LEVEL 6 - UNIT 13 – LAW OF TORT
SUGGESTED ANSWERS - JUNE 2011

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 June 2011 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

(a)

Students were asked to critically analyse the fault based system of accident compensation and to put forward the arguments for reform.

The main object of an action in tort is to compensate the victim of an accident who has suffered damage, and the type of damage primarily suffered by the victim is personal injury for which monetary compensation is sought. In order to establish liability, an expensive court action must be brought and if the claimant is successful, the loss will be borne by the defendant. However court proceedings are invariably complex and technical and this liability based system has been criticised as being expensive and inefficient. However the compensation culture means people are keen to put the legal responsibility for accidents onto somebody else in the hope that damages will be paid by that other person or by their insurance company. One of the findings of the government’s Better Regulation Task Force investigation in their report Better Routes to Redress (2004) was that the ‘compensation culture is a myth, but the cost of this is very real’. The danger of the compensation culture is not the possibility of huge payouts but the perception of entitlement to be compensated for loss or injury.

Moreover the complex, time consuming and procedure driven process will invariably put pressure on the claimant to settle and it may well result in lower damages being paid out than if the case had been litigated in the court. Normally the payment of damages will be by way of a lump sum, rather than payment on a weekly or monthly basis and is generally not dependent on an individual’s financial circumstances (unlike most state benefits which are means tested). Thus changed circumstances would be ignored. However provisional damages may be awarded where there is a known chance that the claimant’s health may
suffer a serious deterioration. The provisional award allows the claimant to return to the court (once only) if the deterioration should occur. Since 2005 a court must always consider whether periodical payments are appropriate, where annual instalments are paid on the basis of a calculation of the claimant’s anticipated yearly requirements payable for the rest of the claimant’s life.

An alternative might be a state-owned accident compensation scheme as in operation in New Zealand where the no fault accident compensation scheme has been in operation since 1974. It covers most physical injuries caused by an accident, a condition that occurs gradually as a result of work, medical treatment or sexual assault or abuse. It is even available to NZ nationals who have an accident abroad provided they have not been away from NZ for the last six months. It is funded by taxation including a tax on petrol and taxes levied on employers and workers.

A mixed model of tort and social security was suggested with a separate scheme for road accident victims by the Pearson Commission Report in 1978 but came to nothing as a result of lack of political will and unfortunate timing. A change of government to the Conservative Party meant an emphasis being placed on individual rather than state funded schemes.

Statutory intervention is also relevant in this area. S. 1 Compensation Act 2006 requires a court to carefully consider the impact that decisions about negligence liability might have in potentially deterring an organisation from carrying out certain types of activities.

NHS Redress Act 2006 – provides for medical negligence cases where compensation has a maximum limit of £20,000, there will also be an explanation and an apology and details of any action that will be taken to prevent any future cases.

(b)

The Human Rights Act 1998 (HRA 1998) incorporated the European Convention on Human Rights (ECHR) into UK law. Consequently statute and case law must be interpreted and applied in a sense that is compatible with Convention rights and so many of the provisions of the ECHR are potentially subject to litigation in the UK courts. Moreover s4 HRA 1998 allows a higher court to make a declaration that it is not possible to construe a provision in domestic legislation in accordance with an ECHR right. A minister may then make fast track amendments to the legislation under s10 HRA 1998 so avoiding full parliamentary debate and process. Since the courts are public authorities, proceedings must be held in a manner consistent with ECHR and consequently any case law will be inevitably influenced by the ECHR.

S1 HRA 1998 limits the ECHR rights created by HRA 1998 to those contained in the relevant articles of ECHR. S7 allows a victim of a breach of ECHR to bring an action against a public authority. It would seem no HRA claims can be made against private individuals in tort law. Also where a body is acting on behalf of a public authority as was the case of a private nursing home providing support that would otherwise have been undertaken by the local authority as in YL v Birmingham City Council [2007], the House of Lords held by 3:2 majority that the care home was not exercising functions of a public nature to bring it within the remit of HRA 1998. This case was distinguished in R (on application of Weaver) v London & Quadrant Housing Trust [2009]. Here the defendant Housing Association was reliant on public funding, had charitable objectives and
worked with the local authorities to implement Government initiatives for social housing. The claimant brought an action under Art 8 and though she failed in her action the Housing Trust was recognised as a public authority.

Appropriate examples of Human Rights Act 1998

Art 8 right to a private life has been the subject of much debate with the laws of libel and malicious falsehood being deemed inappropriate to protect Gordon Kaye from intrusions into his private life whilst in hospital Kaye v Robertson [1991]. In Douglas v Hello [2003] the House of Lords rejected the argument that there is a right to privacy as such in English law and this view was repeated in Wainwright & Another v Home Office [2003] with the caveat that provided English law allowed a remedy where there was a breach of Art 8, in this case for breach of confidence and battery, that was sufficient. In Naomi Campbell v Mirror Group Newspapers [2004] the tort of misuse of confidential information was established allowing photographs and additional information about the model’s visits to narcotics anonymous to be kept private and Campbell was entitled to a remedy. Similarly in Murray (by his litigation friend) Express v Express Newspapers plc [2008], J.K. Rowling’s son was held by the Court of Appeal to have a legitimate expectation that his privacy would be protected, even though he was in a public place when his photograph was taken. His mother had always closely guarded his privacy and not allowed him to be exposed to the media. It is doubtful whether she might have been afforded the same protection.

In defamation actions there is invariably a tension between Art 10 freedom of expression and situations such as unintentional defamation as demonstrated by O’Shea v MGN [2001] also Reynolds v Times Newspapers [2001] a leading case on qualified privilege and investigative journalism.

Article 8 has also been relevant in a recent nuisance claim Dennis v Ministry of Defence [2003] where damages were awarded for a nuisance caused by Harrier jets flying at low altitude over the claimant’s property.

Whereas an injunction would be the more appropriate remedy so preventing or limiting the nuisance, damages may be awarded where the defendant demonstrates that what may be a nuisance to one person has broader benefit for society.

