doctor rather than the accident which resulted in the amputation.

However, in *Baker v Willoughby* [1969] it was held that simply because an injury has been submerged by a new tort should not mean that the first tortfeasor should escape liability: it would be a ‘manifest injustice’ if the argument succeeded. In *Baker* the second defendant was unavailable and so it was held that the defendant who caused the injury during the first tort should not be absolved of liability simply because the second tortuous act caused greater harm. Whilst the decision was criticised in *Jobling v Associated Dairies* (1982) the court
accepted that it ought to be regarded as an exception justified on the facts of the case. The court might be invited to distinguish *Baker v Willoughby* on the facts: in the present problem there is no suggestion that the doctor is unavailable and there is no significant lapse of time between the two (arguably) tortious acts.

Liam could bring an action against the doctor, who doctor owed an established duty of care (doctor to patient), and must reach the standard of a reasonably competent practitioner. No account will be taken of his inexperience: *Wilsher v Essex Area Health Authority* (1986). We are told that the decision to amputate was ‘wrong’ and therefore can establish that the doctor has failed to reach the standard of care required of him.

It can be established that the doctor’s breach has caused Liam’s loss and that that loss is not too remote. It is clear that Jake is responsible for the injuries to Liam. The negligence of the doctor may amount to a *novus actus interveniens* thus rendering the doctor liable for the loss of Jake’s arm.

It is possible that the court will determine that the liability should be apportioned: see *Webb v Barclays Bank v Portsmouth Hospital* (2001).

**Manjeet v Jake**

Manjeet’s claim is also in negligence. The harm suffered is psychiatric in nature. As in other claims in negligence it is necessary to establish duty of care, breach of duty and damage caused by the breach demonstrated.

In order to claim for psychiatric damage Manjeet must show she suffers from a recognised medical condition (*McLoughlin v O’Brian* (1983)), which is more than ‘ordinary human grief’. Additionally, the condition must have been caused by a sudden nervous shock, and not by a gradual appreciation of the incident(s). A nervous breakdown is a recognised medical condition.

For a claimant to be classified as a primary victim, s/he must have been involved in the incident or have suffered some injury or have feared for his/her own safety: *Page v Smith* (1995).

Manjeet is likely to be classified as a secondary victim: she was not in the zone of physical danger. Consequently a duty will only be owed to her only if she satisfies the proximity conditions laid down in *Alcock v Chief Constable of South Yorkshire* (1991). These threshold tests are as follows: first the psychiatric harm must be reasonably foreseeable in a person of reasonable fortitude. On the facts it would seem that is the case here as the accident is particularly horrific and thus would cause harm to a reasonable person. Second, there must be proximity of relationship. To establish this, the question is asked whether Manjeet had close ties of love and affection with a victim. In *Alcock* it was held that there is a presumption of such a relationship in the case of parent and child, and so Manjeet is within the recognised categories. Third, Manjeet needs to have been present at the event or its immediate aftermath. As she witnessed the train becoming derailed and also the carriages on fire she satisfies this criterion.

In the case of *McLoughlin v O’Brian* (1982) the claimant succeeded when she saw her children at the hospital some hours after the accident itself. Manjeet’s experience is closer to the accident caused by the tortfeasor than in *McLoughlin* so this is strong evidence to suggest that she would satisfy this criterion. Finally, she needs to have experienced the event with her own unaided senses. Having seen the train derailed and on fire whilst present at the scene it is clear this is also satisfied.
As above, Liam is in breach of his duty to Manjeet. It is clear that ‘but for’ the accident caused by Liam, Manjeet would not have suffered a nervous breakdown and so the tests for causation/remoteness are satisfied. There are no defences available. It would seem Manjeet has a strong case in negligence against Jake.

**Oliver v Jake**

Oliver is also suffering from a recognised psychiatric condition, namely post traumatic stress disorder. Although Oliver is a foreseeable rescuer, rescuers do not automatically fall within the category of primary victims, and thus still need to pass a threshold test: *White v Chief Constable of South Yorkshire* [1997].

