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 2013 examinations. The suggested answers set out a response that a good (merit/distinction) candidate would have provided. 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 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

Originally the criteria for the existence of a duty of care depended on the relationship of the parties such as doctor-patient. An attempt was made to provide a general test for duty of care in Heaven Pender (1883) but no acceptable test was devised until the House of Lords decision in Donoghue v Stevenson (1932). The case established that there is a duty where there is a relationship of neighbourhood between the parties. The fame of the case rests on the *obiter dicta*. Lord Atkin stated his famous neighbour test as a general test for determining whether a duty of care existed.

‘You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be ... persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question’.

This test identifies the person to whom the duty is owed but not when or the circumstances in which it is owed. (*Yuen Kun Yeu v AG of Hong Kong (1987)*).

The modern approach favours an incremental approach identifying the three stage test of reasonable foreseeability of harm, proximity of relationship and whether it is fair, just and reasonable to impose a duty. (*Caparo v Dickman (1990)*)

In some cases, particularly those involving economic loss, the courts may apply a test of whether the defendant assumed responsibility to the claimant. (*Hedley Byrne v Heller (1963)*).
The criteria form part of a composite test involving each of the issues and the existence of a particular relationship alone is not conclusive. (Murphy v Brentwood (1990)).

The indications are that the real question is now whether it is right in the particular circumstances that the law should impose a duty of care. The main policy issues are the ‘floodgates’ argument, whether Parliament should legislate, whether it has done so and whether the claimant should pursue some other remedy than sue in tort.

The ‘floodgates’ argument centres principally around psychiatric harm issues and pure economic loss cases.

Ordinary physical damage caused by negligent conduct will by its nature be limited to those within the range of impact. Psychiatric damage is not so limited, as persons not within the range of impact may be affected. The courts have been conscious of this problem as they developed the law and have imposed restrictions on those who can recover. In the case of secondary victims where one person suffers psychiatric damage as a result of witnessing harm to another person the courts have laid down that there must be: (i) a close relationship of love and affection between the person suffering the psychiatric damage and the person placed in danger; (ii) that the person suffering the psychiatric damage must witness the event with his or her own unaided senses or witness the immediate aftermath. (Alcock v Chief Constable South Yorkshire Police (1991))

In the case of primary victims there is not the same need to apply stringent guidelines as primary victims are in the same position as persons suffering ordinary physical damage. (Page v Smith (1995) and White v Chief Constable South Yorkshire Police (1999).

In pure economic loss cases the courts are faced with the problem of potentially unlimited losses and have placed restrictions on the circumstances in which such loss can be claimed. The defendant needs to have a ‘special skill’ in giving advice of that nature and there must be a ‘special relationship’ between the claimant and the defendant. (Hedley Byrne v Heller (1963)).

The cases involving prospective and actual Parliamentary intervention indicate a reluctance on the part of the courts to impose a duty of care. An example of this is in the case of defective construction of houses. A remedy was provided by Parliament in the Defective Premises Act 1972. This was a factor which influenced the House of Lords in refusing to impose a duty of care in the cases of D & F Estates Ltd v Church Commissioners for England (1988) and Murphy v Brentwood District Council (1990).

Although some policy issues are dealt with through the doctrine of proximity by imposing restrictions on the number of people who can claim and the types of loss which can be claimed for the courts have showed willingness to invoke public policy principles of immunity where certain groups of defendants were sued in negligence. In most cases these groups of defendants carried out (or failed to carry out) what might be called ‘public service’ duties such as the police, (Van Colle v Chief Constable of Hertfordshire Police (2008) fire services (Capital and Counties plc v Hampshire County Council (1997) and local authority services such as education and social work. (X v Bedfordshire County Council (1995) The standard argument was that it would be in the public interest for these bodies to go about their business without the threat of litigation that might encourage defensive practices or threaten a precarious financial base. The immunity was justified by the courts on the basis that it would not be fair, just and reasonable to impose a duty on ‘policy’ grounds. The overall reason for the immunity was
that the harm to the public in general in granting a duty of care would outweigh the loss suffered by the individual claimant.

Immunity was also applied to advocates (Rondel v Worsley (1969)) but this immunity was removed by the House of Lords in Hall v Simons (2000).

The advent of the Human Rights Act 1998 has led to the courts being reluctant to impose blanket public policy restrictions on a duty of care. A successful challenge to police immunity in Osman v United Kingdom (1999) has led to less restrictive decisions in cases such as D v East Berkshire Community NHS Trust (2003).

It appears that reasonable foreseeability alone has never been the sole criteria for imposing a duty of care and the courts now use a complex of factors including reasonable foreseeability and proximity with policy playing a less important part because of human rights concerns.

**Question 2**

In order to bring an action in defamation a claimant must prove that the words complained of have a defamatory meaning; that they referred to the claimant; and that they were published by the defendant to a third party. There are four major defences available; justification; (that the statement was true in fact) honest comment; absolute privilege; qualified privilege. Traditionally qualified privilege was used where a person made a statement while under a social, legal or moral duty to do so and the person receiving the statement was under a similar duty. An example of this would be a reference. Qualified privilege can be destroyed by malice.