Dobson v Thames Water Utilities [2009] discussed the relationship between damages in private nuisance and damages claimed under Article 8 of the European Convention on Human Rights 1950 pursuant to the Human Rights Act 1998. The case involved a group action against a sewerage undertaker for odours and mosquitoes emanating from a sewage treatment works. The claim was brought by two different categories of claimants: those who occupied property in the vicinity of the sewage works, either as owners or lessees, and those who occupied nearby premises without any legal interest in the properties. Furthermore, in a case such as this, the damages recovered in nuisance by those with a legal interest in the property might be relevant in considering the quantum of damages recoverable under the Human Rights Act by a person who lived in the same household but who could not assert a claim in nuisance because of the lack of a legal interest in the land. Thus, as in this case, the amount recovered by parents in nuisance might be relevant to any damages due to a child living with those parents under the Human Rights Act. However, the extent to which any adjustments might need to be made on these facts would have to be addressed at trial.
Article 2 right to life is implicated in the medical negligence area particularly in relation to the withdrawal of food and water to patients in a persistent vegetative state as in *NHS Trust A v M* and *NHS Trust B v H* [2001].

Other areas that might be considered are Article 6 and right to a fair trial, Article 10 and cyber defamation *Loutchansky v Times Newspapers* [2002], European jurisprudence on rights of privacy and Article 5 right to liberty and false imprisonment.

**Question 2**

Students were asked to identify and critically analyse the criteria used by the courts to determine whether a defendant is in breach of the duty of care owed by a claimant in a tort action.

Breach of duty is at the crux of any negligence action as it determines whether the defendant is at fault relevant to the standard required by the law. To establish that a defendant has breached the duty of care, two aspects have to be proven, firstly that the defendant failed to reach the appropriate legal standard required. This is established by considering the relevant statutes and common law to determine how the defendant ought to have behaved. Secondly whether as a matter of fact the defendant’s actions fell below the required standard and this is established by examining what actually happened in the case.

The general standard of care is objective. In *Blyth v Birmingham Waterworks* [1856] Alderson B. described the standard of the reasonable man thus: ‘Negligence is the omission to do something a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or something which a prudent or reasonable man would not do’ The reasonable man has been described variously as the man on the Clapham omnibus (*Hall v Brooklands Auto Racing Club* [1933]) and commuters on the London Underground (*McFarlane v Tayside Health Authority* [1999]).

Since an objective test is used by the courts, no account is taken of individual disabilities or peculiarities. Consequently a learner driver is judged against the same standard as a reasonably prudent qualified driver – (*Nettleship v Weston* [1971]. In *Roberts v Ramsbottom* [1980] a 73 year old man was liable when he continued to drive his car causing three accidents despite symptoms indicating he had had a stroke. This case was distinguished in *Mansfield v Weetabix* [1998] where the driver was unaware of his rarer medical condition impairing his ability to drive. The Court of Appeal agreed that to find this defendant in breach of his duty here would amount to imposing strict liability. Mansfield was applied in *Taylor v Tanner* [2004].

Where a defendant holds himself out as possessing a particular skill, he will need to reach the standard of care of the reasonable practitioner of the skill he is claiming to have. The cases have covered situations including a jeweller piercing ears (*Phillips v Whiteley* [1938]), a do it yourself enthusiast fixing a door handle (*Wells v Cooper* [1958]).

Medical negligence cases based on the Bolam Test (*Bolam v Friern Barnet Management Committee* [1977]) stated that a doctor will not be liable for breach of duty if he has acted in accordance with recognised medical practice recognised by a responsible body of doctors. *Bolotho v City & Hackney Health Authority* [1977] required that the professional expert opinion should have a logical basis.
Though it was accepted a judicial finding that the views of a professional body were illogical would be very rare. An error of judgement may be negligence if it is not supported by a body of evidence (Whitehouse v Jordan [1981], and inexperience is no defence for a junior doctor who may reach the required standard by seeking advice from a more experienced colleague, as in Wilsher v Essex Area Health Authority [1987].

There is a subjective element to the reasonable man test relating to the particular circumstances the defendant finds himself as in Glasgow Corporation v Muir [1943] and the reasonable person must have foreseen damage as likely to occur in the particular circumstances. (Roe v Minister of Health [1954]). Other cases involving sportsmen include a late and dangerous tackle in Condon v Bassi [1985] held to be a breach of duty, but a different decision was reached in Pitcher v Huddersfield Town Football Club [2001] in relation to a mistimed tackle. Other cases involving sportsmen are Caldwell v Maquire and Fitzgerald [2002], Smolden v Whitworth [1977] and Vowles v Evans [2003].

Other cases involve pupils suing their schools for accidents on school trips and on school premises. Chittock v Woodridge School [2003], Simonds v Isle of Wight Council [2003] and Bradford –Smart v West Sussex County Council [2002].

A lower standard is expected of children and the standard required is that of a reasonable child of the same age. So in Mullins v Richards [1998], where 15 year olds were playing a game with plastic rulers, the Court of Appeal unanimously held there was no lack of reasonable care and a similar conclusion was reached in O v L [2009] where a game of tag in a school playground led to a collision.

The factual standard is determined by the use of various factors to determine whether the defendant’s actual behaviour reached the required standard. These factors are as follows:

The likelihood that damage will occur, meaning the greater the risk of damage, the more care that needs to be taken. Bolton v Stone [1951]. The severity of the possible outcome, so that the greater the injury that is risked the greater precautions that will be required. – Paris v Stepney Borough Council [1951]; Fowles v Bedfordshire County Council [1995]. The importance of the defendants purpose meaning that the court may balance the risk of injury against the importance of the object to be achieved, Watt v Hertfordshire County Council [1954] King v Sussex Ambulance NHS Trust [2002] and Day v High Performance Sport [2003]. Another factor is the practicality of taking precautions against the risk – Latimer v AEC [1953] and Knight v Home Office [1990].

Conformity with accepted practice may be sufficient to fulfil the standard of reasonable care. So in Luxemoore - May v Messanger May Bavestock (a firm) [1990], the test for an auctioneer doing a valuation was that of honesty and due diligence. So an alternative practitioner unaware of the dangers of herbal medicine was not liable for breach of duty when one of his patients died of liver failure Shakoor v Situ [2000].