Rescuers are required to show sufficient proximity by demonstrating that their own safety was under actual or apprehended threat. In order to establish whether a duty is owed Oliver must show he was in danger of personal injury as a result of the rescue attempt or believed himself to be so endangered. This would appear to be satisfied here for he was amongst burning wreckage. Even if Oliver has a propensity to psychiatric harm because of his pre-existing stress-related illness, Jake will still owe him a duty: see *Chadwick v British Railway Board*, *Smith v Leech Brain* [1961] and *Brice v Brown* [1984]. Again breach, causation, and remoteness of damage are satisfied as previously discussed.

In relation to defences, Jake may claim Oliver was *volenti* in acting as a rescuer. This defence rarely succeeds against rescuers as they are considered to be motivated by a desire to help the victim and are not consenting to the risk as such. It would also be against public policy to deny the injured rescuer any damages: *Haynes v Harwood* [1935].

**Question 3**

**Paul v Supersports**

I am asked to advise Paul on any claim he may bring against Supersports under the Occupiers Liability Act 1984.

Paul does not have permission to be on the land in question. Paul has suffered personal injury whilst on land which appears to be occupied by Supersports. His injuries were arguably the result of ‘...injury on the premises by reason of any danger due to the state of the premises or to things done or omitted to be done on them...’ (s1(1)(a) OLA 1984). Where a claim for injury suffered on another’s land is brought by a trespasser a proper cause of action is under the Occupiers’ Liability Act 1984, which provides that the common duty of care is extended to trespassers as well as to lawful visitors. The existence of notices, fences, and gates all indicate that Paul’s presence was as a trespasser.

Liability under the Occupiers Liability Acts is a form of statutory negligence. In order to succeed in his claim Paul would therefore need to demonstrate that he was owed a duty of care by Supersport, that Supersport breached that duty, and that he (Paul) consequently suffered damage that was not too remote in law.

Demonstrating that Supersports owed a duty of care under OLA 1984 has two aspects: first that Supersport was, in law, the occupier of the land and second that a duty of care to Paul had arisen in consequence of that occupancy.

‘Occupier’ is not defined in either the Occupiers Liability Act 1957 or the Occupiers Liability Act 1984. The appropriate test for occupier is the common law ‘control test’ set out in *Wheat v Lacon* [1966]: an occupier is any person who has
sufficient degree of control over the premises in question. This may be taken to mean occupational control (per Lord Pearson, ibid), which in practical terms means who controls access and egress and what the use the land is put to has sufficient control to constitute an occupier. Supersports appears to control both access to the land and the activity that takes place there. It is consequently an occupier of the land in question.

In order to show that Supersport’s duty of care had arisen in the circumstances in question it is necessary to satisfy the requirements of s1(3) of the 1984 Act, which are that the occupier was: (a) aware of the danger or has reasonable grounds to believe that it existed; (b) knew or had reasonable grounds to believe that the other was in the vicinity of the danger; and (c) the risk is one against which, in all the circumstances, the occupier may reasonably be expected to offer some protection.

The kind of knowledge required by s1(3)(a) and 1(3)(b) seems to be part subjective and part objective. The first part of s1(3)(a) (the occupier was ‘aware of the danger’ and 1(3)(b) (‘knew...that the other was in the vicinity of the danger’) both appear to be subjective. The phrase attaching to these subjective criteria ‘ ...or had reasonable grounds to believe...’ appears to be objective in character.

Supersport’s actual knowledge of the existence of the cliffs may be deduced from the use to which the land was put: the cliffs were used to provide a place from which hang gliders might launch themselves, which was part of the occupier’s business activity. The nature of the danger: that is the possibility of personal injury or death resulting from a fall from such a cliff is equally obvious and would be inferred by a reasonable occupier.

The question indicates actual knowledge of the existence of trespassers by Supersports, which it either ignored or tolerated.

Section 1(3)(c) requires consideration of whether, in all the circumstances, the danger was one against which the occupier would reasonably be expected to offer some protection. The test is an objective one, unlike that under the common law duty of humanity, where a subjective test was applicable, taking into account, among other things, the resources of the occupier: see Herrington v BRB [1972].