The defence of qualified privilege is one aspect of the question as to whether public figures should be able to sue in defamation or whether there should be some public interest defence in English law so that debate on matters of public importance is not censored by the prospect of a libel action. This can be done by a number of methods but in England the debate has centred on whether there should be a ‘public interest’ version of qualified privilege.

Historically, qualified privilege was confined to specific occasions such as reports of meetings and to duty–interest situations such as references. The restricted ambit of the defence can be partly ascribed to its drastic effect. Once the privilege has been established, the only way that the claimant can succeed is by proving malice on the part of the defendant. Attempts to introduce a duty–interest privilege attaching to the media were largely rejected on the basis that if the media uncovered wrongdoing, their duty was to report it to the relevant authorities rather than publishing it to the public.

English law resisted the introduction of any form of ‘public interest’ privilege which would apply to the media until recently. Partly as a result of the Human Rights Act 1998 and the freedom of speech requirements in Article 10 of the European Convention on Human Rights, the House of Lords moved the goalposts in Reynolds v Times Newspapers (1999).

The House of Lords refused to find a generic qualified privilege for political information. This was despite argument for the defendants on Article 10 of the European Convention on Human Rights. They held that the standard test of duty in disseminating the information and duty to receive it should continue to apply. In determining this ten matters were identified as having to be taken into account:
1 the seriousness of the allegation;
2 the nature of the information and the extent to which the subject matter is of public concern;
3 the source of the information;
4 the steps taken to verify the information;
5 the status of the information;
6 the urgency of the matter;
7 whether comment was sought from the claimant;
8 whether the article contained the gist of the claimant’s story;
9 the tone of the article; and
10 the circumstances of the publication including the timing.

The basis of the test is one of responsible journalism and a balance has to be drawn between setting the standard of journalistic responsibility too low and encouraging the publication of defamatory material and setting the standard too high and deterring the media from their proper function of keeping the public informed.

The advent of Reynolds privilege has opened up a Pandora’s Box in libel litigation. The limits and exact principles of the defence are still being tested in the courts but some principles are now emerging. The advantage for the media is that in appropriate cases they do not have to run the difficult defence of justification. Whether or not the article was true is not relevant to the question of responsible journalism. What has to be considered is whether it was responsible to publish the article having regard to the risk that the defamatory imputation in the article might prove to be untrue. Relevant to that question may be the information given to the publishers by the sources of the article, the nature of the sources, and the extent to which they backed that information.

In Jameel v Wall St Journal (2006) the House of Lords attempted to make it easier to run the test by applying a three-stage test where the defendant raises a defence of public interest: determining what is in the public interest; inclusion of the defamatory statement; and asking what is responsible journalism. The difficult question is usually that of responsible journalism.

The standard of responsible journalism is as objective and no more vague than standards such as ‘reasonable care’ which are regularly used in other branches of law. Greater certainty in its application is attained in two ways. First, a body of illustrative case law builds up. Secondly, just as the standard of reasonable care in particular areas, such as driving a vehicle, is made more concrete by extra-statutory codes of behaviour like the Highway Code, so the standard of responsible journalism is made more specific by the Code of Practice which has been adopted by the newspapers and ratified by the Press Complaints Commission. This too, while not binding upon the courts, can provide valuable guidance.

Is Reynolds privilege a different creature to traditional privilege? On this their Lordships were divided. Lord Bingham and Lord Hope felt that it emanated from traditional qualified privilege at common law. Baroness Hale and Lord Hoffmann (with whom Lord Scott agreed) felt that the new defence was different and advocated the dropping of the reference to ‘privilege.’

**Question 3(a)**

The court may deny an action to a claimant who suffered damage while participating in a criminal activity. In negligence actions the court may find that no duty of care was owed in the circumstances. The defence may be referred to
as illegality or *ex turpi causa non oritur actio*. This means that an action cannot be founded on a bad cause.

The formulation of an appropriate test has caused serious problems for the court because of the wide range of circumstances in which the issue can arise. The mere fact that the claimant’s conduct is illegal is not sufficient. There must be some connection between the illegality and the damage suffered by the claimant. A major problem is the type of conduct by the claimant which will give rise to the defence. This issue has arisen in the case of suicide by the claimant which is linked to the defendant’s breach of duty. For example, in *Kirkham v Chief Constable of the Greater Manchester Police* (1990), the court refused to bar the claim on the ground of suicide. This was no longer an affront to the public conscience, where the suicide resulted from mental instability. However, in *Reeves v Commissioner of Police of the Metropolis* (1999), the House of Lords preferred the approach that neither *ex turpi* nor *volenti* could be raised as a defence when they were based on the very act that the defendant was under a duty to prevent (in this case, to prevent suicide in custody).

The rules on *ex turpi causa* were laid down by the House of Lords in the case of *Gray v Thames Trains* (2009).