Another issue relating to breach of duty of care relates to proof of negligence and the burden of proof normally lies with the claimant. In circumstances where it is difficult or impossible to show the exact circumstances of how an accident occurred, the doctrine of res ipsa loquitur can be used as an evidential tool whereby the burden of proof shifts and the defendant has to adduce evidence to show the accident could not have happened without negligence.
In order to establish *res ipsa loquitur* the claimant must prove that the thing causing the damage or the event must have been under the defendant’s exclusive control. *Scott v London and St Katherine’s Docks* [1865] and the accident was of a type that does not happen in the absence of negligence. *Hall v Holker Estate Ltd.* [2008]. For the effect of *res ipsa loquitur* see the cases of *George v Eagle Air Services* [2009] and *Ng Chun Pui v Lee Chuen Tat* [1998].

**Question 3**

Students were asked to critically examine the special limitations placed on secondary victims and whether those limitations should be retained.

In the 19th century it was decided that, as a matter of public policy, claims in negligence for psychological harm did not provide grounds for compensation: see *Victorian Railways v Coultas* (1888). In *Wilkinson v Downton* [1897] Wright J recognised liability for psychological harm that was deliberately induced.

In *Dulieu v White* [1901] it was held that an action for psychiatric harm was sustainable in negligence provided the harm resulted from the claimant being put in reasonable fear for her own physical safety. This kind of victim is now referred to as a ‘primary victim’. The approach taken in *Dulieu v White* was approved when the issue of nervous shock first came before the House of Lords in *Bourhill v Young* [1943].

In *Page v Smith* [1995] a majority of the House of Lords held that a duty of care was established by demonstrating the reasonable foreseeability of physical damage to the plaintiff. In such cases psychological damage was contained within the definition of physical.

*Bourhill v Young* [1943] was however concerned not with primary victims but with psychological harm resulting from the witnessing of physical harm to others (i.e. with secondary victims) In *Bourhill* the plaintiff was descending from a tram when she heard an accident that was caused by a motorcyclist’s negligent riding. The plaintiff later saw blood on the road. She suffered nervous shock. Their Lordships took a narrow view of the action and introduced factors that limited the number of potential claimants and had a considerable influence on the development of the action.

Per Lord Thankerton the duty of the motorcyclist was to ride the vehicle with reasonable care so as to avoid harming those he could reasonably foresee would be harmed by his failure to exercise reasonable care. In order for a duty of care to arise the plaintiff needed to be within the contemplated zone of danger. The plaintiff in this case was not.

The action based on psychiatric harm suffered as a result of witnessing harm to others was subsequently recognised on piecemeal basis. Where other factors were present (or it was possible to identify other ways of limiting potential claimants) a duty was recognised. For example, in *Chadwick v British Transport Commission* [1967] the defendants were found liable in respect of psychological harm suffered by a rescuer. In *Dooley v Cammell Laird & Co Ltd* [1951] an employer was held to owe a duty of care to his employee in circumstances in which the employee believed that fellow employees were to suffer serious physical harm: the duty of care arising in this instance as an implied term of the contract of employment.
Psychological damage suffered as a result of witnessing harm to others with one’s own senses was subsequently recognised (certainly where there was a close family relationship): see, for example, *Hinz v Berry* [1970].

This was extended to include situations in which the plaintiff experienced the ‘aftermath’ of traumatic events. In *McLoughlin v O’Audrey* [1983] Mrs McLoughlin did not witness the actual traffic accident that caused the death of one of her children and injury to other family members. She was, however, physically proximate to the scene of the accident (two miles away); she was told of the accident by a person who witnessed it and she experienced the aftermath when she visited the hospital and saw its impact upon her husband and children an hour or so after the event. She was successful in her claim for damages for the psychiatric harm she suffered as a consequence of the defendant’s negligent driving.

The House of Lords held that the nervous shock suffered by Mrs McLoughlin was a reasonably foreseeable consequence of the defendant’s negligence. Per Lord Scarman: ‘Space, time, distance, the nature of the injuries sustained and the relationship of the plaintiff to the immediate victim are factors to be weighed, but not legal limitations, when the test of reasonable foreseeability is being applied.’

The House of Lords took a different approach when it considered the issue in *Alcock v Chief Constable of South Yorkshire* [1992]. In *Alcock*, actions were brought by sixteen plaintiffs, who had experienced the death or suffering of football spectators at the Hillsborough Stadium disaster, by way of radio or television broadcasts. Fifteen of the plaintiffs were relatives of victims. The sixteenth was a fiancé of a victim. Their Lordships held that two tests were to be applied. The first was that the psychiatric harm suffered by the claimant must be reasonably foreseeable: this was satisfied by the claimant demonstrating a close relationship of love and affection (that was not restricted to family ties only). The second test was that of proximity in time and space. This was not satisfied in situations in which the claimant was told of the event by a third person. The claimants in *Alcock* consequently failed.

The special limitations as applied to secondary victims in psychiatric cases are firstly the condition must be a medically recognised condition. These include *Chadwick v BRB* [1967] personality disorder is a recognised condition; *Bourhill v Young* [1942] miscarriage is a recognised condition. *Vernon v Bosely* [1997] simple grief is not a recognised condition however pathological grief is. *Leach v Constable of Gloucestershire Constabulary* [1999] stated that post traumatic stress disorder is a medically recognised condition but distress is not as in *Kralj v McGrath* [1986].

The next condition is that the psychiatric injury must be caused by a sudden event and as in earlier cases, *Alcock* was concerned with harm brought about by a sudden and shocking event. Judicial attitudes to what constitutes such a shock appear to be changing: (e.g.) in *Walters v North Glamorgan NHS Trust* [2002] a doctor’s negligent diagnosis led to a child dying 36 hours later. His mother recovered damages on the basis that the event in question spanned 36 hours, beginning with the negligent infliction of damage and extending to a “dreadful climax” (i.e. the child’s death’). However in *Ward v Teaching Hospital* [2004] the death of a loved one in hospital where the claimant was regularly updated with the patient’s condition could not constitute a shock.

The next limitation is that it must be foreseeable that a person of normal fortitude would suffer illness in the claimant’s position. The distinction between
primary and secondary victims was explained in Page v Smith [1995], and whereas the primary victim who was in the danger zone and could have been hurt may claim for their psychiatric illness without satisfying further criteria, secondary victims must satisfy the criteria set out in Alcock, the first one being they must have a close tie of love and affection between the claimant and the primary victim of the defendant’s negligence. These relationships will be presumed to exist between a husband and wife and parents and children, but those in other relationships will have to convince the court. Lord Keith specifically referred to family relationships and engaged couples and his view was supported by Lord Ackner and Lord Oliver.