There is, however, considerable authority to indicate that, where the risk is obvious, the court is likely to find either that there was no duty in respect of that risk or that there was no breach: see e.g. Tomlinson v Congleton BC [2003], in particular the speeches of Lord Hoffmann and Lord Hutton, in which they address the issues pertaining to s1(3)(c). Per Lord Hoffmann, considerations on the matter should take into account risk, gravity of injury, cost and social value. Lord Hutton emphasised the issues of obviousness of risk and the importance of common sense. It is perhaps worthy of note (in relation to the facts of the present question) that Lord Hutton’s speech referred to Cotton v Derbyshire Dales District Council (20 June, 1994 unreported), in which the Court of Appeal held that a claim for damages in respect of injuries suffered as a result of falling from a cliff should fail because the danger was obvious.

It has long been accepted that what may not be a danger to an adult may nevertheless be a danger to a child. Nevertheless questions of obviousness of risk are important: see Keown v Coventry Healthcare NHS Trust [2006] in which it was held that that claimant should fail because there was (a) no danger arising
from state of the premises (a fire escape) and (b) that the risks of climbing on the outside of a fire escape were obvious, even to an 11 year old.

Paul may have some difficulty in establishing that s1(3)(c) has been satisfied. Supersport may argue that the danger was of a kind that it was not required to offer protection against on the following grounds: the danger was obvious, the cost of providing protection was disproportionate to the risk, and that Supersport’s activity was socially useful.

On the issue of breach, section 1(1) (a) of the 1984 Act provides that liability for injuries on premises should arise ‘... by reason of any danger due to the state of the premises or to things done or omitted to be done on them.’ Section 1(4) provides that the occupier’s duty is to ‘...take such care as is reasonable in all the circumstances of the case to see that [the non-visitor] does not suffer injury by reason of the danger concerned.’

Paul must therefore show that the danger existed because of the state of the premises and that Supersport had failed to take sufficient care to ensure that he did not suffer injury as a result of that danger. Perhaps his best line of argument in demonstrating breach of the common duty of care under the 1984 Act would be that use to which the land was put created a danger in the form of an allurement (see Glasgow Corporation v Taylor [1922]) and that Supersport had failed to take adequate precautions to prevent the injuries he suffered as a result of being lured to the spot in question.

Supersport’s response to Paul’s argument is possibly six fold. The first is that there was nothing wrong with the state of the premises. The cliffs were not dangerous because of anything ‘done or omitted to be done’ on them. The cliffs were not inherently dangerous. Rather, the danger arose as a result of Paul’s choosing to go onto the cliffs and behaving carelessly (not keeping a proper look out) when there: see Tomlinson v Congleton BC [2003], per Lord Hoffmann and judicial comment in the Court of Appeal in Keown v Coventry Healthcare NHS Trust [2006].

Second, the potential danger was obvious. The courts have consistently refused to find liability in such circumstances: see Tomlinson v Congleton BC [2003](HL) etc..

Third, if it is found that a duty did arise then it may be argued that the duty was discharged by way of the warning sign displayed: see s1(5). (It is unclear whether the particular warning would be sufficient to discharge this duty.)

Fourth, Paul may not claim for damage to property under the 1984 Act: see s1(4)

Fifth, if it is found that there was a breach of duty then Paul’s damages should be significantly reduced because of Paul’s contributory negligence.

Sixth, Paul’s claim was framed under the wrong cause of action. Arguably it should have been framed in common law negligence because the injury arose as a result of Supersport’s activity on the land rather than because of the state of the premises: see Ogwo v Taylor [1988]

If Paul is able to succeed in proving duty and breach issues of causation in fact and law should prevent him with little difficulty.
b) Assessment of damages

If he succeeds in his claim, damages will be awarded to Paul for pecuniary and non-pecuniary losses.

The non pecuniary losses are for pain and suffering, loss of amenity and recognition of the injury itself.

The factors the court will take into account include: the length of stay in hospital, number of surgical treatments, type of treatments, permanent disability, diminution in quality of life, diminution in length of life, loss of marriage prospects, cosmetic injury, psychological or emotional harm, inability to pursue hobbies. There are guidelines laid down by the Judicial Studies Board under these heads. In Heil v Rankin (2000) (CA) Lord Woolf emphasised compensation must be ‘fair, reasonable and just’.