The claimant was a victim of the Ladbroke Grove rail crash. He suffered relatively minor physical injuries, but the accident had a major psychological impact upon him, in the form of post traumatic stress disorder (PTSD). Two years later he stabbed a stranger to death. He pleaded guilty to manslaughter on the grounds of diminished responsibility. He was ordered to be detained in a hospital under s 37 of the Mental Health Act 1983. The claimant brought a claim in negligence against the defendants. The defendants admitted that they owed the claimant a duty of care and that they had been in breach of that duty and admitted that his injuries including his PTSD were caused by their negligence. They also admitted that they were liable in respect of his losses, including loss of earnings, incurred before the stabbing. However, they denied liability in respect of losses incurred after that date on the basis that *ex turpi causa* applied.

The issue was whether the intervention of the claimant's criminal act in the causal relationship between the defendants' breaches of duty and the damage of which he complained prevented him from recovering that part of his loss caused by the criminal act. The claim for loss of earnings after the killing was barred.

Orders made by the criminal courts were necessary for the protection of the public from serious harm in cases involving a violent claimant. For as long as the orders were in force, the claimant's earning capacity was removed, and therefore the civil court should not award compensation where the criminal act of the claimant eliminated his earning capacity.

Causation was clear. The mere fact that the killing had been the claimant's own voluntary and deliberate act was not in itself a reason for excluding the defendants' liability. However, the matter had to be approached on the basis that, even though the claimant's responsibility for killing the victim had been diminished by his PTSD, he knew what he had been doing when he had killed the victim and he had been responsible for what he had done.

Two rules were laid down, a narrow rule and a wide rule. The first (narrow rule) is relatively clear cut but the wider rule still leaves severe problems for judges in determining whether there is sufficient connection between the illegality and the claimant’s damage.
In its narrower form, the *ex turpi* rule is that you cannot recover for damage which is the consequence of a sentence imposed upon you for a criminal act.

In *Gray*, the defendants argued that after the homicide any lost earnings arose *ex turpi causa* and so could not be recovered. The claimant sought to evade the application of the illegality defence on the basis that his earning capacity had already been destroyed before the killing. He contended that his loss of earnings was caused by the PTSD, not the manslaughter. Although the act of manslaughter did not break the chain of causation from the defendants' negligence to the claimant's lost earnings (*Corr v IBC Vehicles Ltd* (2008)), the defendants argued that the claimant's voluntary and deliberate crime clearly did have an impact upon his ability to earn, and that he should bear the consequences of his illegal act. The House of Lords held that the defence did apply. The Lords agreed that the principle of "consistency" was a satisfactory reason for the claim to be barred. The civil law must be consistent with any criminal sentence already imposed. They cited the passage of the Law Commission: “it would be quite inconsistent to imprison or detain someone on the grounds that he was responsible for a serious offence and then to compensate him for the detention”. The narrow version of the rule is also illustrated by *Clunis v Camden Health Authority* (1998).

In its wider form, the rule is that a party cannot recover compensation for loss which had been suffered in consequence of his or her own criminal act. It differs from the narrower version in at least two respects: first, it cannot be justified on the grounds of inconsistency in the same way as the narrower rule. Instead, the wider rule has to be justified on the ground that it is offensive to public notions of the fair distribution of resources that a Claimant should be compensated (usually out of public funds) for the consequences of his own criminal conduct. Secondly, the wider rule may raise problems of causation which cannot arise in connection with the narrower rule. For an example of the wider version of the rule see *Vellino v Chief Constable of Greater Manchester Police* (1998). Another example would be where two criminals are engaged in attempting a getaway from the scene of the crime. The car is driven negligently at speed and the passenger is injured. The court would be unwilling or unable to determine what speed would be expected from a competent getaway driver.

For another example see *Pitts v Hunt* (1990).

3(b)

This defence will apply where the damage which the claimant has suffered was caused partly by their own fault and partly by the fault of the defendant. In order to establish the defence, the defendant must prove that the claimant failed to take reasonable care for their own safety and that this failure was a cause of their damage. If contributory negligence is established, the modern position is that the claimant will have their damages reduced by the court in proportion to their fault. If they would have received £10,000 but were found to be 25 per cent contributorily negligent, their damages will be £7,500.

At common law this was a complete defence but following the *Contributory Negligence Act 1945* the courts have the power to apportion damages.

The Act will apply only where the damage was caused partly by the fault of the defendant and partly by the fault of the claimant. In the absence of fault, the court therefore has no power under the Act to apportion damages.
Fault is defined by s 4: ‘negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from the Act give rise to the defence of contributory negligence.’

The defendant must prove that the claimant failed to take reasonable care for his or her own safety (Davies v Swan Motor Co (1949) and Jones v Livox Quarries (1952)) and that the claimant’s fault was a cause of his or her injuries. (Stapley v Gypsum Mines (1953).