The next test from Alcock is that there must be proximity in time and space to the incident. In McLoughlin v O’Brien the claimant saw the victims one hour after the accident and was able to claim, whereas in the Alcock case claimants who did not see the victims until eight hours later failed in their claims.

The final Alcock test is the means by which the shock is caused, namely that the secondary victim must see or hear the event with their own unaided senses. Lord Ackner and Lord Oliver agreed with Nolan LJ who in the Court of Appeal had said there may be exceptional circumstances where perception of the event on a simultaneous live broadcast may satisfy the direct perception requirement. The example given was of parents watching a live broadcast of their children travelling in a hot air balloon which bursts into flames as they watched. Other cases involving being told of the event by a third party include Hunter v British Coal [1998] where the claimant could not recover as he was told of the events by a colleague, Ravenscroft v Reederaktiebolaget Transatlantic [1992] where a mother could not claim as she was told of the incident on the telephone, Hambrook v Stokes [1925] where the mother could claim as she heard the accident and genuinely feared for her childrens’ safety and Boardman v Sanderson [1964] in which a mother was allowed to recover as she heard the incident and saw it immediately afterwards.

The Law Commission Report recommended that the position of primary victims should be left to the courts to determine however legislation was proposed to deal with the following issues. Firstly the requirement for a sudden shock should be removed, so allowing claims from claimants whose condition has developed over time. Also the second and third of the Alcock criteria would no longer be required so secondary victims could claim even if they were not near to the event or its immediate aftermath and did not perceive it with their own unaided senses. The Report recommended that close ties of love and affection would be maintained as a condition for liability, however the relationships with those ties would be expanded. This would include spouses, parents, children, siblings and cohabitants of at least two years. It should be noted these proposals have not been acted upon leaving this area of law ‘… on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify’, per Lord Steyn in White v Chief Constable of South Yorkshire Police [1999].

Students are expected to take a view on whether these limitations should be maintained mentioning the general difficulties relating to proof of psychiatric damage and spurious claims generally and the floodgates argument.
Question 4

Students were asked to comment on recent developments in the rule in Rylands v Fletcher and whether the rule adds anything to existing law.

The rule comes from Blackburn J’s statement in the case that ‘...a person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape’. The defendant will be the owner or occupier of land or whoever collects and stores the substance that escapes. It would seem the claimant needs to have an interest in land and in Transco plc v Stockport Metropolitan Borough Council [2004] it was stated that damages for personal injuries are not recoverable under the rule.

Examining the elements it is seen that there must be a deliberate accumulation so sewage was within the rule in Smeaton v Ilford Corporation [1954], but thistle down was not a non natural use in Giles v Walker [1890]. Something likely to do mischief if it escapes has included water in Rylands v Fletcher itself, fire in Jones v Festiniog Railways, gas in Batchelor v Tunbridge Wells Gas Co [1901] and electricity in Hillier v Air Ministry [1962]. The rule has also included an escape of chemicals, explosions, fumes, flagpoles, fairground roundabouts and even gypsies.

There must be an escape of a dangerous thing from the defendant’s land which was not the case in Read v J Lyons and Co Ltd [1947] where the explosion took place in the munitions factory itself. In Environment Agency (formerly National Rivers Authority) v Empress Cars Co [1998] there was a discussion of the meaning of an escape. The use of the land must be non natural, which in Rylands v Fletcher was applied to a reservoir as a reaction to an accident involving another reservoir which had burst causing many to lose their lives. In Read v Lyons [1947] Lord Porter made the point that ‘what may be regarded as non natural may vary according to the circumstances’. So in Musgrove v Pandelis [1919] a car in a garage with petrol in its tank was considered non natural in the early 20th century where cars were an unusual form of transport. A munitions factory was considered to be a non – natural use in Rainham Chemical Works v Belvedere Fish Guano Co Ltd [1921] but this was later doubted in Read v Lyons (supra).

In Cambridge Water v Eastern Counties leather [1994] Lord Goff considered the storage of powerful chemicals in drums for use in the tanning process and rejected the argument that despite providing employment and being of benefit to the local community storage of large quantities of chemicals on industrial premises is a standard case of non natural use.

It is important to note that after Cambridge Water Case it would seem that foreseeability of an escape of the thing accumulated is a requirement so diluting the strict liability aspect of Rylands v Fletcher, however it is arguable that it is foreseeability of the damage that is required rather than foreseeability of the escape that is required.

The defences to an action under Rylands v Fletcher include the consent of the claimant to the activity which created the risk, act of an unknown third party, default of the claimant or contributory negligence, Act of God and statutory authority.
Consideration of whether Rylands v Fletcher adds anything to the law.

In the Cambridge Water case Lord Goff considered that Rylands v Fletcher should be considered as ‘essentially an extension of the law of nuisance to deal with isolated escapes from land’. In Transco the House of Lords agreed that Rylands v Fletcher should be considered as a sub species of nuisance and should not be discarded and absorbed into the law of negligence as in Scotland and Australia.

It was stated that it is important to retain a small category of cases where liability is strict although statutory regulation had been put in place for high risk activities so as such the rule will be limited in its scope. As such it is important to retain a small category of case where liability is strict. As such statutory imposition of strict liability in many hazardous situations is based on this rule and to abolish the rule would destabilise the regime. The House of Lords also clarified that only those with rights in land could sue, so following the line taking in private nuisance, following Hunter v Canary Wharf, that no action for personal injury could be brought under Rylands v Fletcher.

It can be therefore seen as a sub species of nuisance and as a sub species of negligence. It does add to the law of nuisance in that it has defined elements, whereas in nuisance guidelines exist to determine if the interference is unreasonable. Similarly an isolated event could found an action in Ryland v Fletcher but not in nuisance. Nuisance does not cover interference with purely recreational matters, Bridlington Relay v Yorkshire Electricity now doubted in Hunter v Canary Wharf [1997]. Also the rule governs an isolated event caused by an independent contractor which would not generally be covered by nuisance or rarely by negligence.

In conclusion it would seem that the scope of Rylands v Fletcher has been severely restricted and in other jurisdictions absorbed by negligence. The rule is now severely limited in scope and application, designed to deal with the effects of mass industrialisation in the late nineteenth and early twentieth century. Now in the twenty first century it may be more of historical interest than of practical application.