There are various areas of recovery for pecuniary loss. This would include compensation for medical expenses. However if Paul was treated under the National Health Service then no medical expenses are payable. If however he is treated privately his medical expenses will be recoverable. A payment will be made for future medical care and attention. The court can compensate Paul, who can then pay his mother for her services but generally the maximum amount for the services rendered by a professional carer is the cost of a professional carer.

Paul is also entitled to compensation for future loss of earnings, even though he is a fifteen year old child. He may have shown potential in a particular area and the courts can use that.

Alternatively the courts may take the national average earnings and extrapolate from that. This may include the lost years so that compensation may be payable for reduction of life expectancy. Statutory benefits will be deducted from the sum awarded and interest is payable on judgement debts.

No damages are payable for the loss of the laptop under Occupiers’ Liability Act 1984.

Question 4

In order to discuss the potential tortious liability of Vera and Wilson it is necessary to consider trespass to land, trespass to the person and private and public nuisance.

‘Trespass to land...is constituted by unjustifiable interference with the possession of land’. (Winfield & Jolowicz ‘On Tort’). It is a wrong against possession rather than ownership of the land. Like other trespasses the act complained of must be direct and ‘willed’: accident or negligence are not enough: see Fowler v Lanning [1959], Letang v Cooper [1965], Wilson v Pringle [1987].

Like other trespasses it is actionable per se, though proof of damage will be reflected in damages awarded. ‘Land’ clearly constitutes the surface of the earth but also includes things attached to the surface of the land, including crops or things growing on the land: see Wellaway v Courtier [1918]. ‘Land’ in this context extends (with exceptions) from the centre of the earth to the sky: see Kelson v Imperial Tobacco [1957].
Trespass to the person may take three forms: assault, battery, and false imprisonment. Only assault and batteries are relevant to the facts of the question.

‘Assault is an act of the defendant which causes the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant.’ (Winfield & Jolowicz ‘On Tort’) The essential constituents of assault are the menace of violence together with the ability to carry out the threat.

Battery may be defined as ‘...the intentional and direct application of force to another person’ (Winfield & Jolowicz ‘On Tort’)

Winfield & Jolowicz ‘On Tort’ defines private nuisance as the ‘...unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it.’ Lord Lloyd of Berwick, in Hunter v Canary Wharf [1997], took the view that: ‘Private nuisances are of three kinds. They are (1) nuisance by encroachment on a neighbour's land; (2) nuisance by direct physical injury to a neighbour's land; and (3) nuisance by interference with a neighbour's quiet enjoyment of his land.’

The common law has long taken the view that neighbours should be reasonably tolerant and reasonably robust in their expectations. Generally, when considering whether an ‘unlawful interference’ has taken place, the court will consider the following: (a) whether the thing complained of has been continuous, repetitious or has arisen from a 'state of affairs' (see British Celanese v Hunt [1969] Spicer v Smee [1946] etc.); (b) whether the interference is unreasonable or the claimant is hypersensitive (see Robinson v Kilvert (1899) locality; and whether malice is a factor.

‘A public or common nuisance is one which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects who come within the sphere or neighbourhood of its operation.’: AG v PYA Quarries [1957]. What constitutes a class is a question of fact in every case. It must be a sufficiently wide-spread and representative of a cross section to prevent a single individual constituting a class. In order to bring an action the claimant must show particular harm – that is harm suffered over and above that suffered by the class.

Unlike private nuisance, public nuisance requires no proprietary interest. It may be constituted by a one-off event.

**Vera v Wilson.**

Vera may have a valid cause of action against Wilson in trespass to land. This may take three forms: first, the placing of a chattel on her land in the form of a football (see (e.g.) Rigby v Chief Constable of Northamptonshire [1985]); second damaging plants growing on the land; third, his entering onto the land without permission to recover the football.

Wilson entered Vera’s garden without permission, thus directly interfering with her possession of her land. Vera does not need to prove that damage has occurred simply that Wilson has entered her land without permission. The football entering Vera’s land and damaging her runner beans may also amount to trespass, but not if it was the result of negligence. No defence appears to be
available for Wilson’s trespass as he does not enjoy any rights of entry granted by statute, common law or licence.