A motorcyclist does not owe a duty to other road users to wear a crash helmet, but in failing to do so they are guilty of contributory negligence if they suffer head injuries in an accident. They should foresee harm to themselves, although there is no risk of harm to anyone else. A person who smokes should foresee that they are likely to develop lung cancer and where they are exposed to cancer causing material such as asbestos and also smoke, their damages will be reduced for contributory negligence. (Badger v Ministry of Defence [2006] 3 All ER 173.)

In considering whether the claimant was contributory negligent, the court will take into account factors similar to those which would render the defendant negligent. The test is basically an objective one, although subjective factors are introduced when looking at child defendants and persons under a disability.

The claimant’s failure to take care for their own safety may be a cause of the accident which results in their damage. This occurs where two motorists are held to be equally to blame for a collision and the claimant is injured. A person who plies a driver with drinks and then accepts a lift and is injured will also be liable under this head.

Alternatively, a person may place themselves in a dangerous position which exposes them to the risk of involvement in the accident in which they are harmed.

There are a number of areas where problems are caused in trying to ascertain the appropriate standard of care for the claimant.

The traditional view is that there is no age below which a child cannot be held to be guilty of contributory negligence but this has been challenged in cases such as (Gough v Thorne (1966) and Mullin Richards (1998).

When assessing the claimant’s conduct, the court will make allowance for the fact that the defendant’s negligence has placed the claimant in a dilemma. If the claimant chooses a course which carries a risk of harm in order to avoid a reasonably perceived greater danger, they will not be contributory negligent.

In cases where an employee sues their employer for breach of statutory duty, the court will be slow to find that the employee was guilty of contributory negligence. Regard must be had to the fact that the employee’s sense of danger will have been dulled by familiarity, repetition, noise, confusion, fatigue and preoccupation with work.

In order for contributory negligence to constitute a defence, the claimant’s fault must be a legal and factual cause of the harm suffered. It is not necessary that the claimant’s fault be a cause of the accident itself. (Jones v Livox Quarries (1952).

In the seat belt cases the claimant’s failure to take precautions for their own safety is regarded as a contributing cause of their injuries, but it is necessary for
the defendant to prove that the failure to wear a seat belt was a cause of the injuries. If the claimant was thrown forwards and injured, then clearly failure to wear a seat belt is contributory negligence. But for the failure, either the claimant would not have been injured or their injuries would not have been so severe. However, if something enters the vehicle and crushes the claimant backwards against the seat, the failure to wear the seat belt would appear to be irrelevant and fail the test of causation. The claimant would have suffered the injuries even if they had been wearing a seat belt.

The Law Reform (Contributory Negligence) Act s 1(1) directs the court to reduce the claimant’s damages to the extent that the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

There are two possible ways of assessing the claimant’s share in the responsibility for the damage: causation and blameworthiness. St George v Home Office (2008).

If a test of causative potency is used, then logically every case should end with a 50/50 apportionment, as the conduct of both the claimant and the defendant is a cause. The courts however take a common-sense view, rather than a philosophical view, and arrive at apportionments other than 50/50. Stapley v Gypsum Mines Ltd.

Where the comparative blameworthiness or culpability of the parties is taken into account, then the test is an objective one of deviating from the standard of behaviour of the reasonable person. It is not a moral test. The reasonable person, for example, would wear a seat belt.

The requirement that the reduction should be just and equitable means that there is no single test for determining the level of reduction of damages. The courts treat it as a question of fact and take an ad hoc approach. Reeves v Commissioner of Police for the Metropolis (1999).

Question 4(a)

The purpose of exemplary damages is to punish the defendant for his/her conduct. Where the claimant has suffered no damage then exemplary damages cannot be awarded. (Watkins v Secretary of State for Home Department [2006].

The award of exemplary damages in tort is controversial as many people feel that the punitive function of the law should be performed by the criminal rather than the civil law.

The award of exemplary damages in tort actions has been considered by the House of Lords and the principles are laid down in Rookes v Barnard [1964]. The House was generally unhappy with the award of exemplary damages as this tended to confuse the respective roles of civil and criminal law. Exemplary damages were therefore confined to three categories. Statute and precedent prevented their abolition. The three categories were confirmed by the House of Lords in Cassell & Ltd v Broome [1972].

1 Conduct calculated to make a profit. Such damages are usually awarded in defamation cases and are primarily to reverse unjust enrichment but may also take into account the claimant’s difficulties in litigating. (Cassell v Broome (1972)

2 Oppressive conduct by government servants. This category covers not only government servants in the strict sense, but also persons exercising
governmental functions, such as police officers. (AB v South West Water Services (1993). The ‘cause of action’ test was criticised by the Law Commission. (Law Commission Reports Nos 132 (1993) and 247 (1997)) and the cause of action test has now been overruled. (Kuddus v Chief Constable of Leicestershire Constabulary [2001]) The test is now the nature of the conduct, not the basis of the cause of action. The conduct must still fit into one of the two categories.