SECTION B

Question 1

(a)

Possible Liability to Audrey

Audrey has suffered personal injury as a result of the condition of land owned and occupied by Westford County Council. In Ogwo v Taylor [1988] it was said that where the claim was based upon the state of premises the proper cause of action was under the Occupiers’ Liability Act 1957 (which provides for liability to lawful visitors); where the claim was based upon an activity that was permitted on the premises the appropriate cause of action was in common law negligence. By extension, where the claim is brought by a trespasser the proper cause of action is under the Occupiers’ Liability Act 1984 (which provides for liability to ‘non-visitors’).

In Donoghue v Folkstone Properties [2003] and Tomlinson v Congleton BC [2003], it was held that adequate notice was sufficient to terminate any implied licence and render a person a trespasser. So once Audrey took a short cut
through the roped off area, her claim therefore falls to be considered under the 1984 Act.

Section 1 of the 1984 Act indicates that the person owing a duty under the Act is the same as under the 1957 Act. As in the 1957 Act ‘occupier’ is not defined and the common law test set out in *Wheat v Lacon* [1966] should be employed. The test for occupier is the control test.

The duty arises only where the criteria set out in s1(3) are satisfied. They are that the occupier owes a duty to a non-visitor if (a) he is aware of the danger or has reasonable grounds to believe that it exists; (b) knows or has reasonable grounds to believe that the other is in the vicinity of the danger; and (c) the risk is one against which, in all the circumstances, he may reasonably be expected to offer some protection.

Section 1(1) (a) provides that the Act determines liability for injuries on premises ‘... 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.’

Audrey must therefore show that, as a matter of fact, WDC had sufficient control of the premises to constitute it an occupier and that the section 1(3) criteria were satisfied. Section 1(3)(a) and (b) turn on the knowledge of the occupier. In *Ratcliffe v McConnell* [1999] Stuart-Smith LJ drew upon Lord Diplock’s speech in *Herrington v British Railways Board* [1972] and indicated that the knowledge required to satisfy s1(3)(a) is actual knowledge (i.e. subjective) and that for s1(3)(b) is objective (that is, what would a reasonable person have concluded). WDC’s failure to appreciate the presence of Audrey will not allow it to escape liability. Here the fact that part of the arena was unfinished and in a dangerous state with notices being erected would satisfy s1(3) (a) and (b).

The question of breach may be taken in two stages: first has WDC created or permitted a danger to arise ‘due to that state of the premises or to things done or omitted to be done on them (s1(1) (a); second, has WDC ‘taken such care as is reasonable in all the circumstances of the case to see that [Audrey] does not suffer injury by reason of the danger concerned’ (s1(4)). WDC has allowed or permitted a danger to arise in the form of incomplete building work in an area to which the public have some access; the notice is inadequate in that it is not sufficiently clear under s1(5) and it may be argued that the reasonable Council may have delayed the opening until all the building work was finished or found a more effective way of preventing access to the dangerous part of the stadium. This may have been by posting of security guards at this entrance or blocking it off more securely.

Under the OLA 1984 damages are recoverable for personal injury only but not for damage to property.

Audrey has an arguable but not particularly strong prima facie case.

**Possible Liability to Callum**

There is no mention of any injury to Callum, however on the basis he has been injured it is arguable that any personal injury suffered by Callum was caused by the state of the premises occupied by WDC. One of the Occupiers’ Liability Acts (1957 or 1984) therefore offers the appropriate cause of action.
As a child the court consequently may be prepared to treat Callum as a lawful visitor if he is treated as a lawful visitor the appropriate Act is the Occupiers’ Liability Act 1957.

The duty owed under the 1957 Act is the common duty of care. It is a duty to ‘... take such care as in all the circumstances of the case are reasonable to see that the visitor will be reasonably safe in using the premises for which he is invited or permitted to be there’ (s2(2)).

Section 2(3)(a) of the 1957 Act provides that ‘an occupier must be prepared for children to be less careful than adults.’ In *Liddle v Yorkshire (North Riding) County Council* [1934] it was held that where the risk of falling off a wall was obvious even to the seven-year-old who was injured, there was no breach. Callum, is six years old and the tools may constitute an allurement as in *Glasgow Corporation v Taylor*.

In *Phipps v Rochester Corporation* [1955] Devlin J took the view that, in cases involving children of tender years, reasonable parents do not allow their children to be sent into danger without proper protection and the occupier could rely upon the parent to behave reasonably. Callum therefore seems to have a strong arguable claim against WDC.

There is also the question of the liability of the subcontractors in relation to the tools left under the seat. This may be dealt with under common law negligence or under 2[4][b] the occupier may not be liable if liability can be passed to an independent contractor whose negligence may have caused the harm as in *Haseldine v Daw* [1941] provided the occupier checked the contractor’s credentials, the work [if possible] and it was reasonable to entrust that work to a contractor. Awareness of tools is something which would have been fairly easy to ascertain – *Wodward v Mayor of Hastings* [1945].

**Possible Defences to Audrey’s Claim**

Two defences are appropriate. The first is *volenti non fit injuria*. Section 1(6) of the Occupiers’ Liability Act 1984 provides that no duty is owed to those who willingly accept the risk in question.

WDC posted notices saying no entry beyond this point. However the risk of danger is not obvious. This is not likely to be sufficient to justify the defence: see *Ratcliffe v McConnel* [1999]. In the case of trespassers the courts adopt an objective test and not the subjective test of agreement. It is: did the claimant enter the property when aware of the risk in question: *Titchener v British Railways Board* [1983]. The answer to this would appear to be no.

The second defence is contributory negligence. It is not mentioned specifically in the 1984 Act but its inclusion may be implied. Section 1 of the Law Reform (Contributory Negligence) Act 1945 provides that where a person suffers damage partly as a result of his own fault and partly as a result of the fault of another, damages may be reduced to such an extent that the court thinks just and equitable. WCB is required to demonstrate that Audrey failed to take reasonable care of her own safety, that her lack of care contributed to the damage suffered by her, and that it was reasonably foreseeable that it would do so. Audrey’s carelessness may be argued in that she ignored the notice and was acting ‘in haste’ and consequently her damages may be reduced.
**Possible Defences to Callum’s Claim**

The defences available against Callum would only be contributory negligence. However this defence is unlikely to succeed. The courts are reluctant to find children negligent. In *Yachuk v Oliver Blaise* [1949] a nine-year-old boy who lied to the defendant and purchased petrol in order to ‘play’ with it, was not found to be contributorily negligent when he was burned as a result. The court took the view that he did not, and could not be expected to, know the properties of petrol. In *Gough v Thorne* [1966] Lord Denning MR took the view that the child’s age was of importance in determining contributory negligence, saying that a child should be found ‘guilty’ of contributory negligence only if blame was to be attached to her.