Vera may also bring an action in trespass to the person against Wilson. Wilson’s driving his car at Vera may amount to an assault if it caused her to apprehend immediate physical harm; there appears to be an element of hostility: see Wilson v Pringle (1987). This is likely: Wilson did not swerve until the last minute and so it is reasonable to assume that Vera would have believed Wilson was going to run her over.

The noise caused by Wilson and his daughter’s occasional football games may amount to an interference with Vera’s quiet enjoyment of her land. In principle, that might constitute a private nuisance. The court is required to balance the rights and interests of both parties. It is unlikely that the noise made by two people playing football in Wilson’s own garden during daytime hours would amount to an unreasonable use of land. It is also unlikely that such noise will be sufficiently continuous or repetitious to constitute a private nuisance. The physical damage to Vera’s plants may also constitute a nuisance: see Miller v Jackson [1977] and St Helen’s Smelting v Tipping (1865).

The remedies available to Vera may include an injunction to prevent further trespass to her land and also damages as compensation for damage caused to her runner beans. Damages in cases of trespass to land are nominal where there is no physical harm or the damage caused is slight. She also be entitled to damages for trespass to the person if it is determined Wilson’s conduct amounted to an assault.

Wilson v Vera

Wilson may have a claim against Vera in the trespasses of battery and possibly assault.

When Vera turned the hose on Wilson she deliberately and directly caused the application of force (by way of the water projected from the hose) to his person. Her conduct amounts to a battery both on the basis of mere touching: see T v T [1988], Re F [1989] etc. It also arguably contained an element of hostility: see Wilson v Pringle [1987].

If Wilson saw that Vera was about to spray him with water from the hose pipe, and thus caused him reasonable apprehension of battery by way of the water, then he will have claim against Vera in assault. As is mentioned above, tort and battery are actionable per se: he does not need to show harm when establishing a claim.

Vera’s playing music loudly and slamming car doors at 4.00am may constitute an unreasonable interference with Wilson’s quiet enjoyment of his land. He consequently has a possible claim in private nuisance against Vera. As an owner occupier Wilson has relevant capacity to sue in private nuisance – Hunter v Canary Wharf (1997).

The court will consider whether Vera’s behaviour is sufficiently unreasonable to amount to a private nuisance.

In doing so, it will consider the locality. What may be considered a nuisance in one location will not be in another: see Sturges v Bridgman (1879). Wilson’s land is situated in a prosperous residential estate. This would weigh in favour of a finding of private nuisance.
It will also consider the sensitivity of the claimant. Wilson works ‘long hours’ and this may raise (in Vera’s favour) the argument that he is abnormally sensitive to noise. However, the playing of music loudly and the slamming of car doors in the early hours of the morning is likely to affect the quiet enjoyment of any residential neighbour. The argument of abnormal sensitivity is therefore unlikely to succeed: see McKinnon Industries v Walker.

The relationship between Vera and Wilson is not a friendly one. If it is possible to establish that her conduct is motivated by malice then that is likely to act as an aggravating factor in a finding of private nuisance: see Christie v Davie [1893], Hollywood Silver Fox v Emmett [1936] etc..

There seems to be little or no social utility in Vera’s conduct. This too would weigh in favour of a finding of private nuisance.

It would seem that Wilson does have a good case against Vera in private nuisance. Vera does not appear to have any defence.

Wilson may also have a claim in public nuisance. To pursue this he would need to establish, first, that a sufficient number of people have been affected by the music to constitute a class. He would then need to prove that he has suffered particular damage. That is, damage either different in extent or greater than the class as a whole. If it is possible to show other residents have been affected by noise, Wilson, because he lives next door to Vera, may argue that he has been disturbed to a greater extent than the other residents and so has suffered particular damage. He would seem to have a good claim. No defences appear to be obviously available to Vera.

In light of a finding of nuisance caused by Vera to Wilson the remedies available would be damages, to compensate Wilson for the reduction in amenity value of his home. There is also a possibility that the courts could impose an injunction restricting Vera from continuing to undertake the activities which cause the nuisance (Kennaway v Thompson [1981]). Similar remedies of damages and an injunction are available in the event of a finding of public nuisance.

Wilson’s remedy for trespass to the person in the forms of assault and battery are likely to be nominal damages for undergoing the tort per se and substantial damages for any personal injury suffered and harm caused to his property, should they have occurred.