This category covers wrongful arrest. The circumstances in which exemplary damages could be awarded against the police in cases of wrongful arrest were considered by the Court of Appeal in Thompson v Commissioner of Police for the Metropolis (1992)

3 Express authorisation by statute. The only clear example of this is the Reserve and Auxiliary Forces (Protection of Civilian Interests) Act 1951 s 13(2).

4(b)

The multiplier is used in the calculation of pecuniary damages. The court first calculates the annual loss to the claimant and then applies the multiplier to this figure. It is calculated by working out the number of years that the disability is likely to continue. This figure is then reduced to take into account the contingencies of life, i.e. the claimant might not have lived or worked until retirement age and s/he has received a capital sum which can be invested and make money which would otherwise not be available to them.

The use of the multiplier is controversial. If a person has been living on income then the income would have increased to take account of inflation. A capital sum, however, is fixed and the courts do not make an allowance for future inflation. The claimant will, however, be able to invest the capital and earn interest on it. One of the factors in calculating the appropriate multiplier is therefore the amount of interest that the claimant could earn on the capital. The House of Lords has now ruled that this is to be on the basis that the claimant had invested in index-linked government securities (ILGS). The average rate of interest on ILGS is 3 per cent and this should be the discount rate. (Wells v Wells [1998]. This was later amended by statutory instrument to 2.5 per cent. (Damages (Personal Injury) Order 2001.)

4(c)

Non-pecuniary losses cover;

1 Loss of amenity

The claimant may recover damages for the injury itself and any consequent inability to enjoy life. These damages are calculated on an objective basis and do not take into account the claimant’s inability to appreciate the disability. Unconscious claimants may therefore recover for loss of amenity. (West v Shephard [1964]).

2 Pain and suffering

The court will award damages for any pain and suffering which can be attributed to the injury itself and to any consequential surgical operations. The award will cover past and any future pain. Compensation neurosis may also be
compensated. This is a medically recognised condition caused by awaiting the outcome of litigation.

An unconscious claimant cannot recover damages for pain and suffering. A conscious claimant may recover for any mental suffering caused by the knowledge that life has been cut short (Administration of Justice Act 1982 s 1(1)(b)) or that their ability to enjoy life has been diminished by physical handicap.

SECTION B

Question 1

The traditional expression for this kind of damage is nervous shock but it is now referred to as psychiatric damage. This kind of damage raises problems because of the floodgates risk and the fear of fraudulent claims.

No damages are given for the shock itself. Compensation is awarded for the more long lasting effects of trauma.

The commonest type of psychiatric damage is post-traumatic stress disorder (PTSD). This requires an external stressor of an exceptional nature to trigger it. Historically the common law was reluctant to compensate for psychiatric damage but rules gradually developed in the twentieth century.

Modern claims are divided into two-party and three-party claims. In the former the claimant is a primary victim. In the latter a secondary victim. A primary victim is a person who was directly involved in the accident.

The law on secondary victims was established by Alcock v Chief Constable South Yorkshire (1991). The requirements for an action are: (i) a sufficiently close relationship of love and affection with the primary victim; (ii) proximity to the accident or its immediate aftermath; and (iii) nervous shock suffered as a result of seeing or hearing the accident or its immediate aftermath. The defendant must take his victim as he finds him and the claimant must have suffered from a recognised psychiatric illness.

The law on primary victims was established by Page v Smith (1995). A duty of care is established by proving reasonable foreseeability of physical damage. No distinction is drawn between psychiatric and personal injury for the purposes of foreseeability. The secondary victim control devices do not apply.

In White v Chief Constable South Yorkshire (1999) the police officers at Hillsborough were refused primary victim status. The fact that they were rescuers and employees of the defendant did not affect their status. They were secondary victims and unable to claim.

Barry has suffered a recognised psychiatric injury – post traumatic stress disorder. He is potentially a primary victim if he is in danger himself of suffering personal injury from the molten metal. Applying White v Chief Constable South Yorkshire Police (1999) and Page v Smith (1995). Barry can recover damages for his PTSD if he falls into this category. If he is a secondary victim – i.e if he has not suffered the PTSD as a result of fear for his own safety but for the safety of Adam then he must satisfy the control tests in Alcock v Chief Constable South Yorkshire Police. (1990). Was there proximity in time and space;

(i) Was there direct perception of the accident or its immediate aftermath by the claimant’s own unaided senses;
(ii) Was there a relationship of love and affection between the claimant and the primary victim? In the cases of spouses and parent/child there is a presumption of such a relationship. (Alcock) In other cases the claimant must prove that there was a similar relationship.

Barry succeeds under the first test but has no relationship. Workmates are mere bystanders. (McFarlane v EE Caledonia Ltd (1994)).