The defence is unlikely to succeed against Callum who is only six years old..

(b)  

**Josh’s potential claim in negligence.**

In order to establish a claim in negligence Josh must prove he is owed a duty of care, there has been a breach of duty and damage has been caused which is not too remote. A duty of care is owed as a matter of fact and law see *Condon v Bassi* [1985]. In relation to the breach of duty, the legal standard that Glenn must reach is that of the reasonable ice hockey player, *Blyth v Birmingham Waterworks* [1856]. In relation to the factual duty, allowance will be made for decisions which are made in the heat of the game. Factors such as the magnitude of likely harm in *Paris v Stepney Borough Council* [1951] and the degree of probability of damage that may occur as in *Bolton v Stone* [1951]. This may be relevant if this was considered to be a serious foul by the referee, as seen in *Evans v Vowles* [2003] and *Condon v Bassi*.

**Possible defences available to Glenn**

Glenn is unlikely to be able to rely on *volenti non fit iniuria*, as Josh is likely to be found to have accepted the risk ordinarily incidental to the sport, but not the risk of a serious foul. However the defence of contributory negligence is likely to succeed as the reasonable ice hockey player would presumably have put on all his protective padding for such a dangerous game. Josh’s damages will therefore be reduced by such proportion as the court considers appropriate by virtue of Law Reform (Contributory Negligence) Act 1943.

Answers are expected to demonstrate knowledge and understanding of legal principles, statutory provisions, and cases. They will demonstrate the skill of applying the law to the facts. They will give a reasoned view of probable or likely legal outcomes.

**Question 2**

(a)  

Candidates are asked to advise Professor Brayne on any action he may take in respect of the poster and the intranet item relating to his attitude to his students and his financial activities. This is a problem on defamation. To prove the tort of defamation the claimant needs to prove the publication to a third party 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.
This phrase defamatory statement is defined in *Sim-v-Stretch* [1936] as: ‘A statement which tends to lower the claimant in the estimation of right-thinking members of society generally, and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear and disesteem’.

*Skuse-v-Granada TV* [1996] stated a test for ‘defamatory meaning’ to be that the words should be given the natural and ordinary meaning that would be conveyed to the reasonable reader, presumed not to be naive, capable of reading between the lines and not to be overly suspicious, so as to choose a defamatory meaning over a non-defamatory meaning.

Comments on a person’s morality, professional competence or physical appearance may all be defamatory. For example in *Youssoupoff* [1934] the claimant successfully sued MGM for producing a film which suggested she had been raped by Rasputin. In *Berkhoff-v-Burchill* [1996] the defendant described the claimant actor as ‘hideous-looking’ and claimed the words may be insulting but not defamatory. The Court of Appeal said the actor relied on appearances in public to earn a living and the words conveyed the feeling the actor was ‘repulsive’ so were defamatory.

The function of the judge is to decide if the words used are capable of being defamatory and then the judge will ask the jury to decide [if applicable] the interpretation and application of the words. In *John-v-Guardian News and Media Ltd* [2008] the judge struck out the claim by Elton John as it was found the words complained of were not capable of carrying the meaning which he alleged.

In order to succeed in a claim for defamation Professor Brayne would need to demonstrate that there had been a publication of material that was capable of bearing a defamatory meaning (that could include innuendo), that the material referred to him, and that the material was published to a third party.

In the present problem, here the fact that Professor Brayne is being accused of neglecting his students in favour having a financially lucrative consultancy is likely to be defamatory as it suggests neglect of his professional duty. See *Byrne v Dean* [1937].

Reference to the claimant is not problematic where the claimant is referred to by name, here the defamatory words are spoken about a group therefore the size of the group will determine whether the statement is actionable of the charge and the extravagance of the accusation’. *Knupffer v London Express Newspaper Ltd* [1944]. So as a general rule, a member of a class that has been defamed cannot sue merely because he is a member of that class *Knupffer v London Express Newspaper*, unless the class is sufficiently small and the statement can be said to apply to every member as in *Aspro Travel v Owners Abroad Group* [1996] or the statement is worded so that a particular member of the class can be “pointed to”. Professor Brayne will only be able to bring his action if the words can be said to point to him and the class is sufficiently small to refer to each person mentioned in that class. This is a matter of fact for the court to determine. Publication is clearly evident, as it is communication to a person other than the person defamed or their spouse or civil partner.

As far as the Student Union intranet is concerned Claudia’s failure to remove the defamatory posting makes her responsible for its continued presence and will be liable for multiple publication see *Bunt v Tilley* [2006].
Possible defences available to Claudia

The defence available to Claudia might be fair comment. The defence of fair comment protects the right to the honest expression of opinion. Opinion cannot be proved, by its very nature, to be either true or false. The defence does not, however, constitute a licence for the expression of unsubstantiated or dishonestly held views. It is therefore limited by a number of requirements.

First, the comment in question must be on a matter of public interest. In *London Artists v Littler* [1969] it was held that what might amount to public interest could be divided into two classes. In the first were matters in which the public in general may have a legitimate interest (e.g. 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). To amount to fair comment the opinion expressed must be based on fact. 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 (e.g.) *Kemsley v Foot* [1952].

The borderline between opinion and fact is sometimes difficult to draw. If it is not clear that the material complained of is opinion then the defence of fair comment will not be available; the defendant will be forced to rely upon justification, which is often less favourable to the defendant than fair comment.

To be regarded as ‘fair’ the comment must satisfy two tests. The first is objective. In *Turner v Metro-Goldwyn-Mayer* [1950] the test was formulated by Lord Porter as: “would any honest man, however prejudiced...exaggerated or obstinate his views, have written this criticism?”

The second test relates to the motive or state of mind of the defendant and so is subjective. If the defendant’s comment is motivated by malice it will destroy the defence. In this context ‘malice’ means that the statement was made out of spite or with an evil intent. Thus in *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 the defendant’s malice, which was demonstrated in the review complained of and in the witness box.

The judge will decide whether the comment could be in the public interest.

(b)

Candidates are asked to advise Janice on her liability in defamation and on any action she may take in respect of the reference.

It is necessary to apply the legal rules relating to defamation as above – there is no issue with the statement being defamatory or with reference to the claimant. The issue here is with publication. Certainly there will be publication in relation to the hundred copies sent in the internal post. The problematic issue is whether Dick’s action in removing the letter from the photocopier was reasonably foreseeable. There was no publication in *Huth v Huth* [1915] when the envelope was marked private and confidential.

Janice may be able to plead the defence of justification. The defence of justification amounts to a claim that the defendant’s statement was true. It may
be argued that the fact that the statement is true means that the claimant has the reputation that he deserves; it cannot be said that the statement of the defendant has lowered the claimant in the eyes of right thinking people, rather it is the claimant’s own actions which have done so. If justification is to be argued it is for the defence to prove that statement was true. The burden of proof is on the defence.

The court’s task is to decide, first, whether the defendant has discharged the burden of proof: what s/he alleges is factually true. Its second task is to decide whether the facts alleged provide a defence to the ‘sting’ of the defamation complained of: Edwards v Bell [1824].

The defendant must set out in his defence the meaning in his statement that he asserts is true and is justified: Lucas-Box v News Group Newspapers [1986].

It is not necessary to prove that the facts alleged were literally true. It is sufficient that they are substantially true. For example, in Alexander v North Eastern Railway [1865] 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. Where the defendant’s statement makes a general rather than a particular allegation against the claimant the defendant may find increased difficulty in justifying the allegation. For example in Wakely v Cooke and Healey [1868], the defendant attempted to justify the allegation that the plaintiff was a ‘libellous journalist’ by establishing that the plaintiff had been successfully sued for libel. The court took the view that, in context, the words carried the meaning that the plaintiff libelled people habitually: establishing that the plaintiff had been the defendant in a libel action on one occasion was insufficient to justify this statement.

As far as the reference is concerned, qualified privilege applies to references, Janice would have to show Professor Crump acted out of malice. It is also possible that an action in negligence might succeed here. As seen in Spring v Guardian Assurance [1994] where the House of Lords held that an employer who provides a reference in respect of an employee, past or present, ordinarily owes a duty of care to the employee in respect of its preparation, and will be liable for any economic loss suffered by the employee as a result of negligence. By analogy this could also apply to academic references.

Answers are expected to demonstrate knowledge and understanding of legal principles, statutory provisions, and cases. They will demonstrate the skill of applying the law to the facts. They will give a reasoned view of probable or likely legal outcomes.

**Question 3**

In order to advise Jason of his claims in tort of trespass to the person, namely battery and false imprisonment it is necessary to establish whether Rosie is an employee acting in the course of her employment in which case vicarious liability will also be imposed on Lawsec and/ or Duberry solicitors. As Jason is an employee he will also be owed the employer’s personal duty of care. Jason may also have a claim against Dr Sven for battery.
Potential Vicarious Liability for Rosie’s actions
In Readymixed Concrete (South East) v Ministry of Pensions [1968] McKenna J put forward the following three-part test:
1. the ‘employee’ agrees that in return for a wage or other remuneration s/he will provide work and skill for the employer
2. the ‘employee’ agrees, either expressly or impliedly, to be subject to the control of the ‘employer’
3. the other terms and conditions of the contract should not be inconsistent with there being a contract of employment.

Rosie would appear to satisfy the first two parts of McKenna J’s test. She would appear to supply Duberry Solicitors (DS) work and skill in return for remuneration; she is subject to the control of DS to such an extent as to make DS the employer. DS seems to instruct her not only on what to do but how to do it. Similarly the third part of the test appears to be satisfied. However there is the question of whether as an agency worker she is employed by Lawsec.

In Hawley v Luminar Leisure [2006] the giving of detailed orders to a club doorman was sufficient to make the club owner vicariously liable for the torts of the doorman, even though he ostensibly worked for a company that provided security services. The court may therefore regard Rosie as an employee of DS.

The employer may also be vicariously liable for the torts of employees, providing they are committed whilst in the course of employment. When considering whether the tort was committed in the course of employment the court may ask
1. Was it a wrongful act that was authorised by the employer or
2. Was it a wrongful and unauthorised way of doing an authorised act

In Lister v Hesley Hall Ltd [2001] the House of Lords said that in deciding if an employer is vicariously liable for the wrongful act of an employee it was important to look at the closeness of the connection between the nature of the employment and the particular tort. Other factors to be considered were whether tort took place on the employer’s premises and during working hours. Another way of assessing this is to ask whether the employee was on a ‘frolic of his own’: see Hilton v Thomas Burton (Rhodes) Ltd [1961] & N v Chief Constable of Merseyside Police [2004].

If the court decided that Rosie was not an employee, then vicarious liability may exist outside the employment relationship if it can be shown that a principal and an independent contractor were engaged in a joint enterprise: see Holliday v National Telephone Co [1899].

It is likely here that Rosie is an employee but it might well be that she is acting on a frolic of her own when she decided to hit Jason over the head.

Jason’s potential claim for trespass to the person
Rosie’s conduct gives rise to possible claims in battery and false imprisonment.

Battery has been defined as ‘...the intentional and direct application of force to another person’ (Winfield & Jolowicz). Cole v Turner [1704] defined the tort as ‘the least touching in anger’. In Wilson v Pringle [1987] the Court of Appeal required that the defendant’s action be done with a ‘hostile intention’ and that ‘hostile’ meant an intention to do the act complained of.
The House of Lords seems to have ignored attempts to deal with the tort in terms of motive and has concentrated upon the issues of consent and necessity: see *Re T* [1988] and *Re F* [1989].

Whichever analysis is used Rosie appears to have committed a battery: she hit him over the head with an umbrella. The facts suggest that she acted intentionally.

It would seem Rosie does not appear to have a defence. Necessity as a defence is unlikely to succeed here as although Rosie is acting ostensibly to protect her employer's property, the force used by her would need to be proportionate: *Lane v Holloway* [1968]. The court would also be unlikely to hold that the force used was reasonable.