Chris has developed a stress related disorder. In order to succeed he must prove that that this is a recognised psychiatric illness for the purposes of a claim. If it is not his action will fail. Chris is a secondary victim as he is not in any danger himself and must therefore satisfy the Alcock control tests. A claimant cannot be categorised as a primary victim because he feels himself (wrongly) to be responsible for the death of a fellow employee. Where a workman ran to turn off a water hydrant after an explosion and discovered a quarter of an hour later that his workmate had been killed, he was not a primary victim. (Hunter v British Coal Corp [1998]). Where a crane driver witnessed a load dropping into the hold of a ship and feared injury to his workmates, a duty was held to be owed on the basis of fear for the safety of fellow workers. (Dooley v Cammell Laird & Co Ltd [1951]) The decision in Dooley v Cammell Laird would appear to be in doubt following White although it was not expressly overruled and it is possible that it could be supported on a primary victim basis.

Applying the control tests for secondary victims he satisfies the proximity in time and space test as he has witnessed the accident to Adam with his own unaided senses. However, he would appear to fail the proximity of relationship test with Adam.

Diana must prove that she has suffered a recognised psychiatric injury (are the recurrent panic attacks a recognised psychiatric injury). She would be classified as a secondary victim and must satisfy the control tests. As Adam’s wife there is a presumption of proximity of relationship. Her problem is whether she satisfies the proximity in time and space test. If the sound of the accident is classified as sufficient or if she witnessed the immediate aftermath of the accident by witnessing Adam’s injuries before they were cleaned up then she will have a claim. (McLoughlin v O’ Brian (1983)) In the Australian case of Jaensch v Coffey (1984) the claimant was held entitled to recover damages for the psychiatric illness she suffered. Deane J said: ... the aftermath of the accident extended to the hospital to which the injured person was taken and persisted for so long as he remained in the state produced by the accident up to and including immediate post-accident treatment ... Her psychiatric injuries were the result of the impact upon her of the facts of the accident itself and its aftermath while she was present at the aftermath of the accident at the hospital. This decision has been approved by the House of Lords in Alcock.

Edna would appear to have problems establishing that that she suffered from a recognisable psychiatric illness. If the angina attacks have worsened and are classed as a recognisable psychiatric illness then she will have a claim by applying the ‘egg-shell skull’ rule that you must take your victim as you find them. (Smith v Leech Brian (1962) Edna has the same problems as Diana in establishing proximity in time and space to the accident. On proximity of relationship she would have to prove that she has a claim as Adam’s de facto mother. The kinds of relationship which may involve close ties of love and affection are numerous, and it is the existence of such ties which leads to mental disturbance when the loved one suffers a catastrophe. They may be present in family relationships or those of close friendship, and may be stronger in the case of engaged couples than in that of persons who have been married to each other.
for many years. It is common knowledge that such ties exist, and reasonably foreseeable that those bound by them may in certain circumstances be at real risk of psychiatric illness if the loved one is injured or put in peril. The closeness of the tie would, however, require to be proved by a claimant, though capable of being presumed in appropriate cases.

**Question 2**

This question is on occupier's liability for defective premises. Although an area of negligence, liability is governed by statute, the Occupiers’ Liability Acts 1957 and 1984.

Liability in such case falls on the occupier of the premises. This term is not defined by either Act and was considered by the House of Lords in *Wheat v Lacon (1966)*. In order to be an occupier a person has to have sufficient control over the premises. In this case the Peabody Trust will be the occupier.

In order to determine which Act is applicable it is necessary to determine the status of the claimant. If the claimant is a visitor, then the 1957 Act will apply. If the claimant is a trespasser, the 1984 Act will apply. Bertram and Clarence would be classed as visitors as they came lawfully on to the land. Dick is a trespasser, as the occupier was unaware of his presence and if he had known of his presence, would have objected to it.

As Bertram is a visitor, the Trust will owe him the common duty of care under the 1957 Act s 2(2). This is a duty to take reasonable care for the visitor’s safety for the purposes for which he was permitted to be there. Bertram is also a contractual entrant. If the contract is silent as to the duty owed to the visitor, then the common duty of care in the Act will apply.

Prior to the Act, the courts had drawn a distinction between the occupancy duty, which was concerned with dangers due to the state of the premises, and the activity duty, which was concerned with the occupier’s activities on his premises. Is a rowing boat within the occupancy or the activity duty? There is no clear case as to whether the Act applies to the activity duty. However, s 1(3)(a) states that the Act applies to fixed and movable structures, and this could include a rowing boat. Bertram might be well advised to bring his action in the alternative, under the Act and in common law negligence.

What effect would the term on the ticket have? It attempts to exclude liability. Would the Unfair Contract Terms Act 1977 apply? This would depend on an interpretation of s 1(3). Are the premises being used for business purposes? If they are then the Act will apply. Under s 2(1) liability for death or personal injuries caused by negligence cannot be excluded. The notice does not appear to operate as a warning and neither could it raise the defence of *volenti non fit injuria*. (Unfair Contract Terms Act 1977 s 2(3).)

As Bertram is owed a duty of care, the Trust would appear to be in breach of duty by failing to maintain the boat, and Bertram has suffered damage as a result. Bertram would appear to have an action.