Jason may also have a claim for false imprisonment. False imprisonment is ‘...the infliction of bodily restraint which is not impliedly or expressly authorised by law.’ *R v Governor of Brockhill Prison ex parte Evans* [2008] per Lord Steyn. It is clear law that, whilst the restraint must be total, incarceration is not a necessary element of the tort: see (e.g.) *Warner v Riddiford* [1858] and *Bird v Jones* [1845]. It is possible for a person to suffer false imprisonment even when unaware of the imprisonment: see *Meering v Graham White Aviation* [1919] and *Murray v MOD* [1988]. Locking Jason in his office will amount to false imprisonment.

Against claims by Jason, Rosie might argue lawful arrest. It is unlikely that such a defence will succeed. She will have exceeded the powers provided under ss24 and 24A of the Police and Criminal Evidence Act 1984 (as amended); she also failed to explain to Jason the reason for her detention: see *Christie v Leachinsky* [1947]. There is little indication that he was likely to leave before possible arrest by a constable.

**Jason’s potential claim for breach of the employer’s personal duty of care**
It is an implied term of the contract of employment that the employer owes a personal (non-delegable) duty of care to employees. In *Wilson & Clyde Coal v English* [1938] Lord Wright said that the duty took the form of providing competent staff, safe tools and equipment, and safe systems of work. To this should be added there is a duty to provide a safe place in which to work. It is arguable that the injury to Jason derived from a failure to employ competent staff or ensure safe systems of work.

The duty to employ competent staff includes what is generally regarded as ‘competence’: see (e.g.) in *Hawkins v Ross Castings Ltd* [1970]. It extends to other idiosyncrasies of the employee: see (e.g.) *Hudson v Ridge Manufacturing* [1957], where an employer was liable for the actions of a known practical joker whom the employer did nothing to restrain. The duty upon the employer is not strict. It is negligence based: see (e.g.) *Coddington v International Harvester Co of Great Britain Ltd* [1969]. If Rosie had no history of this type of behaviour DS may not be liable under this heading. A safe system would include adequate supervision of vulnerable employees known to suffer from a disease.

**Jason’s potential claim against Dr Sven**
Jason will claim that Dr Sven gave him medical treatment without consent.
In situations where an unconscious patient is incapable of consenting to medical treatment, Dr Sven may use the defence of necessity for what would otherwise be a battery. In Re F; F v West Berkshire Health Authority [1990] it was held the doctor should do no more than what is reasonably required to be done in the best interest of the patient. Similarly in Frenchay Healthcare v NHS Trust [2004] it was held that there is no reason to question the decision of a consultant in an acute emergency.

So it would seem that Dr Sven is not liable for the tort of battery.

Answers are expected to demonstrate knowledge and understanding of legal principles, statutory provisions, and cases. They will demonstrate the skill of applying the law to the facts. They will give a reasoned view of probable or likely legal outcomes.

**Question 4**

This question concerns the rights and liabilities under Public and Private Nuisance. Private nuisance is the unlawful interference with another’s use or enjoyment of land or some right over or in connection with the land.

To be a claimant under private nuisance the claimant must have a legal interest in the land affected as in Malone v Laskey [1907], Hunter v Canary Wharf [1997].

A defendant under private nuisance is the creator or adopter of the nuisance see Sedleigh-Denfield v O’Callaghan [1940] when the monks became aware of the blockage to the culvert but did nothing to clear it.

The court considers various factors to help it decide on the meaning of ‘unlawful use’ of land e.g. locality, duration of the act[s] as in Spicer v Smee [1946], malice which may make a lawful act unlawful as in Hollywood Silver Fox Farm v Emmett [1936] and public utility e.g. if the act is of public benefit.

If the use causes physical damage then these factors become less important in this respect as in St Helens Smelting Co v Tipping [1865].

The court’s view of ‘unlawful use’ depends on the type of harm suffered i.e. if physical damage the court will presume liability but if the harm is only to comfort and/or convenience the court will then consider the factors above.

The court considers the relevance of the sensitivity of the claimant i.e. the harm is suffered only because of the higher vulnerability of the claimant e.g. Robinson v Kilvert [1889] and there is also the public interest defence, e.g. Dennis v MOD [2003].

**Paul and Queenie’s potential action against Ray in Private Nuisance**

They will be able to claim in private nuisance if they can prove that there is an unlawful interference with a person’s use or enjoyment of land, or some right over, or in connection with the land.

Paul and Queenie need a proprietary interest in land in order to bring their claim as held in the House of Lords in Hunter v Canary Wharf [1997]. To decide whether the interference is unlawful, it is a question of whether the interference is unreasonable as held in Bradford v Turnley as referred to in Cambridge Water
*Co v Eastern Counties Leather plc.* This will be a question of fact in each case. The character of the neighbourhood is relevant, here this is a rural setting however this is only of significance if the interference relates to personal comfort and convenience. Where there is physical damage as here to the washing and the sculptures, the character of the neighbourhood has no relevance as seen in *St Helen’s Smelting v Tipping* [1865]. There is a continuous or recurrent state of affairs as it appears Ray shoes horses on a regular basis, *Halsey v ESSO* [1961], *Miller v Jackson* [1977]. Paul’s sculptures may also be considered extra sensitive in the same way as the brown paper affected by the heat in *Robinson v Kilvert* [1889].

Ray may raise the defence of social utility. The fact that Ray is the only blacksmith within the rural community he serves is a factor the court may take into account when deciding whether Ray’s use of the land is unreasonable, however if the court decides the use of land is unreasonable the fact the activities are of a benefit to the public will not afford a defence. This was the view of Lord Denning in *Miller v Jackson* [1977] and also was the view of the court in *Kennaway v Thomson* [1981].

The remedy that will be sought should their claim be successful is an injunction which could limit the times when the activity could take place. It is here that the court may take into account the usefulness of the activity in question, in *Dennis v Ministry of Defence* [2003] damages were awarded for depreciation of the value of the land instead of an injunction.

Better answers might include consideration of the practicality of preventing the nuisance: see (eg) *Bamford v Turnley* [1862], *Andreae v Selfridge* [1938], *Moy v Stoop* [1909].

**David’s claim against Ray in public nuisance.**

A public 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.

David as the claimant must show particular harm. Candidates should explain and analyse what constitutes a class and the meaning of particular harm. They should consider relevant case law: see (eg) *A.G v P.Y.A. Quarries* [1957], *A.G v Gastonia Coaches* [1977], *Dollman v Hillman* [1941], *Hollings v Yorkshire Traction Co Ltd* [1948], *Castle v St Augustine Links* [1922].