Clarence is also a visitor to the premises and is owed the common duty of care. Section 2(3)(a) of the 1957 Act provides that where a person enters in the exercise of his calling, the occupier may expect that that person will appreciate and guard against risks which are ordinarily incident to that calling. (*Roles v Nathan (1963)* and *General Cleaning Contractors v Christmas (1953)*. However, the fact that a person has a specific skill will not absolve an occupier who has not
exercised a sufficient degree of care. \textit{(Ogwo v Taylor (1988))}. Liability in this case would depend on why the cooker exploded. If Clarence had lit a cigarette and that caused the explosion, then the Trust would be under no liability. But if Clarence had exercised reasonable care, the court would have to decide whether the Trust was at fault.

Dick is a trespasser and any duty owed would be under the 1984 Act. The fact that the relationship of occupier–trespasser is established does not establish a duty of care. It is necessary to pass the threshold of s 1(1) \textit{(Keown v Coventry Healthcare NHS Trust (2006))} and apply s 1(3) of the Act. The Act will apply in respect of any risk of their suffering 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 \textit{(s 1(1)(a))}. s 1(3), which states:

An occupier of premises owes a duty to another (not being his visitor) in respect of any such risk as is referred to in subsection (1) if:

(a) he is aware of the danger or has reasonable grounds to believe it exists;
(b) he knows or has reasonable grounds to believe that the other is in the vicinity of the danger concerned or that he may come into the vicinity of the danger (in either case whether the other has lawful authority for being in that vicinity or not); and
(c) the risk is one against which, in all the circumstances of the case, he may reasonably be expected to offer the other some protection.

If the claimant satisfies these three requirements then a duty will be owed.

If a duty is owed, the court would have to determine whether there had been a breach. The standard of care is the usual negligence one of reasonable care \textit{(s 1(4))}.

Would the notice displayed next to the berries suffice as a warning within s 1(5)? This would appear to depend upon the age of the trespasser. If a duty had been held to be owed to Dick then the occupier had cause to appreciate the presence of the child and the premises would have to be reasonably safe for a child trespasser and an obstacle to entry erected. Although the case is similar on the facts to \textit{Glasgow Corp v Taylor (1922)}, the approach on the statute might be different from the old common law approach. What may be important is how Dick got into the park and whether reasonable steps were taken to prevent this.

**Question 3**

There are three types of nuisance: public, private and statutory. Although the same conduct by the defendant may give rise to liability in any of these. Public nuisance is primarily a criminal offence, but may give rise to an action in tort where the claimant has suffered special damage- ‘one which materially affects the reasonable comfort and convenience of life of a class of Her Majesty’s subjects’ In order to sue in the tort of public nuisance, the claimant must prove that they suffered special damage. For this purpose, special damage means damage over and above that suffered by the class of persons affected. Private nuisance is a tort which deals with disputes between adjacent landowners. It involves drawing a balance between the right of one person to use their land in whatever way they wish and the right of their neighbour not to be interfered with. Private nuisance is an unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with it.
Parties to the action:

For private nuisance the claimant must have an interest in the land. (Hunter v Canary Wharf (1997)) For public nuisance there must be special damage to the claimant. (AG v PYA Quarries (1957)).

Requirements of private nuisance:

The claimant must establish that the defendant has caused a substantial interference with their use or enjoyment of their land. No account is taken of trivialities. The interference may take a number of forms but some of the commonest are; physical damage to the claimant’s land; substantial interference with enjoyment of land through smells, vibrations, noise, dust and other emissions; encroachment onto land by roots or branches.

Whether the interference amounts to a nuisance is a question for the court. Normally this will be determined by applying a reasonableness test, but where the interference causes material damage to the claimant’s land, the defendant will be liable unless the claimant is over-sensitive or one of the defences to nuisance applies. (St Helens Smelting Co v Tipping (1865)).

Where the interference causes sensible personal discomfort the court will apply a reasonableness test to determine whether it amounts to a nuisance. A number of factors may be taken into account, either in isolation or in conjunction to determine whether the defendant’s conduct was reasonable.

These factors include: the locality; the duration of the nuisance; the sensitivity of the claimant’s property; any malice on the part of the defendant.

Ishmael

Must prove that there was an interference with his use and enjoyment of land. The court will take the following factors into account; the locality; the duration of the interference; sensitivity of the claimant’s interest; any malice; public utility is not generally a factor in determining whether a nuisance has been committed but it may be in relation to the remedy. (McKinnon and Walker (1951)). The defendant’s factory emitted sulphur dioxide which damaged the plaintiff's commercially grown orchids. As the interference would have damaged non-sensitive plants, the plaintiff was able to recover the full extent of the loss, including the damage to the sensitive orchids.

Who can the action be brought against?

Alan may be sued as the creator of the nuisance and/or the occupier. Ersatz as landlords are prima facie not liable unless they come within one of the exceptions. The most likely exception is if they are taken to have authorised the nuisance (Southwark v Mills (1999)) The question of sensitive user arises in the case of the tapestry. (Hunter v Canary Wharf (1997)) If the damage is due more to the sensitivity of the claimant’s property than to the defendant’s conduct then no nuisance is committed.

There is no issue of sensitivity in the case of the plasterwork so the hotel should be able to recover for this. As non-sensitive property has been damaged it is likely that the tapestry could be recovered for. In Mckinnon v Walker (1951). The defendant’s factory emitted sulphur dioxide which damaged the plaintiff’s commercially grown orchids. As the interference would have damaged non-sensitive plants, the plaintiff was able to recover the full extent of the loss, including the damage to the sensitive orchids.
It is no defence that all reasonable steps were taken.

The loss of profits are pure economic loss. These may be difficult to recover in private nuisance following Hunter (1997) but might be able to be claimed in public nuisance as special damage over and above that suffered by the class. Economic loss has been recovered where the highway was obstructed and business losses incurred. (Fritz v Hobson (1880); Benjamin v Storr (1874).

The hotel guests have no action in private nuisance as they have no interest in the land. (Hunter (1997)). They can sue in public nuisance if they have suffered special damage over and above the class of persons affected.

The restaurant
May have an action in public nuisance – special damage, which can include pure economic loss. The nuisance appears to have affected a class. In Castle v St Augustine’s Links (1922). The plaintiff car driver was struck by a golf ball hit from the thirteenth tee of the defendants’ golf course as he was driving on the highway. Balls frequently went over the highway. The siting of the tee amounted to a nuisance. The class of persons affected were highway users. The plaintiff had suffered special damage, so the defendants were liable in public nuisance.

They may also have an action in private nuisance if affected by the noise/vibration.

The remedies would be damages and possibly an injunction.

**Question 4**

This question is concerned with the tort of trespass to the person, specifically assault, battery and false imprisonment.

(a) A battery is the direct and intentional application of force to another person without that person’s consent. The application of the force must be voluntary and intentional.

An assault is an act which causes another person to apprehend the infliction of immediate, unlawful force on his person. (Collins v Wilcock (1984)).

The torts of assault and battery normally go together. If a person waves their fist, this is an assault. If the blow is struck, that is a battery. If the claimant is unaware of the impending blow, for example, if they are struck from behind or are unconscious, then battery only is committed.

For assault to be committed, the claimant must be in reasonable apprehension of an immediate battery. The test for reasonable apprehension is an objective one. If the defendant does not have the means to carry out the threat, then no assault is committed.

False imprisonment is the unlawful imposition of constraint on another’s freedom of movement from a particular place.

The tort does not require incarceration as such and can be committed by any unlawful detention. Forcing a person to remain in a field by threatening them with a gun would be false imprisonment.

Gary’s attack on Alex is prima facie an assault and a battery. A battery is the direct and intentional application of force to another person without that person’s
consent. The application of the force must be voluntary and intentional. This will be committed when Gary knocks her to the ground and kicks her. An assault is an act which causes another person to apprehend the infliction of immediate, unlawful force on his person. This would be committed when Gary chases her. A defence of self defence of person or property would probably fail as only reasonable force may be used and this appears to be clearly excessive force. (Lane v Holloway (1968)). The burden of proof in self-defence in civil proceedings is on the defendant. What amounts to self-defence will be a question of fact in each case but the basic principle is that the force used must be reasonable in proportion to the attack. Mistake is not generally a defence in a tort action as a mistake as to law or fact will not usually exclude a defendant from liability. (Ashley v Chief Constable of Sussex Police (2008)). The courts will not usually accept a defence of necessity. (Southwark v London Borough Council (1971)).

(b) When Alex pursues Gary out of the wine bar this may be an assault. It will depend on whether Gary is in immediate apprehension of being hit.

When Alex blocks Gary in the car this could be false imprisonment. The restraint must be total (Bird v Jones (1845)). False imprisonment is the unlawful imposition of constraint on another’s freedom of movement from a particular place.

The tort does not require incarceration as such and can be committed by any unlawful detention. If a person has a reasonable means of escape, the tort will not be committed. But if the means of escape involves any danger, it is not reasonable to expect a person to take it. If the door to a room is locked but there is an open french window at ground level, this would not be false imprisonment. But it would not be reasonable to expect a person to climb from a second-floor window. As the car is only three inches from a wall this could mean it is false imprisonment unless Gary could have exited the car by the other door.

Shouting at Gary through the car window could be an assault if it would have been practicable to carry out a battery. (Thomas v NUM (1985)). The test for reasonable apprehension is an objective one. If the defendant does not have the means to carry out the threat, then no assault is committed.

When Gary is pushed this is prima facie a battery and there would appear to be no justification. Hostile intent may be required. (Wilson v Pringle (1986)). However subsequent decisions seem to have ignored the requirement of hostile intent.

The only defences available to Alex would appear to be self-defence, (of property) mistake and necessity. The question is whether Alex used reasonable force in attempting to recover what she mistakenly considered her own property. For civil law purposes, an excuse of self-defence based on non-existent facts that were honestly but unreasonably believed to exist has to fail. The belief had to have been reasonably held, and it might be that even that would not suffice to establish the defence. (Ashley v Chief Constable of Sussex Police (2008)).